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ABSTRACT

This document presents the hearings and appendixes, concerning the civil rights obligations needed for institutional eligibility for federal higher education programs. Letters, statements, and statistical data offered in the testimony of interested individuals and institutional representatives are included. (MJM)

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FEDERAL HIGHER EDUCATION PROGRAMS INSTITUTIONAL ELIGIBILITY

HEARINGS

BEFORE THE

SPECIAL SUBCOMMITTEE ON EDUCATION

OF THE

COMMITTEE ON EDUCATION AND LABOR

HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

SECOND SESSION

PART 2A

CIVIL RIGHTS OBLIGATIONS

HEARINGS HELD IN WASHINGTON, D.C.
AUGUST 8, 9, 12, 14, 15; SEPTEMBER 17, 19, 20, 23, AND 25, 1974

Printed for the use of the Committee on Education and Labor
CARL D. PERKINS, *Chairman*

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U.S. DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
EDUCATION
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CIVIL RIGHTS OBLIGATIONS OF INSTITUTIONS OF POSTSECONDARY EDUCATION

THURSDAY, AUGUST 8, 1974

House of Representatives,
Special Subcommittee on Education,
of the Committee on Education and Labor,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to call, in room 2261, Rayburn House Office Building, Hon. James G. O'Hara (chairman of the subcommittee) presiding.

Present: Representatives O'Hara, Dellenback, Kemp, and Biaggi.

Staff present: Jim Harrison, staff director; Webster Buell, counsel; Robert Andringa, minority staff director; and Elnora Teets, clerk.

Mr. O'Hara. The Special Subcommittee on Education will come to order.

Today the special subcommittee is entering a new phase—and what will probably be a very controversial phase—of our preparation for the development and enactment of a new student financial assistance package.

For weeks we have examined assistance programs and discussed the pros and cons of programmatic changes. For 3 days last month we looked at the question of accreditation as a device for determining institutional eligibility for participation in student aid programs.

Today we begin an effort to determine what are the obligations of institutions of postsecondary education under titles VI and VII of the Civil Rights Act, under Executive Orders 11246 and 11375, under title IX of the Education Amendments of 1972, and under rules and regulations made or proposed to be made in accordance with such statutory authority.

Let me reiterate for the record that I am not asking about the application of the civil rights laws to student assistance. Our inquiry is more fundamental than that. When we rewrite the Higher Education Act we are going to have to give considerable thought to what an institution should be and do in order to become an eligible institution for title IV or for other Federal programs.

The new legislation could make compliance with the full range of Federal law and regulation a condition for participation in student aid. Or we may choose to make more specific requirements. Whether we require compliance by reference, leaving the fleshing out of the details to the rulemakers and regulation writers, or whether we exercise our legislative authority in greater detail and put those requirements into the statute itself, this subcommittee needs to know what those obligations currently are, and needs to make some judgments as to what they should be

Judging by the conflicting perceptions among educators, students, administrators, and Federal officials, there is a need for the general public to know just what these obligations are, what is their statutory and constitutional justification and just where the dividing lines are between what the Constitution and the laws mandate and what the agencies suggest and recommend.

I hope we can emerge from these hearings, for example, with a clearer working distinction than any I have seen yet, between "goals" and "quotas," in employment and admissions. I hope we can gain a better understanding than I have yet gained, for example, of whether or not discrimination changes its nature and its culpability depending upon the race, sex, or ethnic background of the person discriminated against.

I would hope that we can get a better idea of the extent and basis for a phenomenon which I find as repugnant as I find the name sometimes given to it. I refer to what some call "reverse discrimination"—the alleged requirement or pressure upon institutions to confer benefits of Federal programs or contract employment to individuals because of their sex or their racial or ethnic background. When that phenomenon results in the selection of a white or a male applicant in preference to a nonwhite or a female applicant, it is properly called "discrimination." And I think we would all agree that is contrary to the spirit and letter of the law.

But when sex or race are taken into account and a nonwhite applicant is selected in preference to a white applicant, or a female applicant in preference to a male applicant, there is substantial argument as to whether or not this is wrong—and even those who think it wrong call it "reverse discrimination," as though it were somehow different in kind than old-fashioned straightforward discrimination.

As chairman of the subcommittee I will try to avoid reaching conclusions as to the facts before they are before us. I do not assert as proven that the kind of discrimination I have described is, in fact, being required or suggested by Federal agencies.

But my proper neutrality as to the allegation does not require the pretense of neutrality as to the principle involved. I will probably not use the phrase "reverse discrimination" very much. I don't care much who gets the benefit of and who bears the burden of discrimination on the basis of race, sex, religion, or ethnic origin. Whoever the victim, whoever the alleged beneficiary, it seems clearly contrary to the concepts of the Constitution. And, if it is not in direct violation of the law, it ought to be.

Mr. Biaggi, did you care to make a statement?

Mr. BIAGGI. Yes, I do, and thank you, Mr. Chairman.

I would like to welcome Chairman Powell and his associates today. Hopefully we can provide some further enlightenment on the issue.

Discrimination poses a serious obstacle for racial minorities and women as they struggle to achieve equality in our society. While truly sympathetic to their plight, I am also sensitive to the excesses to which affirmative action programs have been carried. In particular, I am very concerned that the already thin line between affirmative action programs and hiring quotas may have vanished.

While the official statements of the Equal Employment Opportunity Commission and the Office for Civil Rights have drawn this distinction. I am concerned that the implementation of form EEO-6 will have the practical effect of establishing hiring quotas for selected minorities. Form EEO-6 raises concerns on many levels. University administrators fear that they will be coerced into hiring according to an unconstitutional quota system. I am concerned that in the name of fighting discrimination serious consequences will be overlooked.

I am not convinced that the distinction between goals and quotas is one which is operationally sound. If the practical effect of form EEO-6 is to foster hiring quotas, the effects will stretch far beyond our universities and threaten the merit system for hiring and advancement generally.

The maximum benefits for society at large as well as the individual are achieved only when the employer is given free reign to select the individual most qualified to do the job. And only if individuals are hired and advanced on their merits, can American concepts of freedom and equal protection keep their meaning.

I understand that the development of form EEO-6 was initially an attempt to consolidate reporting procedures for four Government agencies. And since the Equal Employment Opportunity Commission is not the only agency involved, I am reluctant to be critical, but at the same time, I am very sensitive to the problems this new reporting procedure will present for the universities in New York and throughout the country. Not only will EEO-6 impose added burdens on the limited resources of these universities, but I also question whether any final result will justify the expense and effort involved.

The fundamental departure of form EEO-6 from the previous reporting requirement is that detailed salary levels and occupational breakdowns are now required from universities. EEOC also requires extensive maintenance of files on all applications submitted for a job. The impression this has created with many administrators is that the objective is the fulfillment of a quota.

While EEOC might not be mandated to require affirmative action programs, we cannot ignore the fact that the EEOC carries out its functions in this context. And the heavy handed tactics of the Federal Government in the past have justifiably created concerns among administrators that they may be subject to reprisals.

The EEOC has identified recruitment as the critical problem in underrepresentation of minorities in higher education. However, Civil Service-type hiring and promotions do not have application to a university setting where evaluation is frequently based on subjective criteria like quality of publication and commitment to teaching.

The parallels between universities and other large businesses—particularly in the academic departments—are limited. For one, the valuable and coveted concept of academic freedom must operate as a restraint on extensive Government intervention in university activities.

More effective would be Federal efforts to aid universities in recruiting minority groups by performing a job clearinghouse function.

The problem with the EEO-6 program is that rather than focusig in on problems such as recruiting it deals only with statistics which may often obscure the true picture. Rather than adding to the expenses of already burdened universities by requiring more complex procedures, the EEOC should concentrate its efforts on identifying those institutions where discrimination problems exist and following up with administrative and legal action. By placing a presumption of guilt on all universities the program unjustly increases the expenses of universities effectively dealing with the problem on their own.

Further, I question whether or not our former goal of eliminating racial identification on applications is being compromised by now requiring a university to reveal an applicant's race or ethnic origin. And even more objectionable is the use of visual identification to achieve this. Not only is there an ethical shadow over this effort, but its accuracy must be seriously questioned.

Quoting the U.S. court of Appeals in *Pennsylvania* v. *O'Neill*, let me conclude, that. . . .

". . . American progress in its attempt to eradicate racial discrimination is due largely to the generally held belief that individuals regardless of their race, creed, religion, sex, or national origin should be accorded an equal chance to compete for the opportunities society provides—employment, education, and others—on the basis of individual ability. In our democracy, rights are accorded primarily to individuals, as distinguished from groups. Opening doors long shut to minorities is imperative, but in so doing, we must be careful not to close them in the face of others, lest we abandon the basic principle of nondiscrimination that sparked the effort to pry open those doors in the first place."

Thank you, Mr. Chairman.

Mr. O'Hara. The Chair recognizes the gentleman from Oregon.

Mr. Dellenback. Thank you, Mr. Chairman.

I commend the chairman for moving the hearings into this particular phase. I think we are moving into an aspect of student assistance which is properly within the scope of what this subcommittee should be concerned with. I think it is an aspect that some of us have felt very strongly about, namely, that too infrequently does the Congress exercise its function of oversight. All too frequently we create programs, cast them forth, expect them to run, and then at some later stage of the game rise up and run after them because we find some aspect has not measured up to the specifications of our initial dream. This kind of oversight opportunity which we are here engaged in, Mr. Chairman, I am sure we both agree is extremely important, and is a vital part of what this subcommittee and what the Congress ought to be doing.

The earlier comments have made clear the nature of one aspect of the problem. We are into a situation where, if you take a static view of the overall situation, you find what some of us consider inequities. If we then try to deal with the dynamics of what you do to change that static situation to bring about a static equity, you run the risk that the dynamic tool you will use to bring about that change is itself inequitable.

That, too simplistically, it seems to me, sums up what I see as the problem. We have a goal that we want to reach for, and we must be sure that the manner in which we reach for it is itself not contradictory of the goal for which we are reaching. I hope that the higher education organizations which will be testifying before our subcommittee, Mr. Chairman, as well as individuals and representatives of agencies who testify before us, will really look upon these hearings as an opportunity to give us the information we so badly need to go forward to make changes in legislation, if indeed there should be changes made.

I would hope that no one will attack for the sake of attacking or defend for the sake of defending, but rather will help us with the issues and analogies as we try to see where it is we should go.

I close with those few simple comments, Mr. Chairman. I consider these hearings valuable and I approach them with an open mind and I will look forward to the witnesses who are going to speak this morning.

Mr. **Kemp.** Mr. Chairman, I applaud my distinguished colleague from Michigan for the initiative you have taken in holding today's hearings to investigate the enforcement impact of antidiscrimination legislation in the field of higher education. Although Congress has enacted forceful legislation providing for administrative remedies to charges of discrimination, to date the problems facing the Nation in this area have not been successfully dealt with, as borne out by the overwhelming backlog of charges now facing the Equal Employment Opportunity Commission.

As my colleagues are aware, I have long been an advocate of employment standards which are fair and equally applicable to the entire labor force in the country. The laws which Congress promalgates should and must be viable standards of practice for all men and women, irrespective of special interests, and applicable on an industry-wide basis. Truly the potentially discriminatory practices in the area of higher education, including hiring, promotion, discharge and tenure, demand that Congress take note and make every effort to discover and eliminate any ingrained inequities which may exist. As always, I shall fully support any legislation before the Congress which will serve to successfully ameliorate and ultimately eliminate discriminatory practices in employment.

Mr. **O'Hara.** I thank the gentleman from Oregon and the gentlemen from New York for their statements as we prepare for this new round of hearings.

As we have each indicated in our statements, we are concerned about the ways in which the objectives are achieved. I am not prepared to reach a conclusion. I heard a lot of pro and con about the way the goals have actually operated. What we are trying to do to start off with is we are trying to find out just exactly how these laws have been implemented, just what have been the mechanisms, what have been their effects, and we are going to be hearing from administrators of these laws and from the administered, that is, from those who are subjected to the laws and we are going to be taking a cross-section of testimony of just how these programs have operated and then we will arrive at our conclusions about whether or not the ways in which they have operated are proper to achieve the goals that we all seek.

We are very pleased to have as our first witness for this set of hearings the Chairman of the Equal Employment Opportunity Commission, Mr. John H. Powell, Jr., who is accompanied by Mr. Edgar Morgan, Director of the Congressional Affairs, and Mr. Jack Gould, who is concerned with compliance, Mr. George S[illegible]e, Special Assistant to the General Counsel, Mr. Alvin Golub, who is Executive Deputy Director of the Commission, and Mr. George La Nove.

Mr. Powell, could you favor us with your testimony?

STATEMENT OF JOHN H. POWELL, JR., CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ACCOMPANIED BY EDGAR MORGAN, DIRECTOR, CONGRESSIONAL AFFAIRS; JACK L. GOULD, COMPLIANCE SECTION; GEORGE SAPE, SPECIAL ASSISTANT TO THE GENERAL COUNSEL; ALVIN GOLUB, EXECUTIVE DEPUTY DIRECTOR; AND GEORGE LaNOUE

Mr. POWELL. Thank you.

Mr. Chairman, at the outset I want to express my deep thanks for the privilege and opportunity of being the first witness to appear in this very important area.

Mr. Chairman, I have a prepared statement and would be glad to read that statement. However, I am at your pleasure, I am more than glad to submit the statement and enter into a dialog with the members of this committee, since, as I read your letter to me and as I hear your statement and the statements of your colleagues, there seems to be some concerns not expressed in that letter and, fortunately, since I am involved in the enforcement of a statute which raises many of the questions mentioned here, I will be glad to share with you my views on these important subjects.

Mr. O'HARA. Why don't we do both? Why don't you give us your statement and then add whatever you wish and then we can discuss it.

Mr. POWELL. Thank you.

Mr. Chairman and members of the subcommittee, I appreciate this opportunity to appear before you to outline the Equal Employment Opportunity Commission's role in eliminating discrimination in postsecondary education. I might indicate that our jurisdiction, of course, includes all private educational institutions, we have investigative authority over public educational institutions, and the Department of Justice, under the 1972 amendment, as you know, exercising court enforcement in that area.

We believe that the Commission's role is significant now and is likely to grow more important in the next few years. Let me state, briefly, the essentials of the Commission's jurisdiction, its workload and summarize a few of the most recent decisions relating to higher education institutions.

The responsibility of the U.S. Equal Employment Opportunity Commission is to enforce title VII of the Civil Rights Act of 1964, as amended. Title VII makes it an unlawful employment practice to discriminate on the basis of race, color, religion, sex or national origin.

From its earliest days the Commission was given jurisdiction over discrimination against nonprofessional employees in private postsecondary educational institutions. This narrow authority, limited to nonprofessional employees and not covering teachers, however, made it more difficult for the Commission to attack all types of discrimination against minorities and women in higher education.

Consequently, in 1972 the Congress gave the Commission new enforcement powers and widened its jurisdiction to cover all employees (academic and nonacademic) in all postsecondary institutions (public and private), except to the extent of the court's enforcement relating to public institutions. The only exceptions are institutions of less than 15 employees and religious educational institutions which are permitted to utilize religious preference in hiring personnel directly related to its activities. (Sec. 702)

EEOC's ultimate sanction is litigation. However, due to the magnitude of the subject and number of cases involved, the Commission, in my opinion, must employ these court enforcement authorities so as to encourage voluntary compliance. The resolution of many of the questions addressed by you, Mr. Chairman, and the other members of this committee, will certainly help in achieving that voluntary compliance.

The Commission does not issue certificates of compliance. It does not grant funds to educational institutions and it does not have the power to suspend or terminate grants or contracts. While insisting on equal employment opportunity which in many situations will require affirmative action, title VII makes no abstract requirement of affirmative action similar to that required by Executive Order 11246, as amended.

ENFORCEMENT PROCESS

The enforcement of title VII proceeds as follows:

The Commission's district offices receive written charges of discrimination against public and private employers. I might say that while we ultimately have a written charge, the charges are often phoned in and mailed in. The charges that we treat cover virtually the waterfront, virtually 63 million employees are covered under title V, 75 percent of thework force. We do not have, you know, jurisdiction over Federal employees.

As a member of the Equal Employment Coordinating Council, I do have some coordinating recommending responsibilities in that area. The Commission's jurisdiction covers labor organizations, joint labor-management apprenticeship programs, and public and private employment agencies. Members of the Commission also may initiate charges alleging that a violation of title VII has occurred. Before investigation, a charge must be deferred for 60 days to a State fair employment practice agency where an enforceable fair employment practice law is in effect. After an investigation, if there is reasonable cause to believe the charge is true, and the determination was that the reasonable cause takes place by what is known as a determination, that authority is implicit in the Commission and certain cases where there is precedent it has been delegated to the district director, and the district office then attempts to remedy the alleged unlawful practices through the informal methods of conciliation, conference and persuasion.

Unless an acceptable conciliation agreement has been secured, the Commission may, after 30 days from the date the charge was filed, bring suit in an appropriate Federal district court. The Attorney General brings suit when a State government, governmental agency or a political subdivision is involved.

If the Commission or the Attorney General does not proceed in this manner, at the conclusion of the administrative procedures, or earlier at the request of the charging party, a notice of right to sue may be issued which allows the charging party to proceed within 90 days in a Federal district court.

In private sector cases, the Commission may intervene in such civil action if the case is of general public interest, and will advance significantly the enforcement of title VII. The investigation and conciliation of charges having an industrywide or national impact are coordinated or conducted by the national Office of Compliance.

Under the provisions of section 706(f)(2), as amended by section 5 of the Equal Employment Opportunity Act of 1972, if the Commission, or the Attorney General in a case involving a State government, governmental agency or political subdivision, after a preliminary investigation concludes that prompt judicial action is necessary to carry out the purposes of the act, may bring an action for appropriate temporary or preliminary relief pending final disposition of a charge.

In addition, EEOC has had an active research program on academic discrimination and the Office of Voluntary Programs has aided scores of institutions in complying with title VII.

THE EDUCATION INSTITUTION AS AN EMPLOYER

The concept that institutions of higher education are above or at least not in the same relationship to the rest of society is shared by a large segment of the population, and by most institutions of higher education as well. This view is frequently held, notwithstanding glaring realities to the contrary. In fact, particularly as such institutions tend to grow in size, they assume more of the structural and organizational attributes of any business organization. As one such element of its operation, the institution must maintain a certain number of employees; it must recruit such employees from available labor pools; and it must determine the levels and classifications of its employees.

The institution must also set wages for its employees according to rank and length of service and must develop a system of incentives and benefits to retain those employees it has recruited. In other words, the institution, in fulfilling its role as the forum of organized learning, functions also as an employer in the same way that most businesses maintain their respective roles. It is this role of employer which places institutions of higher education within the purview of the Federal Government and its avowed interest to protect the national commitment to equal employment opportunity.

More specifically, it is this role as employer which has placed all educational institutions within the jurisdiction of title VII of the Civil Rights Act of 1964, as administered by the Equal Employment Opportunity Commission.

DISCRIMINATION IN HIGHER EDUCATION INSTITUTIONS

The magnitude of discrimination in higher education has been well documented in several studies. Among the best are the collection of testimony and reports in the hearings on H.R. 16098 before this subcommittee in 1970 and the statistical analysis by Bayer and Astin (1972) for the American Council on Education.

At the Commission we know that behind each statistic are real people who believe they have been discriminated against by academic institutions. Currently more than 1,600 individuals have filed such charges with the Commission.

In 1973 approximately 1 out of every 40 charges coming to the Commission was against a higher educational institution. Of these, 79 percent were against public institutions, 21 percent against private; 44 percent were filed on the basis of sex discrimination, 39 percent on racial or ethnic discrimination, 4 percent on religious discrimination, 13 percent are other or mixed.

The issues raised in these charges were almost evenly divided among discrimination related to hiring, discharge, promotion, wages, and terms and conditions of employment. In short, discrimination is likely to be found at any point in the university personnel process.

When title VII was amended to give the Commission wider authority over discrimination in higher education, Congress applied the same title VII principles and procedures to academic institutions as previously applied to industries or other commercial establishments.

Some of the issues found in higher education may be illustrated in the Commission's recent decision. One of the most frequent problems, for instance, is undervaluing the contributions of women teachers by men who dominate the ranks of tenured faculty and administrators.

In one such case we found that reasonable cause existed to believe that a university denied a charging party reappointment and tenure because of her sex. We held that a system of awarding tenure that relies on subjective nonreviewable judgments of the tenure candidate by the candidate's colleagues is a system that lends itself to abuse, where most of the colleagues are of a different race or sex from the candidate.

We also found in a case before the Commission for decision that female assistant professors in the music department were paid less and received smaller yearly increases than male assistant professors performing similar duties.

While discrimination in faculty appointments often has a devastating effect on individual academic careers, discrimination against whole classes of nonacademic employees is also found in universities. EEOC discovered that one major university classified its female maintenance workers as maids and paid them less than males which it called janitors, though they both performed essentially the same tasks. The conciliation agreement EEOC negotiated ended the salary inequity and included a settlement for backpay.

Occasionally an institution will misinterpret its affirmative action goals. This was evidenced in a recent case where a college, due to decreased student enrollment, had to lay off some of its instructors. A white male professor, although ranked first in his department among the five nontenured instructors according to objective criteria, was nevertheless selected for discharge by higher ranking college officials primarily on the grounds that the needs of its black students placed "top priority" for the need for black instructors. The fifth-ranked black female was retained.

The EEOC rejected the college's "assumption" that only black teachers could meet the needs of black students. However, the Commission did recognize that in some limited circumstances an employer utilizing "objective criteria" could "consider an individual's ability to relate and communicate to a particular racial or ethnic or sex group where such abilities are required as essential ingredients for successful performance of the particular job in question."

As a result of the 1972 action by Congress EEOC now plays a role in insuring equal employment opportunity in educational institutions, including postsecondary educational institutions, which is the focus of this committee. There are currently charges against most large universities in the country, and that should not be surprising, I might say, Mr. Chairman, because one only needs to take a look at the employment patterns extant throughout this country to recognize that the mission which EEOC was created to perform, we still have a long way to go and since educational institutions are part of the society and have not at least in this respect differed, it is not at all surprising with these statistics.

When discrimination occurs in a college or university, equal educational as well as equal employment opportunities suffer. Our Nation is committed to provide and protect both kinds of opportunity and the EEOC intends to see that its responsibility under the Civil Rights Act is fully implemented and faithfully pursued.

I would be glad to answer any questions, Mr. Chairman. I would like, however, in light of the comments made, to address myself to some of the concerns I have heard expressed here.

Mr. O'Hara. Please feel free to do so, Mr. Powell.

Mr. Powell. I would like to comment, if I may, upon the remarks of Congressman Biaggi and then comment on the remarks of the chairman.

One of the several things that Congress requires the Equal Employment Opportunity Commission to do is to collect information. The purpose of collecting information is to identify the fact of discrimination.

Now, the EEO-1 form is the form we have had for many, many years. The EEO-6 form, to which the Congressman refers, results from the amendments to the law. If there are changes from EEO-6, or if EEO-6 is different from EEO-1, I would suggest that the difference represents the experience, the result of the experience of this agency in recognizing the kind of information that it must have in order to carry out the mandate that Congress has imposed upon us.

Let's understand that all that we are doing, when we put out these forms, is to ask the respondent to give us the information which is in its custody. Now, as an administrator, it would raise questions in my mind if the respondent were not willing to give information in such an important area, particularly when the respondent is a respondent which has virtually no black professors or female professors and when the reason for the requested information is to achieve equal employment opportunities.

Let's understand that the Federal Trade Commission also requires business enterprise to provide information; that the Securities and Exchange Commission requires that the corporate entities in offering securities or bonds must provide full disclosure.

Now, we have had substantial experience, since the early thirties, with other areas, areas of economic concern. I might suggest that title VII, unlike other statutes which represent an option of Congress chosen from several constitutionally permissible approaches is constitutionally required. There would be a need for action such as that taken under title VII even if there were no 1964 Civil Rights Act.

I would suggest that the authority of an agency empowered to enforce the 13th and 14th amendments ought to be at least as great as the authority of other agencies which regulate commerce.

Mr. Chairman, you have made the suggestion that there is some question as to whether Federal agencies are involved in two standards, one for blacks and women and another for white males. I would suggest to you that nothing could be further from the truth.

If we look at the development of the tools for eliminating discrimination and we look at the opinion brought forth in the *Swann* case, the court said there that:

> Where we have patterns produced by policies of the state, where color consciousness was the explicit method used to achieve segregation, we must have color conscious remedies in order to eliminate the present effects of past discrimination.

Mr. Chairman, blacks were slaves in this country a little over a hundred years ago and the 13th amendment, as you know, was not implemented in the area of employment or education for many years. When the 1964 Act was passed, it was already late in the day.

Many of the States had already seen the need for this kind of legislation and when a Federal law was finally enacted in 1964 the agency was not then empowered to implement the remedies that must be implemented if there is to be fundamental change in the historic pattern of exclusion of minorities and women from so many areas of employment.

Mr. Chairman, this Nation put a man on the moon in less than 10 years. I would suggest while that effort was terribly important, nothing is more important, in my opinion, than for the Government to give the resources to those agencies whose job it is to see to it that the promise of the 14th amendment is honored.

Mr. Chairman, I agree with your opening statement that reverse discrimination is an anomalous term. If you have 20 jobs and 100 applicants, and 100 applicants are white males and the employer selects 20 of those people and we assume that all of the 100 are qualified, I would say that the employer has discriminated against 80 of the people who were qualified. I would also suggest that that discrimination is not illegal.

If we change that hypothetical and we hypothesize an employer who has historically discriminated against blacks and women, and that employer has been advised by counsel that unless he takes steps to change his work pattern, he will be subjected, if he is a Federal contractor, to action under 11246, or, if he has more than 15 employees, to action by this agency. If such an employer, for example, has 20 vacancies and 100 applications and he has, as he should do, taken steps to see to it that women and blacks apply, and he succeeds in getting qualified blacks and qualified women to apply. And if he then selects from among the 100 qualified people, some of whom are blacks and some of whom are women, he selects qualified blacks and qualified women, some people then yell reverse discrimination.

Now, I am not unmindful of the legitimate concern that many people have that all of a sudden they are not going to be considered on their merits. And as I indicated in my prepared text, we will respond, because people must recognize that the jurisdiction of this agency extends to the rights of everyone. The jurisdiction of the Equal

Employment Opportunities Commission, as I think is your concern, is to see to it that everyone not be discriminated against on so irrelevant a factor as race, creed or color. But I do not intend to be intimidated and I trust this committee will not be intimidated simply because there are those who are unrealistic in their fears.

We must look beyond the rhetoric, Mr. Chairman, and look at the facts. Any sort of preliminary analysis of the facts will show that blacks are not displacing white males, that women are not displacing males, and I think that it is terribly important in this area, an area subject to so much misunderstanding, for us to tell it like it is and not necessarily to respond to the rhetoric, even though that rhetoric might be the rhetoric of a majority, because the rights of the majority are no greater than the rights which are respected of members of the minority.

I am ready to answer any questions.

Mr. O'Hara. Mr. Powell, if I could start off the questioning. I am somewhat concerned by several of the aspects of your presentation. For instance, your reference in your statement, if we can sort of take them up in order, when you speak of the white male instructor who is passed over, and I believe you indicated your Commission provided a remedy for that white male instructor?

Mr. Powell. That is correct.

Mr. O'Hara. You then went on to say at the conclusion of that paragraph, "However, the Commission did recognize that in some limited circumstances an employer utilizing objective criteria——."

Mr. Powell. That is put in quotes because it is emphasized. It should be objective criteria because it is the only guide we have to the use of subjective criteria, which is invidious.

Mr. O'Hara [continuing]. Yes. "Could consider an individual's ability to relate" and so forth "where such abilities are required as essential ingredients for successful performance of the particular job in question."

Now let me say something about that. As I grow older, I am inclined to reminisce a little bit, more than I used to, and I can remember the debate very well on the provision of title VI that permitted any kind of consideration——

Mr. Powell. I am old enough to remember that debate also.

Mr. O'Hara. There you are. It is subsection i and it is now United States Code 2000 (e) of the 1964 act. "Racial Imbalance." It says: "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to hire and employ employees" and so forth "on the basis of his religion, sex, or national origin"——

Mr. Powell. That is a bona fide occupational qualification.

Mr. O'Hara [continuing]. "Where it is a bona fide occupational qualification."

Well, I can very well remember this because it was an effort to water down title VII. I opposed it.

Mr. Powell. I see.

Mr. O'Hara. And the effort was to water it down further by saying: In some circumstances race could be a bona fide occupational qualification.

Mr. Powell. No, that is not what I remember.

Mr. O'Hara. I remember that debate on the floor of the House when we had this situation—well, finally, those of us who opposed this thing in its entirety were not able to prevail, but we were able to prevail in at least knocking "race" out of it, so that under no circumstances could race be considered a bona fide occupational qualification.

Mr. Powell. There are few instances, Mr. Chairman, where that provision is operative. I cannot say that there are no provisions. Perhaps if the job is to provide a sperm bank, it might well be that only males can perform that function. We have not yet gotten to the point where we can provide synthesized sperm, but the BFOQ exceptions are very limited in any case.

The language, Mr. Chairman, is adressed to the phenomenon, and I might say here we should consider the admonition made by Mr. Justice Holmes when he said that "In examining many problems, a page of history is better than two volumes of logic."

Mr. O'Hara. I think Holmes only gave one volume of logic.

Mr. Powell. Yes, whatever it was, but I think his remarks in that context are particularly applicable to the problem of accommodating the public interests in selecting people of merit. Mr. Chairman, when I got out of law school less than 20 years ago, my qualifications as a lawyer I can tell you were irrelevant and the qualifications of many other blacks and Spanish-surnamed people and the encouragement of women to go into law and other fields was irrelevant because of the attitude of society.

Now, what have these patterns of discrimination which persisted for so many years resulted in? It has resulted, Mr. Chairman, for example, in such developments as is being seen in our cities, which, in the last 25 or 30 years has seen the movement of the affluent, largely white families to the suburbs. This movement was taking place while discrimination was rampant, while the Federal Government was involved itself in the perpetuation of discrimination. The President of the United States, has conceded this in a statement he made in June of 1972, and what it results in is that the police departments of the major cities and educational institutions of the major cities consist of particular kinds of people ethnically and racially in leadership positions where the clientele, if you will, are poor people, are black people, are Spanish-speaking people, and are Mexican-American.

The statement of the President Mr. Chairman, was a recognition of the fact that if policemen are going to do an effective job in our ghettoes, it is important and there is a public interest in the employment of some qualified black policemen, there is a public interest in the employment of black teachers, there is a public interest in there being some black sanitation workers, and I would think that people who look at that problem and are aware of all of the explosions we have had in the sixties will agree, that is what that statement is meant to affirm.

Mr. O'Hara. Mr. Powell, I am going to get off of that in a minute, but let me say you should have been a member of Congress. Those are very effective arguments, and they were made at that time when the law was under debate.

Mr. Powell. Sometimes it takes many years for effective arguments to be accepted.

Mr. O'Hara. And many times the Congress decided against it. As a matter of fact, the arguments are being made.

Mr. Powell. You are familiar with the *Carter v. Gallagher* case.

Mr. O'Hara. Well, let me finish my statement. Many people who don't take your view then argued that race was sometimes a bona fide occupational qualification.

Mr. Powell. Mr. Chairman, I do not want to be characterized as saying that. My remarks, if you understand me to say that, are being misunderstood.

Mr. O'Hara. Well, in any event one of my points is that I think whatever powers your Commission has, they are derived from the law, the law that created your Commission described its powers. I don't really think that you are at liberty to determine that the Congress, in prescribing the powers of the Commission, and in limiting the powers of the Commission, made a mistake and, therefore, it is your responsibility to correct the mistake.

Mr. Powell. What is it that you are referring to?

Mr. O'Hara. I think you told me in your statement that you felt that in some circumstances race was a bona fide occupational qualification and that is on page 9.

Mr. Powell. I don't know.

Mr. O'Hara. You said you thought the institution should be able to consider an individual's ability to relate and communicate.

Mr. Powell. That is not a racial matter. A white person could relate in that regard and a woman could relate, Mr. Chairman, in that regard. You are reading more into the statement than is there, Mr. Chairman.

Mr. Biaggi. Will you yield?

Mr. O'Hara. I will in just a moment, but let me just button this up. May I just ask then if under any of your regulations would an institution of higher education be permitted to consider race as a bona fide occupational qualification?

Mr. Powell. No. Title VII does not contemplate that and I, of course, have an obligation to see that the laws are faithfully executed and I am very, very mindful of the requirement.

Mr. O'Hara. You would not consider an institution to consider race a bona fide occupational requirement?

Mr. Powell. Certainly not.

Mr. O'Hara. I am sorry I misunderstood that.

Mr. Powell. That is quite all right.

Mr. O'Hara. Mr. Chairman, what we are after really is the system you used and before we get into that I would like you to take us, lead us through your system. You have received a complaint and you led us through in general terms in your statement. You attempt a reconciliation.

I would like to know just how that attempt for reconciliation usually operates in the case where the complaint is one that involves alleged systematic discrimination on the basis of race or sex. But before we get into that, I am going to yield to the gentleman from New York and the gentleman from Oregon later if he wishes to make any comments.

Mr. BIAGGI. Just in the colloquy you just had a bit ago, Mr. Powell stated that in yesteryear at least, in connection with the police departments——

Mr. POWELL. And even today——

Mr. BIAGGI. OK. Well, that is not my understanding, but it is perfectly all right. I think it applies——

Mr. POWELL. Oh, yes; we still have a long way to go.

Mr. BIAGGI. You don't in the area I am addressing myself to.

You said something about the police, sanitation people, and the like. You said, or you implied at least, that it would be ineffective or at least a diminution of efficiency if we didn't have police officers whose backgrounds related to the community in a general way. You spoke directly to blacks and Spanish surnamed.

Mr. POWELL. Any ethnic group, any sector.

Mr. BIAGGI. I am glad you said that; I am glad you included that.

Mr. POWELL. There is no question about it.

Mr. BIAGGI. Fine. I am glad you said that. Let me give you my history. To begin with, I was a police officer for 23 years, but before that I lived in the ghetto; I was born in a ghetto and raised in a ghetto, the ghetto the like of which thankfully does not exist any more in this country. I am of Italian origin and we didn't have policemen of Italian origin for several reasons: One, our parents were immigrants and we had language difficulties. We would have been grateful if we had the bilingual programs then, but we did not.

Be that as it may, that was a universal condition.

Two, there was a psychology that had developed in our community at least and I think it ran across the country and as far as the immigrants were concerned, it was a police impression and it was the Government and they took that European psychology with them and there was a status position that they felt they were automatically cast into.

And, three, the educational process had not taken full hold yet. But the fact of the matter is police efficiency went on. I will tell you what offended us and today the same principle applies, whether it be of Italian extraction, whether it be black, whatever, the discrimination we all abhor, it is a question of how you deal with it and how it is to be corrected and we fought that fight all of our life.

In those days, in many areas we were denied the opportunity. It is the denial that is the offence.

Mr. POWELL. I agree.

Mr. BIAGGI. Not the fact that a people chose to go into one profession or another.

Mr. POWELL. I agree with you most assuredly in that regard.

Mr. BIAGGI. I am sure you do.

Mr. POWELL. I do.

Mr. BIAGGI. But that is why it becomes very difficult to deal with the problem on a general basis.

Mr. POWELL. I agree, I agree.

Mr. BIAGGI. I will point up another illustration. In the sanitation department for a while they thought it was the complete province of those of Italian ancestry for whatever derogatory reasons were advanced. Today it is somewhat different. It is a well-paying job and the benefits are good.

Mr. Powell. $17,000 in one city I read in the papers the other day.

Mr. Biaggi. That is without overtime. Again, it was denial of opportunity. So some people oriented in different areas, I am aware of that. That is an important consideration in making your evaluation?

Mr. Powell. I agree, no question.

Mr. Biaggi. That is why again general impressions or general approaches to problems are difficult and ofttimes put you in a position where you arrive at a conclusion that works hardships.

Mr. Powell. I agree. Might I say that with respect to your reference to statistics, the law is that the statistics raise a rebuttable inference and evidence could be directed to show, one, there is no denial of the opportunity; two, there are efforts to recruit; and, three, for their own reasons a particular ethnic group, racial group or sexual group, chose not to enter into this.

I might say I have been in the minority as regards an aspect of the "conventional wisdom" about integration. The purpose of integration, the purpose of the thrust of integration was to provide mobility and an opportunity for people to choose where they wanted to live. And I have some very strong views about the appropriateness of someone dictating that there should be a particular number.

The number should be the result of the free unfettered choice of people, irrespective of their color or other such irrelevant factors. I do believe that the policymakers ought to take a look at the equal protection laws in terms of services, whether those services be educational services, garbage removal services or police protection services. There are many people in the black community who feel that the concern about narcotics did not become pronounced until narcotics were a problem in the suburbs because the problems of narcotics, as you know, coming out of the ghetto, has always been a problem in the ghetto.

Equal protection like law and order is a nice sounding word, but it does not mean anything unless there is some implementation. Police protection is a concern of the black community because there are blacks who own businesses in the black community and they perceive police protection to be one thing in the ghetto and another thing in the suburbs. They would see it a little differently if there were blacks——

Mr. Biaggi. I don't know if I agree with you on that one. All I can say is that concern, despite some popular misconception, is as great if not greater than outside the ghettoes.

Mr. Powell. I can see the problem myself as a public administrator to speak the truth even though it be unpopular, even though it may seem to be a minority point of view, because I have faith in the ultimate sense of fairness of the people of this country. It is the obligation of those who would be leaders to speak the truth and the truth is a commodity of which there is really not enough.

Mr. Biaggi. I would like to conclude, arrive at a conclusion as to my initial premise, which we both agree on. The policemen, even though not of Italian origin in my area, did a good job. The teacher, even though not of Italian origin, did a pretty good job. The fact that she was not of Italian origin didn't mean she could not teach. It wasn't an essential that she be of Italian origin to be able to teach.

That is the point I am making in a broader application. If you tell me she couldn't be one of Italian origin because she was of Italian origin, then you make your point.

Mr. Powell. I don't quarrel with that, but I must tell you if you have been in any large city like New York, in the context of there being concern about there being no independent review of police action, you recognize that there are many people who are not black, who are not Italian, who conduct themselves in such a way that reasonable people would perceive that they are antiblack, anti-Italian. I have been a witness to that.

Mr. Biaggi. You are not alone. You are not alone.

Mr. O'Hara. The Chair will yield to the gentleman from Oregon, whom we understand is at this very moment supposed to be in a markup session of the Committee on Interior.

Mr. Dellenback. Thank you, Mr. Chairman, very much.

First, let me ask you a few mechanical questions. It is my understanding that the entire operation of your Commission is, at the present time, being looked at. Also, oversight is being conducted in another one of our subcommittees.

Mr. Powell. No, that is prospective. Well, in the sense we are providing information to that subcommittee, yes, that is true.

Mr. Dellenback. I don't mean to get into the broad reach of this issue, but rather to focus our thinking principally on the educational field. Is the Commission mechanically equipped in terms of number of employees, dollar budget, facilities and the like to really handle the workload, as far as postsecondary education is concerned?

Mr. Powell. Postsecondary education, I wished I had the statistics, I do not. I will be glad to provide you with more full statistics in that regard. Looking at the jurisdiction that the agency has, postsecondary education, while important and while there are many views as suggested in my statement about it, in terms of the scope of the area, I do not conceive it to be an unmanageable one.

That is not to say that—let me put it in the affirmative. I do feel that given the mandate of the Commission, that the Congress, in its wisdom may see fit, I hope, I trust, to provide us with considerably more resources than we now have.

Mr. Dellenback. Do you think you do not have adequate facilities now to do these things?

Mr. Powell. I think our resources are adequate when you recognize that the agency was, in effect, reconstituted in 1972 and we are now integrating these new tools that we have.

Mr. Dellenback. You indicated on page 6 of your testimony that there have been apparently some 1,600 charges?

Mr. Powell. Yes.

Mr. O'Hara. Charges of discrimination filed against academic institutions?

Mr. Powell. Right.

Mr. Dellenback. That was the total filed against academic institutions in 1972?

Mr. Powell. Not enducational institutions, but postsecondary institutions in 1972, since 1972.

Mr. Dellenback. You say in your testimony "Academic institutions", and you are now refining it to mean postsecondary institutions. I am not quibbling, but would you clarify what you are telling me.

Mr. Powell. In reading the statement last night I noticed we focused on postsecondary institutions and I see that statement may be misleading because it might suggest to the committee we do not have jurisdiction over educational institutions as such. That was changed then in my remarks, however, these statistics relate only to postsecondary institutions and they represent that number of charges brought only since 1972.

Mr. **Dellenback.** How many of those charges have you dealt with so far?

Mr. **Powell.** Well, the charges are in the administrative process, all of them are in administrative process. Do you mean "disposed of"?

Mr. **Dellenback.** Yes.

Mr. **Powell.** I don't have the information at my fingertips, but would be glad to provide it to the committee.

Mr. **Dellenback.** I will be glad to get it. In the meantime, can you tell me approximately is it 90 percent, 50 percent, 20 percent or 1 percent insofar as how many of those 1,600 charges have reached resolution one way or another?

Mr. **Powell.** We will provide you with that information.

Mr. **Dellenback.** Do you have any approximation?

Mr. **Powell.** It is very few.

Mr. **Dellenback.** Very few?

Mr. **Powell.** Very few. I think, if I may, this is a new area of jurisdiction. It is an area in which sister agencies have exercised some authority. There have been discussions between the staff at EEOC and the staff at HEW in this context of EOC and the Treasury Department in another context. This is a new area of jurisdiction and we have, I think, geared up and you can expect that we will be more prompt in the disposition of these cases.

One of my concerns, generally speaking, is that the charges in administration in a much more prompt and effective fashion than in the past.

Mr. **Dellenback.** Is it my understanding that the Commission has a backlog, at the present time, that reaches far beyond postsecondary institutions?

Mr. **Powell.** I think that is a matter of public knowledge and the subject of much discussion.

Mr. **Dellenback.** And the backlog is approximately 100,000 cases?

Mr. **Powell.** The 100,000 charge is not the number that we are saying. The number is somewhere between 80,000 and 90,000. That, of course, is far too high. That has to be understood with historical reasons, we were not constituted to do this.

Mr. **Dellenback.** I am not arguing with you or blaming you for this thing. Since you erudite lawyers have referred to your favorite phraseology, let me refer to a quote of Justice Cardozo: "Justice delayed is justice denied." If it takes 3 or 4 years before you get a resolution, it is no answer to the claimant.

Mr. **Powell.** Justice Cardozo is my favorite, too. It may be we might need another tool to see to it that we do adhere to the admonition of Mr. Justice Cardozo.

Mr. **Dellenback.** Whatever we write into the law insofar as a substantive measure is concerned, is important, but perhaps only academically interesting, if with a substantial number of the cases, there is a delay of such magnitude that we don't really get prompt resolution.

Now, the 1972 amendments are not that old yet, but it is my understanding that of the 1,600 charges of discrimination that have been filed in connection with postsecondary academic institutions—regardless of how many are in process, so to speak—there is a very low number of them that have been removed. The statistics that have been seen by my staff indicate it is less than 1 percent at this time.

I am not again saying this in quarrel with you, but saying it is my understanding we don't have many of them settled.

Mr. Powell. Let's say that in the use of terms we both say the same thing. If you say "resolved," you mean "disposed of," and I agree, but if you say "resolved," whether there has been a determination, as to whether or not discrimination is present, then I would not agree.

Mr. Dellenback. I would agree with your second definition.

Mr. Powell. I would accept the definition of "disposed of." It was only, let me just say that in 1972 in March, that is, 1972, when the 1972 amendment was finally passed, there were less than 40 lawyers in the Office of the General Counsel.

I mention that only by way of illustration. I can mention many other examples. We now have 286 lawyers in five litigation centers and headquarters. Now it took time to staff, provide the staffing. I would say it took virtually a year just to gear up, to implement that statute. We are now at the point where we can make the most expeditious use of the tools which Congress made available to us in 1972 and which it took some time to get into the mainstream.

Mr. Dellenback. I read you reluctantly, then, as telling me that you now have adequate personnel, adequate facilities and adequate budget so that you are going to be able to keep any further backlog from developing while proceeding to catch up on this backlog so we have currency in the handling of these cases.

Mr. Powell. I didn't say that.

Mr. Dellenback. That is why I said I read you reluctantly. May I just say, Mr. Powell, I get a little bit of the feeling that when I ask a question, you take my question as contentious and you become contentious.

Mr. Powell. Certainly not.

Mr. Dellenback. The best answer you might give us is: "Congressman, we don't have nearly enough people to handle the cases; we need more money, staff personnel, and more lawyers. If you expect us to handle the load of discrimination cases that are being dumped on us, you have to give us more help."

If that is your answer, put it in the record.

Mr. Powell. There is no question, in my opinion, we will need more money and more resources. I thought I had said that, but if there is some doubt about it, let me say we need more money and more resources to do the kind of job that I think should be done. I am also saying, however, that we have been given more resources, we do have more money than we did in fiscal 1973.

There is the need to integrate those matters and put in procedures which we can make effective.

Mr. Dellenback. I am worried about the backlog, and worried about the fact that although the 1972 amendments are less than 2 years old, we run the risk that the backlog will continue to grow. It is possible we could get a 3- and 4-year delay, which is present in some other cases.

Mr. Powell. I want to be as responsive as possible, but let me take 1 minute to tell you where we are. When the Equal Employment Commission opened its doors in July 1965, there was a backlog of 8,500 charges before we opened. Every year the number of charges filed with the agency has increased. During fiscal year 1972 I don't know what the number was, but the number that came before us in fiscal year ending 1974, June 30, 1974, was 55,000 charges, which was an increase of some 20,000 charges over what we ever had before in the current fiscal year.

If our forecasts are accurate this year, we will receive something like 75,000 charges, so that when we, or the fact that we are getting better, as we are getting better, the fact we are processing more charges is not enough, but what we have to do is to reach up to that point which is consistent with the increasing knowledge of people about their rights.

Now, the goal that I have set for my agency for this year is that we will process as many, or at least as many charges that come in. If we do that, we will process more than twice as many charges than we ever processed before. If I can come close to that, I will be in a position to come back to you or your colleagues and suggest we need more resources and more tools in order to do a better job.

I must demonstrate, in my opinion, we are making the best possible use of the resources you have given us.

Mr. Dellenback. I am not attacking you, but I want you to understand whatever we write substantively in the law will be implemented. It may take other tools.

Mr. Powell. We do, in my opinion, need cease-and-desist authority in some areas, I am forced to say.

Mr. Dellenback. Let me put in the record one mechanical item: The fiscal 1974 budget request for the agency was $44 million and Congress approved $43 million. In 1975, the President requested $56 million and the House appropriated $52 million, so that the budgetary requests are not being substantially eroded in the appropriations process.

If at any later time you come to us to say you are not able to keep up with the backlog, and even beyond that you are not able to make any real headway in catching up on it, it may be there is not enough being requested in the budgetary process. It may be you will have to be making recommendations regarding mechanical changes, say, cease-and-desist orders, et cetera.

Let me ask one more substantive question, Mr. Chairman, and then I will leave. I am concerned whether or not you feel—this is back to my opening statement—that employers should attempt to do anything special in achieving compliance. Let's suppose by something special I might mean something which viewed by itself would be considered discrimination according to current standards. Should employers attempt any so-defined special procedures in order to bring about an accelerated change in the composition of the total employment picture.

Mr. Powell. Well, we are getting at semantics. No, I don't think employers need do anything special. I think employers need to do that which they should have always been doing, that is to say, that since the average employer is an employer who either has no females or blacks or, if he has females or blacks, they are concentrated into what has been termed "black jobs," which are typically the hot, dirty, heavy jobs, or female jobs, which all too often are clerical jobs, then he should take those steps which will convey to these groups that there are now opportunities for them to get jobs commensurate with their abilities and aspirations.

If you want to call that "special," then it is special.

Mr. Dellenback. What you have described is especially important, and those steps are proper and urgently needed; but it is not what I was really referring to. I am leading to this particular point: Suppose, in a given year, an educational institution is going to hire 100 new people, and it has 1,000 employees on the books. If you look at the 1,000, you would find a very low percentage of females and a very low percentage of minority groups—not reflective of society and perhaps the result of past discrimination. Now, given the fact that the institution is going to hire 100 new employees this year, should it attempt to differentiate or discriminate in any way in setting up whom it hires in that 100 new employees?

Mr. Powell. No.

Mr. Dellenback. In an attempt to bring about a revised situation?

Mr. Powell. No.

Mr. Dellenback. You feel very strongly that should not be the case?

Mr. Powell. I think it is not necessary. It would be unwise.

Mr. Dellenback. Let me ask you this: Whether or not required by law or regulation—and you indicated your opposition to it—in your opinion has the process of implementation actually tended to make the administrators of educational institutions feel that they must give some clear preference to minority or female candidates in order not to run into trouble with the Government?

Mr. Powell. Well, I do have an opinion, but I must say the opinion is based not upon any great analysis of the situation. I have read very much about this area and it has been an area very close to my heart. I do believe that if there be any instances in which administrators have seen fit to discriminate in the way you have suggested, they are the exception and they are not the rule.

Mr. Dellenback. You don't think there is a widespread feeling among educational administrators that unless they do that, they will be put under some sort of pressure?

Mr. Powell. I want to be responsive, Mr. Dellenback. May I just say, preliminarily, that probably the most important task that administrators of law such as this have to achieve is public acceptance, public acceptance, particularly those segments of the public who have particular responsibilities.

Now, if they get public acceptance, the kind of rhetoric coming forth would be more supportive of the legislation.

Now, we must recognize that the kind of public acceptance that is necessary for there to be a change in the pattern of employment which our statistics tell us has not yet arrived and we must also recognize that this business concern about so-called reverse discrimination, reflects not quite so much the facts as it does an attitude of resistance.

Now, I have seen, in talking with corporate executives, a discernible change. I am happy to report that corporations, which when this agency was founded expended little or no resources to be advised as to what they had to do to comply with title VII, but that has changed.

Now, in the area of education, I think you have to understand that there is still a lot of resistance. When we look beyond the rhetoric and we look to the actual situation which prevails in a particular college, those statements must be considered in that context.

Now, that is not to say that in particular instances particular people may not feel this way, but that is also a reflection of the fact that they have never really sat back and said, "What is it we are really required to do?"

What they do is, they pick the most horrible kind of things and say, "This is what we are required to do and this is horrible" and I would agree if that is what they are required to do. The fact is they are not required to discriminate.

The object of 11246 is to eliminate discrimination and you don't achieve it by discriminating against white males, particularly when white males in general are in the majority and white males are the people who run things.

Mr. DELLENBACK. Thank you very much, Mr. Powell. The area with which you are charged with responsibility is an area which we agree is of extreme importance and we appreciate your remarks.

Thank you very much, Mr. Chairman.

Mr. O'HARA. Thank you.

I wonder if I could at this point get Mr. Powell to lead us through a description of how they handle their conciliation procedures in a case in which an institution of higher education has been charged with a pattern of discrimination.

Mr. POWELL. Let me be frank with you, Mr. Chairman, and say even though I am Chairman of this Agency, I am probably not the best witness to give you the kind of minutia you may want.

I will be more than glad to share with you the knowledge I acquired in the 7 months I have been Chairman and in the many years I have been a lawyer concerned with matters of civil rights.

I have visited some 11 or 12 of my district offices and talked with district directors and the staff and talked certainly with my executive director and my General Counsel, but my responsibilities are such I do not get into the level, into the process and it would be inconsistent with my responsibilities in the Commission. Be that as it may, I am more than glad to discuss with you that which I am competent to discuss.

Mr. O'HARA. Well, you have your staff with you and they can interject.

Mr. POWELL. Fine.

Mr. O'HARA. Let us suppose then a hypothetical institution of higher education in which it has been charged there is faculty discrimination and an investigation determines that the number of women and blacks employed as members of the faculty is very, very small and completely out of any relationship with the numbers among faculty generally throughout the county.

What sort of conciliation would you attempt with such an institution? How would you go about that in trying to arrive at a voluntary compliance with the law?

Mr. POWELL. I think, first and foremost, we would attempt to rectify the problem of the particular person or persons who brought the charge. If the question is one of failure to hire, then we would try, in the first instance, at least, or as a part of the package that would become a part of the conciliation agreement, to get that person hired, or if it is a question of failure to promote or failure to get tenure, we would attempt to get that rectified.

Another thing, we would attempt to get the institution to undertake those initiatives, sometimes referred to as affirmative action, and sometimes in affirmative action programs or plans which would be designed to achieve the elimination of the barriers. Sometimes those barriers result from word-of-mouth recruiting where the faculty as indicated in which the communications regarding the opportunities for employyour hypothetical, is all male and all white. Sometimes those initiatives would relate to the kind of advertisement and the kind of places to ment would be sent.

Am I answering your question?

Mr. O'Hara. Yes, you are. Would you, as a matter of course, suggest to such an institution that it set for itself goals in terms of hiring of women and minorities?

Mr. Powell. Let me, well, I think the answer to that is "Yes," but let me back up a moment and say how we get there.

What an employer's obligations are in terms of equal employment opportunities turns on many variables. One of the variables on which it turns is the work force from which it draws its employees. Is that work force in the local area? Is it the metropolitan area? Is it downtown? Are the levels of skills of that employer such that that employer can recruit regionally? Are they such that that employer can recruit nationally?

Now, let's assume that the employer's work force is such and its pay levels are such that he can recruit nationally. Then we would take a look at what skills are within the groups which have been excluded. Let's say that there are 13 percent women who are presumably, who could be called upon to be professors of chemistry or law, and 6 percent blacks or what have you. We would then suggest that a reasonable goal would be commensurate with the number of qualified minorities or women in the work force, which is the work force from which that person recruits.

We would further suggest he or she or it should take those steps calculated to get the word to those people.

Mr. O'Hara. All right, but your goal would set, the goals that you would hope that the institution would set for itself would involve not just maintaining a representative proportion of women and minorities in its new hires, but wouldn't the goal involve, within a certain length of time, reaching those goals in terms of the entire faculty?

Mr. Powell. May I anticipate where I think you are going?

Mr. O'Hara. Please.

Mr. Powell. It is commonly thought that the goal of the Equal Employment Opportunity Commission and other agencies that are concerned with elimination of barriers is to see to it there be a specific number of women, a specific number of minorities in jobs, and Mr. Biaggi I think most eloquently objected to that and I don't have any quarrel with that.

The goal, the objective is to eliminate barriers to equal employment opportunity, a convenient benchmark is the number of women who are qualified and I am sure that, since I do not share the concern that I think has been expressed in some quarters about ability of large employers to bring themselves into sufficient knowledge as to what they have to do and what they do not have to do, I am sure that the Harvard Universities, the Yale Universities, the Stanfords, and General Motors and General Electrics are aware that they don't have to hire *x* number of women, *x* number of blacks or *x* number of Spanish-surnamed people.

There is no necessity to do it and we would be wasting funds if we insisted on doing it. Statistics must be seen as a guidepost. The objective is to see to it that a qualified person, whether he be white or black or female or male, is accorded that degree of consideration commensurate with the needs of the employer and commensurate with his or her qualifications.

Mr. O'HARA. I am sure that is the goal of the law and I trust the goal of the Commission.

Mr. POWELL. Nothing about what we have done would suggest otherwise. If you look at the kind of things we have been doing——

Mr. O'HARA. But in terms of mechanics, of how you get there, if you have found at the time you were investigating a specific complaint that this institution is one in which the faculty, for instance, is all white men.

Mr. POWELL. Unfortunately, that is not too uncommon.

Mr. O'HARA. All right. Suppose it happened in this case and you then attempt to conciliate the complaint and you suggest to the institution that it adopt an affirmative action program and it does adopt an affirmative action program and you would anticipate, I suppose—and I think your answer to an earlier question indicates this—that the affirmative action program includes some goals that an institution has set for itself.

Mr. POWELL. Yes.

Mr. O'HARA. That is in terms of faculty hiring.

Mr. POWELL. I don't have any objection to that. What we do is enter into what is termed conciliation agreements if we are able to effect relief at the conclusion of the administrative process. A conciliation agreement often encompasses what popularly is referred to as an affirmative action program.

Mr. O'HARA. Yes, and the affirmative action program usually would encompass some goals in terms of hiring.

Mr. POWELL. Right.

Mr. O'HARA. And those goals would be expressed, not in terms of numbers or percentages of new hires, but in terms of numbers or percentages of entire faculty employment within a certain timespan?

Mr. POWELL. It would be, no, Mr. Chiarman, I beg to differ.

Mr. O'HARA. Please explain it.

Mr. POWELL. The fact is that both of those things that are often mentioned—or typically what we are focusing on are the new "hires" and over a certain timespan, whether the ultimate goal that you suggest within a period of 5 years is reached or not, it is conceivable that the employer might find himself or herself or itself in compliance.

I think the important thing is the goals which are set in terms of the new hires. It may also be necessary, because of the incumbent employees, to set some goals for opportunities for promotion, as was done in the A.T. & T. settlement, which I will be glad to share with you the particulars of that or as was done in the steel settlement.

I think that both elements are focused upon. I think that, as between the two, Mr. Chairman, the first is the terribly important one. Once you get some females into the workforce or blacks into the workforce, I think it is far more likely that you are going to have blacks and women and Spanish-surnamed people and Indians and Asian-Americans applying.

Mr. BIAGGI. Mr. Chairman, just for 1 minute.

Mr. O'HARA. Yes; I yield to you.

Mr. BIAGGI. I keep hearing Mr. Powell saying Spanish surnamed. The thought that comes to my mind is why Spanish surnames and not Italian surnames?

Mr. KEMP. Polish surnames. What ethnic groups are included in this heterogeneous society?

Mr. POWELL. Am I to answer your question or Mr. Kemp's or Mr. Biaggi?

Mr. BIAGGI. Both. They are in point.

Mr. POWELL. I must apologize to both of you if I am being interpreted as suggesting, if my remarks have been interpreted in such a way as to suggest there were only Spanish-surnamed people who were entitled to this. The fact is, our experience is, and, of course, we are more than glad to address ourselves to the problems of all groups, that in the main the complaints that we have are complaints from people of Spanish-surnamed background in the national origin context.

In the racial context we don't have many complaints of white people who are claiming discrimination because they are white, so that is why I used those terms. But I will be more than glad to state for the record now if an Italian-surnamed is discriminated against because of being Italian, my agency is ready, willing, and able to address that.

Mr. BIAGGI. I am sure of that. I understand your philosophy, but under the law form EEO-6 it requires the administrator to break down statistics and it goes down to "(a) black, (b) white, including Pakistanians and East Indians," and you come to (c) Spanish-surnamed, and why was that distinction made?

Mr. POWELL. When I was General Counsel of the Commission. Sorry, I thought you finished.

Mr. BIAGGI. All right.

Mr. POWELL. When I was General Counsel of the Commission on Civil Rights, we had occasion to address this question. I think that under Executive Order 11246 the question of what a minority person is for purposes of getting relief is addressed and, in effect, what we say is that any group who, because of that group's nationality, race, or color, is treated in a disparate way, in a context of employment, if that be the concern, or education, if that be the concern, Government programs if that be the concern, is a minority in terms of relief.

Now the statement on EEO-6 forms reflect the experience that the agency has had with what, from among that vast assemblage of people who would be entitled to relief, if they were being accorded disparate treatment, have, in fact, in the most number of cases almost universally been the group that has been discriminated against. It has been a reflection of that experience.

Mr. Biaggi. I tell you that it is a reflection of Government. I tell you what. Government is at fault here, the Government itself. I am not talking about the agency, but Government itself, because it has communicated to the world, the United States and its occupants that they are concerned with the deprivation of "A(1) blacks; (2) whites, including Pakistanians and East Indians, and (3) Spanish-surnamed," and the focus very frankly has been on blacks and Spanish-surnamed. So the average citizen sits back and says, "Well, they are concerned about them. They are not interested in us."

Mr. Powell. That is unfortunate. Spanish-surnamed people tell me it is only the blacks and women tell me it is blacks and the blacks tell me it is only women.

Mr. Biaggi. The result is that the rest of the community sits back. If the Government were to put the same emphasis on ethnic origins, the same emphasis, and communicate it to them, I am sure you would get more response from them because there is no question in my mind that the offense is committed in other areas and I am sure you agree with that score and the moment you popularize the notion, there is a place they can obtain redress, you know they will return in boards.

Mr. O'Hara. If I can interrupt for a minute, Mr. Kemp has been sitting patiently all of this time. I am going to allow him to go ahead.

Mr. Powell. May I respond first?

Mr. O'Hara. All right, respond and then we will go to Mr. Kemp.

Mr. Powell. Mr. Biaggi, I will be more than glad to have the staff talk with you with an eye toward seeing to it that the agency is as responsive to any group which has been discriminated against in a particular context. I assure you that I do not conceive the agency as being this type of agency.

Mr. Biaggi. I understand your philosophy, but the question is how do you, as an agency or on the part of Government, take an aggressive attitude and let the people know how you feel?

Mr. O'Hara. Mr. Kemp.

Mr. Kemp. Thank you and let me say I want to congratulate you on holding these hearings on this important issue.

In this free society, uppermost in our mind should be the rights of an individual to a free and unfettered choice. My question, I think, goes back or underscores one of the concerns that Congressman Biaggi has, that is, when talking about affirmative actions, special steps or goals, or however we want to put it as to terminology, what type of special goals are there for the type of ethnic background people that Congressman Biaggi was talking about?

Are there special goals for those people in terms of the criteria by which you judge institutions having not practiced the discrimination requirements?

Mr. Powell. May I comment? We already discussed what "special" means. I don't conceive that these are special unless we are going to say that what has been accorded white males up until and including 1960 as special. I don't think they are special, but the rights of people are very special.

Wait a minute. May I answer your question?

Mr. Kemp. Yes; but any white male?

Mr. Powell. Let me answer your question. The rights of people are very special. And if any person, whatever that person's national origin, sex, race, is discriminated against because of those qualities and if that discrimination results in that group's exclusion, and statistics show it, our rules require that steps be taken and if you want to characterize them as "special," that is all right with me. But if you are suggesting that there is one rule for blacks and women and another rule for the Irish or Polish or Italians, that is not the fact.

What is the fact is that there are special problems, Mr. Kemp, for blacks. There are special problems for women that Polish people, in most contexts do not confront, although in some contexts undoubtedly face. That is what I mean by "special." That is why history has to be understood.

Now, if a black person applied to a public or private employer in the fifties and the application were for jobs which were not traditionally held by a black person, that type of person would be treated one way and the Polish person and Irish person and Italian person would be treated another, that is history.

S[illegible]r rules are reflective of the facts which result from that history.

Mr. **Kemp.** And the criteria by which you make the judgment, as I understand it, is based on numbers and qualifications?

Mr. **Powell.** No, the number is not a static thing, Mr. Kemp. The number reflects what has happened in the months and in the many occasions where people of various ethnic and racial groups have applied. The number reflects that. The number tells a story of what has happened. It tells a story of what has happened when people have applied and it tells a story of who has applied and it tells a story of why they have applied and why those who have not applied have not applied. That is what statistics are.

Mr. **Kemp.** Well, just to define it a little more because I think this is of particular interest to both of us—and I appreciate your responsiveness and I am sure you take the questions in the spirit they are given because I don't want to put you on the defensive, take any institution, what are the criteria by which you make a judgment as to whether or not that institution is, in fact, complying with the mandate that Congress has given to your Commission?

Mr. **Powell.** We look at a number of criteria. We might even examine the applications at a given time of people and as Mr. Biaggi has suggested, it is unfortunate that we look at the question of race and what-not, but I, being familiar with the problem, must say that there is a legitimate Government purpose: I testified that such a purpose exists in a related area about a jury bill where the question was whether race should be considered, where there were people of black origin excluded and I answered affirmatively. The analogous situation is employment, we would want to know who had been applying.

Have blacks been applying? If they have, where have they been hired when their skills were the same as whites who were hired into higher grade levels and the blacks were not hired? If they have not been applying, why have they not applied? After we have a conciliation agreement, who is applying?

An effective conciliation agreement would result in blacks applying for jobs they have not applied for before, and Italians and Irish and Poles, if that be the case. An effective agreement would result in people being hired for jobs irrespective of sex, race, or national origin.

Mr. BIAGGI. You said, "I suggested unfortunately he directed his question to the question of race" and I did not say that and let me get this on the record because I think I have been misquoted because I never said that and it was not my intention. What I said was it is unfortunate we didn't give the same special emphasis to popularizing the notions for those others involved in this law.

Mr. POWELL. I beg your pardon, Mr. Biaggi.

Mr. BIAGGI. What I was really suggesting, forgive me, was affirmative action.

Mr. KEMP. Mr. Powell, what type of research programs are going on in terms of discrimination in the academic institutions?

Mr. POWELL. You mean in general or by the Equal Employment Opportunities Commission?

Mr. KEMP. By your Commission.

Mr. POWELL. I don't have that information at my fingertips. I would suspect that not really enough. One of the areas about which I have been concerned is the extent to which the agency uses the area of research and it is an area where we are going to do a better job than before. We have to improve in that area.

The Federal Reserve Board has issued research reports which I think are very, very—at least one Governor of that Board has issued such a report and we should do more of that. There is a committee I have asked to be appointed to stress that question and I will be glad to share with you some of the things we would like to do.

I can also tell you what we have done.

Mr. KEMP. At this time?

Mr. POWELL. No; I don't have that information now.

Mr. KEMP. I yield back my time, Mr. Chairman.

Mr. O'HARA. Thank you, Mr. Kemp.

Mr. Powell, in your statement you indicate there are charges against most large universities in the country. Could you supply us with the basis for that statement?

Mr. POWELL. I will be glad to. We do have confidentiality problems and I am sure the problems of confidentiality can be resolved. I will let my staff and your staff work that out, Mr. Chairman.

Mr. O'HARA. Well, let's just talk about numbers then without talking about the specific identity of institutions, although it seems to me that the Freedom of Information Act might be applicable here.

Mr. POWELL. I don't think so, Mr. Chairman. The Congress of the United States has charged us with not revealing the names of the people or the respondent in the investigative conciliation stage and I don't know of anything in the act which exempts us from that requirement which Congress has imposed.

There are many people who feel that requirement should not be there, but while it is there, I am bound to adhere to it.

Mr. O'HARA. Well, we spoke a while ago of the number of charges that have been made against institutions of postsecondary education and perhaps you can tell us the number of institutions about whom complaints have been made and then—you say there are 1,600 charges that have been filed against institutions of higher education and then you indicate on the same page that 1 out of every 40 charges in 1973 was against a higher educational institution. You have all of those figures apparently.

Now, how many institutions are there against whom complaints have been filed and what are their sizes?

Can you tell us that?

Mr. Powell. I can't give you specific numbers, but the ball park figure would be 400 institutions, I am told, but we can give you a specific number. We will give you that.

Mr. O'Hara. All right, we would like to receive that.

Mr. Powell, I don't recall the provision of law and maybe you can refresh my memory on this, that indicates that the identity of persons complained against may not be revealed. Would you proceed on that?

Mr. Powell. One of my staff is going to do that for me.

Well, on 706, and I understand there are others, but it is a misdemeanor, I might say, to violate this provision, Mr. Chairman. Quoting from section 706(b) of the 1964 act as amended, in the section which talks about the function of the agency, reading from the statute, "Nothing said or done during and as apart of such informal endeavors may be made public by the Commission, its officers or employees or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public such information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than 1 year, or both."

Mr. O'Hara. Well, this is the way I would interpret that.

Mr. Powell. There are cases on this and we will be glad to share that with you also.

Mr. O'Hara. Well, my interpretation of that is that in an effort to promote free discussion and reconciliation the Congress has provided that matters disclosed in the reconciliation process or statements made in the reconciliation process should not be revealed or used in further proceedings.

Mr. Powell. The staff has given me this and I think it is more pertinent, 709(e). That is of the 1964 Civil Rights Act as amended, title VI. "It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information."

Now, when I was General Counsel of the Commission on Civil Rights, I had occasion to accompany the staff director of that agency to the Office of the Chairman of the Equal Employment Opportunities Commission. The occasion for my coming was that the Commission on Civil Rights had obtained information, EEO-1 information from the Equal Employment Opportunities Commission, and it got into the hands of others who did in fact publish it.

We were admonished by the then-Chairman of the agency that unless we took steps to see to it that that did not happen again, we would not be favored with that information and it was his opinion, as I recall, that the people who published that information had committed a criminal act.

Mr. Gould. Mr. Chairman, our regulations provide that under certain circumstances we can release the information if it will further the purposes of the act and perhaps we can work out some kind of arrangement where we would provide you with this information under confidential circumstances where it would not be released to the general public.

Mr. Powell. We, as a matter of course, Mr. Chairman, provide Congressmen with this kind of information. I recall a discussion I had with my General Counsel when I first became Chairman and it was indicated to me that when a Congressman wants this kind of information, we do provide it to him, or, of course, to a member of the U.S. Senate.

But the information, or the statute indicates, and the cases hold, that the information is not to be released to the public-at-large. Many newsmen have discussed it with me and feel it is not a wise policy. They do not understand that the agency or do not accept the proposition that the agency is bound not to release this information.

Of course, the information does become public at such time as we file a complaint in the Federal court, information as entered into that proceeding, that is.

Mr. O'Hara. Mr. Powell, I think that in the Congress that Congress has the responsibility, very clear responsibility, to conduct oversight review of the operation of the laws of the United States to the extent that it is necessary for the Congress to determine the way in which its laws operate, and that it ought to be able to obtain such information.

I think the Congress, of course, has to operate under certain restraints itself in that regard and use its judgment so that it would not be hampering the enforcement of the laws by any premature or unwise disclosure of such information, but I think the Congress has to be able to obtain the information.

What we would like to do, if we could, is put the staff of this committee in touch with your staff and I am going to ask the staff of the committee to review with your staff a sufficient sample of cases involving higher education institutions so as to be able to determine the manner in which the law has been applied. We will, as a matter of restraint, not make specific information with respect to any particular complaint public in any way.

Mr. Powell. May I make an observation, Mr. Chairman?

Mr. O'Hara. Yes.

Mr. Powell. There is no question in my mind that the committee certainly has that authority. We, of course, as you know, are about to be involved in oversight hearings by a sister subcommittee of the Committee on Education and Labor. For what it is worth, my view is this, that educational institutions perform a very important job and everything should be done to support and enhance that effort.

Not only in my opinion should educational institutions not be exempt from the requirements imposed upon them by the authorities at large, they, like public institutions, whether those educational institutions be public institutions or private, should stand as an example in terms of the people involved in that process.

Mr. O'Hara. Well, Mr. Powell, not only do I agree with that, but I was one of those who voted against the limited exemption contained in title VII of the Civil Rights Act that was offered with respect to religious qualifications at institutions, or educational institutions that were run by a religious society.

It is my feeling that educational institutions ought to be covered even to the extent of having imposed that exemption where the matter was before the courts. I want to tell you this though. I think that I agree completely that educational institutions ought to be subject to all of the provisions of the law. I noticed in your opening statement your reference to the fact that some people didn't think that educational institutions ought to be covered by the activities of your Commission.

I think they should be covered. You also referred to the fact that in the early days you were given jurisdiction over only nonprofessional employees of such institutions and I don't think your jurisdiction should be limited in that way or ever should have been.

Mr. Powell. I agree.

Mr. O'Hara. And my only concern is, I want to see just how you are applying these laws to these institutions because certainly I know you have to agree with me that there has been a good deal written and said about the application of the requirements of equal opportunity at institutions of higher education.

Mr. Powell. That arose in the HEW context mainly.

Mr. O'Hara. Primarily. Another one of the problems that has arisen and about which there have been numerous complaints made to me has to do with the overlapping of requirements of the Office of Contract Compliance for those institutions that have Federal contracts of some kind, the Office of Civil Rights in the Department of Health, Education, and Welfare, and your own Commission. Some institutions feel that it has been an unnecessary burden to be required to attempt to justify their activities to all three of these agencies.

Mr. Powell. I agree and we attempted to coordinate the EEO–6 form, and the EEO–6 form is a form which resulted from discussion between EEOC and HEW and the information we gathered is information intended to meet the requirements not only of EOC, but also of the Office of Civil Rights of the HEW.

Speaking as one Commissioner and at the risk of seeming or without departing from the seriousness of this, if I had to choose between all of the paper that is filed by all of the educational institutions and all of the other employers on compliance, which is the name of the game, then I certainly would want compliance.

There are a number of people who feel that affirmative action plans, that there has developed among the corporate community, and I suppose among the educational community, a new technology, a new technique of filling out forms and forms are filed and approved and dissemination remains rampant.

Mr. O'Hara. I think that may well be the case with him and unfortunately there has not been a technique of affirmative action of compliance grow up that does not really meet civil rights.

Mr. Powell. As General Counsel on Civil Rights, we were involved in the process of looking at what or how effective the enforcement apparatus of the compliance agencies are or have been. Any preliminary look at that mechanism would show that what is needed in the implementation of that law and what is needed, the implementation of civil rights law at large is a commitment to implement the law.

The authority of the Office of Federal Contract Compliance and the authority of the 29 compliance agencies is such that if it were used prudently, judiciously, but used, we would have a much better situation in terms of employment. The fact is, Mr. Chairman, as I am sure you know, that that authority has not been used.

To say that it has been used sparingly would be overly optimistic. It has virtually never been used. It has been used so sparingly that as a practical matter it is, in effect, nonexistent.

The use of the cutoff is a matter which should be used and if it were used, I have no doubt that we would have much greater compliance in equal employment opportunities than we now have.

Mr. O'HARA. I am sure of that. As one of those who designed the cutoff mechanism, I regret that it has not been used. There is great reluctance on the part of administrators to use that. Instead, they have developed, or administratively developed as alternatives to the use of the cutoff compliance, mechanisms that I deemed less efficacious and more offensive than the cutoff mechanism.

I think that is a serious mistake. I hope, through these hearings, in cooperation with yourself and others who are concerned with the administration of the law and with members of the committee and the House, that we can develop improved systems of requiring institutions of higher education to fully observe the rights of all. That is our objective.

I assure you of that. We are going to be hearing a lot of testimony and I hope that you will be able to keep on top of what we are doing, because I am sure we are going to be in touch with you further. I imagine there are some questions that will arise during the remainder of these hearings that you may wish to come back before the committee and make some further response to and I hope you will keep in touch with us.

Without objection the members of the committee, the committee members rather, will reserve the right to send in further written questions for inclusion in the record and without objection the witness, the Chairman of the Equal Employment Opportunity Commission, and the Commission, are granted permission to provide materials for insertion in the record of this hearing that are relevant to the question. I will be asking the staff of this subcommittee to be in touch with your office in an effort to work out some mechanism whereby we can get an overview of the procedures used by your agency in the education field so that we will have a better understanding of it. I assure you we will do it in a way that will not compromise the objectives of the Commission under the law or damage the reputation of any institution or any person so we will be very careful of that and we would like to work with you and will be in touch with you.

[Documents follow:]

ACTIVE CHARGES AGAINST HIGHER EDUCATION INSTITUTIONS

	Bases						Issue					
	Total	Female	Negro	Spanish or Mexican American	Religion	All other	Hiring	Discharge	Promotion	Wages	Terms and conditions	All other
JANUARY 1974												
Public	1,274	[1] 626	325	163	58	281	480	350	354	343	469	855
Percent	(79)	(44)	(22)	(11)	(3)	(19)	(16)	(12)	(12)	(12)	(17)	(30)
Private	342	[1] 191	87	18	28	55	111	111	79	112	139	300
Percent	(21)	(50)	(22)	(5)	(7)	(14)	(13)	(13)	(9)	(13)	(16)	(35)
Grand totals	1,616	817	412	181	86	336	591	461	433	455	608	1,155
Percent		(44)	(22)	(9)	(4)	(18)	(15)	(12)	(11)	(12)	(16)	(31)
JANUARY 1973												
Public	365	[1] 153	73	85	23	47	153	538	119	82	127	273
Percent	(87)	[1] (40)	(19)	(22)	(6)	(12)	(19)	(15)	(13)	(10)	(14)	(30)
Private	63	[1] 40	14	3	4	13	20	25	8	18	21	19
Percent	(13)	(55)	(18)	(4)	(5)	(18)	(18)	(22)	(7)	(17)	(20)	(17)
Grand total	437	193	87	88	27	60	173	163	127	100	148	292
Percent		(42)	(19)	(19)	(5)	(13)	(17)	(16)	(13)	(10)	(15)	(29)

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[1] Since some charges have multiple bases or issues these numbers add up to more than the total number of charges.

FAILURE TO REAPPOINT FEMALE INSTRUCTOR AND PAY DIFFERENTIAL WERE SEX BIASED; DENIAL OF COMMENDATION WAS RETALIATION

Decision of Equal Employment Opportunity Commission, Decision No. 74-15, **August 7, 1973.**

TITLE VII—CIVIL RIGHTS ACT OF 1964

Sex Discrimination—Female Music Instructor—Denial of Reappointment—Resultant Denial of Tenure—Instructor's Qualifications.—There was reasonable cause to believe that a university music department discriminated against a female instructor on the basis of sex where it denied her reappointment even though she was a demonstrably qualified and valuable faculty member. Reasons given for the denial of reappointment, and resultant denial of tenure, were pretextual in nature and not a defense to the sex bias claim. Claims that the instructor was "abrasive" were discounted as a true basis for the departmental action. 42 U.S.C. Sec. 2000e.

Back reference.—¶ 1050.

Sex Discrimination—Salary Differential—Female Assistant Professors—Lower Average Salary.—There was reasonable cause to believe that a university discriminated against female assistant professors of music on the basis of sex where they received a lower average salary and a lower average annual pay increase than their male counterparts. Since both male and female assistant professors performed similar duties and had similar qualifications, it was a reasonable inference that the pay differential was improperly based, at least in part, on sex. 42 U.S.C. Sec. 2000e.

Back reference.—¶ 1548.

Sex Discrimination—Filing of Charge—Employer Retaliation—Withholding of Customary Letter of Commendation.—There was reasonable cause to believe that a university unlawfully retaliated against a female employee who filed a sex discrimination claim where a department head failed to supply her with a customary written commendation for a musical recital. Since the refusal to issue the letter was based, at least in part, on the fact that the letter might be used against the university in the sex bias claim, the refusal amounted to retaliation for the bias claim. 42 U.S.C. Sec. 2000e.

Back reference.—¶ 1350.

Full Text of EEOC Decision

Summary of Charge

Charging Party, a female, alleges that respondent Employer has engaged and is engaging in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964, as amended, by denying her a timely promotion from Instructor to Assistant Professor; by discriminating against her with respect to compensation; and by failing to reappoint her, all because of her sex. Charging Party further alleges that Respondent has retaliated against her because she filed a charge with the Commission, in violation of Section 704(a) of Title VII, as amended.

Jurisdiction

Respondent is a part of the University System providing educational services and employing in excess of 25 persons.[1] The Commission received a charge from Charging Party on May 23, 1972, and deferred it to the appropriate State agency on May 30, 1972. The State agency terminated its proceedings on July 11, 1972. The charge was filed with the Commission on July 17, 1972, within the time limitations prescribed by the Act. On November 27, 1972 the Commission received a second charge from Charging Party alleging retaliation, which charge was also timely filed. Charging Party's initial allegation concerning her promotion from Instructor to Assistant Professor relates solely to events occurring prior to September 1, 1967. Because those events occurred prior to the passage of the March 24, 1972 amendments to the Act, see footnote 2, *supra*, the Commission is without jurisdiction to decide the merits of that portion of Charging Party's allegations. Accordingly, that portion of the charge is hereby dismissed.[2]

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[1] Title VII was amended effective March 24, 1972. The amendments extended the coverage of the Act to include the employment practices of educational institutions in their educational capacity and, in addition, those of States or political subdivisions thereof.

[2] We note that jurisdiction may have vested were Charging Party still seeking the promotion from Instructor to Assistant Professor or if there existed a continuing adverse effect from the alleged discriminatory denial of that promotion.

Summary of Investigation

We are called upon to decide whether the decision of the University, Department of Music, to refuse to renew Charging Party's contract as an Assistant Professor of Music for the period September 1973 to June 1976 (and thereby grant Charging Party tenure)[3] was influenced to any extent by her sex.[4] The resolution of that question necessarily involves a detailed analysis of Charging Party' qualifications and abilities as a professor at that institution of higher learning.

The record reflects that in 1956 Charging Party entered the University of Pittsburgh where she majored in Music, after having graduated from high school sixth out of a class of 432. At the University of Pittsburgh Charging Party received an Honor Award for Scholarship and was elected to membership in the Special Fellowships Program for persons showing exceptional promise as future college teachers. After attending the University of Pittsburgh from 1956 to 1960, Charging Party transferred to the Juilliard School of Music for the Performing Arts where she earned her B. S. and, M. S. degrees in 1962 and 1963, respectively, as a scholarship student.

During her undergraduate years at the University of Pittsburgh Charging Party made numerous recital appearances in the Pittsburgh area and was a winner in the Pittsburgh Society Auditions, held annually to discover the most promising artists in the Pittsburgh area. While in attendance at Juilliard, Charging Party appeared on local radio stations in New York City and performed for chuches, clubs, and at hospitals. Upon graduating from Juilliard in 1963, Charging Party received an appointment as an Assistant Professor at Huntington College in Montgomery, Alabama, where, along with piano, she taught keyboard harmony, organ, and music education. Charging Party first began teaching piano when she was 17 years old. She continued to teach piano lessons through her undergraduate and graduate studies.

Charging Party remained an Assistant Professor at Huntington College until 1965 when she came to Respondent university as an Instructor for the academic year September 1965 to June 1966. Respondent reappointed Charging Party as an Instructor in 1966. In May 1967 Respondent awarded Charging Party an appointment and promotion to Assistant Professor. In January 1970 Charging Party received reappointment as an Assistant Professor for the period September 1970 to June 1973. When Respondent's Music Personnel Advisory Committee (tenure committee) met on April 6, 1972 to consider Charging Party's reappointment for the period September 1973 to June 1976, it decided by majority vote to deny Charging Party reappointment.

Charging Party alleges that she was denied reappointment because of her sex. Respondent denies the charge. We recognize that employment standards in academia, as in other fields, are somewhat *sui generis* and that a certain measure of subjectivity is inevitable in reaching the decision of whether to retain a faculty member and grant him or her tenure.[5] The situation is made more difficult by the fact that in making or reviewing such a decision one is not dealing with the relative qualifications of competing individuals, but rather with the qualifications of a person relative to some nebulous norm.[6] The standard of proof in discrimination cases of this type[7] was recently articulated by the United States Supreme Court in *McDonnell-Douglas Corp v. Green,—U. S.—*(1973), 5 EPD ¶ 8607, where the Court said:

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[3] It is unclear in the record the exact rights, privileges, or benefits gained by an award of tenure. For a discussion of the importance of reappointment to a faculty position and the granting of tenure generally, see *Johnson v. University of Pittsburgh,* — F. Supp. — (W. D. Pa. 1973), 5 EPD ¶ 8660.

[4] An employment action based in part upon an unlawful consideration is not saved by the fact that other, non-discriminatory, considerations may have also been present. *Gates v. Georgia-Pacific Corporation,* [2 EPD ¶ 10.305] 326 F. Supp. 397 (D. Oreg. 1970); Cf. *King v. Laborers, Internat. U. of No. America, UL. No. 818,* [3 EDP ¶ 8198] 443 F. 2d 273 (6th Cir. 1971).

[5] To the extent that Respondent has any formal procedures to be followed in making such determinations, they are found at Appendix D, Sections 1.8–1.9 inclusive, of Respondent's *Faculty Handbook: Information for the Academic Staff of University,* September, 1971, a copy of which is a part of the instant record.

[6] A male employee of the Department was denied reappointment at or about the same time as was Charging Party. The reasons for this denial are materially different from any considerations concerning Charging Party's reappointment. Thus we are not faced in this case with a situation where one successful applicant is picked from among a group of applicants.

[7] In our view, for purposes of proof, a failure-to-hire situation is equivalent to one in which an employer fails to reappoint an individual. Moreover, in a Policy Statement on Faculty Rewards, labelled *"For Review Purposes Only"* and dated April 4, 1972, Respondent states "Generally, decisions of reappointment, promotion and tenure are based on the same considerations as are used for hiring."

"The complainant in a Title VII trial must carry the initial burden under the statute of establishing a *prima facie* case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants (iii) that, despite his qualifications, he was rejected; and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." At p. 7787.

The Court went on to conclude that:

"The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for respondent's rejection." At p. 7787.

With respect to this rebuttal evidence:

"Petitioner's [the company's] reason for rejection thus suffices to meet the *prima facie* case, but the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent [complainant], *neither does it permit petitioner to use respondent's conduct as a pretext for the* sort of discrimination prohibited by § 703(a)(1)." At p. 7787. (Emphasis supplied).

Based on the extensive qualifications and promotions exhibited in Charging Party's personnel file, summarized *supra*, we can only conclude that she was a qualified and valuable member of the faculty and an accomplished musician. We thus reach the question of whether Respondent's asserted defenses of its decision to fail to renew Charging Party's contract are, as the Supreme Court said in *McDonnell-Douglas, supra*, "pretextual."

Respondent's position is that the tenure committee (composed of six males and one female, tenured members of the Music Department) declined to reappoint Charging Party because of alleged shortcomings in her relationships with her colleagues, students, and the public. There is no claim that Charging Party did not adequately and faithfully fulfill her actual teaching duties. Indeed, Respondent admits that Charging Party's ability as a teacher was not criticized, discussed, or otherwise weighed as a factor when the tenure committee decided to deny Charging Party reappointment and tenure at its April 6, 1972 meeting.[8] While we find this lack of analysis of Charging Party's abilities in what is clearly the major function of her employment suspect, because these abilities do not appear to be in dispute we shall move ahead to what the record evidence demonstrates concerning Charging Party's "relationship" with colleagues, students, and the public.

With respect to this inquiry, the Commission representative interviewed numerous colleagues and students of Charging Party. Their statements, signed and sworn to under oath, are a part of the instant record. We think the following are particularly illustrative:

A former student of Charging Party testified:

"Piano lessons under [Charging Party] were very satisfying. She was the first piano teacher I had who showed me the importance of a daily technical study program to build technique. Through this I developed a very good hand position and learned a lot about using the 'impulse.' Her approach to memorization was very helpful to me. . . . *The general altitude toward [Charging Party] was positive. Few students disliked her although I did hear a few remarks about her personal appearance. Although not at all a lenient teacher, she seemed to get along very well with students.*" (Emphasis supplied)

A Music student and Department Secretary testified:

I have studied with [CP] for 3 years in piano. Her teaching was excellent; I've learned more from her than from any other teacher; I've been studying for 16 (sixteen) years. [CP] is a capable teacher who gets along well with her students except for a few which is normal. She is always ready to tell you your good points then she helps you strengthen your weak points. Once I took over her class when she was ill and the students were doing well and had favorable things to say about her. When the students got wind that she was not returning they were concerned for her."

An Associate Professor of Music (who is the member of the tenure committee quoted at footnote 8, *supra*) testified:

"I think her teaching is competent. The tenure committee met once; they discussed her; They all had complaints about her—it was mainly personal problems that they related. I have never had problems with her. [CP] is a go-getter, outspoken, ambitious, and energetic."

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[8] The female member of the tenure Committee testified to the Commission representative that at the meeting "[T]hey discussed her. . . . [I]t was mainly personal problems that they related. . . . *They didn't seem to say anything about her teaching.*" (Emphasis supplied).

An Assistant Professor of Music testified:

"I've heard [Charging Party] [is] a good teacher from her students and from judging her students at exam time I think they're good. I don't agree 100% with any faculty member including [CP] but I think she has been treated unfairly in not being reappointed . . . I don't agree with the tenure committee because [Charging Party] is a good teacher and has good rapport with students . . . Her personality may cause problems among faculty and students but to me it's not a great problem . . ."

Another former student of Charging Party testified:

"During my four and one-half years at Respondent I studied with [CP] for five semesters. [CP] had more patience and took more time to work with me on techniques (than did one tenured male professor). She also offered me endless encouragement."

This witness went on to state that the tenured male professor (who it seems was instrumental in denying Charging Party reappointment) was "surprised at my progress" after the witness's five semesters under Charging Party's tutelage.[9]

The Commission representative also interviewed and received statements from male faculty members who were members of the tenure committee. The Chairman and Head of the Music Department testified extensively regarding Charging Party's working relationships with students and faculty. The common thread of his testimony is that Charging Party has an "abrasive personality." This witness stated that some students, admittedly a small number, complained about Charging Party's teaching. However, the only specific negative situation concerning Charging Party that the witness could recall involving Charging Party's teaching related to Charging Party's tardiness, not her working relationship with her students. He also cited two examples of poor "public relations", one involving harsh criticism of a student and the other an alleged disagreement between Charging Party and a prospective donor of a harpsichord. Another witness, a full professor of music, discussed his extensive differences with Charging Party, most of which related to differences over course content and certain university policies—matters on which we think it clear that reasonable persons may differ. There is no claim by Respondent that Charging Party's alleged solicitation of the students of this witness, who is a member of the tenure committee, was ever substantiated or discussed with Charging Party. Nor does it appear that this allegation was an operative factor in the decision not to renew Charging Party's contract. Other testimony elicited from members of the tenure committee amounts to no more than a general denial of the charge of discrimination.

In sum, we cannot conclude that the "personality conflicts" cited by Respondent's witnesses could reasonably have been found to outweigh the positive contributions made by Charging Party to the University during her period of employment. Nor do we find such contentions persuasive in light of Respondent's admitted failure to consider evidence favorable to Charging Party with respect to her teaching abilities. We further note that several members of the faculty, including some members of the tenure committee, admitted that the normal course of their professional life brought them into only limited contact with Charging Party and other faculty members.

Courts have often observed that proof of discrimination is seldom direct. See, e.g., *United States v. Jacksonville Terminal Company*, [3 EPD ¶ 8324] 451 F. 2d 418 (5th Cir. 1971); *Marquez v. Ford Motor Company*, [3 EPD ¶ 8156] 440 F. 2d 1157 (8th Cir. 1971). Often an inference of discrimination must be drawn from the totality of the circumstances, and while one factor standing alone might not warrant an inference of discrimination, a coalescence of factors may suffice to so demonstrate. See *Lowry v. Whitaker Cable Corp.*, 472 F. 2d 1210 (8th Cir. 1972); 5 EPD ¶ 8440, affirming — F. Supp. — (W. D. Mo. 1972), 5 EPD ¶ 8439. A major circumstance in this case is the fact that the entire process of determining who shall or shall not be reappointed is accomplished in a highly subjective, essentially nonreviewable, manner. As indicated above, the guidellines for such determinations are at best nebulous. It is clear from the testimony of various faculty members that highly subjective considerations, often not communicated to the unsuccessful applicant, may operate to disqualify an otherwise well qualified person. As pointed out in a similar context in *Rowe v. General Motors Corporation*, [4 EPD ¶ 7689] 457 F. 2d 348 (5th Cir. 1972):

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[9] As stated *supra*, the complete text of these statements is a part of the instant record. While not making specific comparisons, we note that the general evaluation of Charging Party's rapport with students and faculty alike was that she had at least as good rapport with these persons as did tenured members of the faculty.

"[Such] methods for promotion . . . would enable an individual foreman, if he were so inclined, to exercise racial discrimination in his selection of candidates for promotion . . . . All we do today is recognize that promotion . . . procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that matter, not really known to management. We and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect non-discriminatory action." (Footnote and citations omitted). At 359.

We believe that the treatment that females can expect from males under similar circumsances can be viewed with equal skepticism. Further, it is significant that only male faculty members considered Charging Party's personality too aggressive. Charging Party's female colleagues voiced no such complaints. Moreover, numerous witnesses testified that the head of the Keyboard Area of the Music Department, a male, frequently expressed strong opinions on University policy matters. While certain female witnesses characterized this individual as abrasive and overly aggressive, no male witnesses so characterized him. This division of opinion along male-female lines alone, especially with the negative reaction to Charging Party emanating strictly from the males, leads us to believe that Charging Party's sex was a factor in the way her male colleagues perceived her. It is well known that in our society aggressiveness in males is generally looked upon with approval, while the opposite is true with regard to females.

We conclude that in the totality of circumstances presented in this case, i.e., that Charging Party was a competent aggressive female instructor denied reappointment by virtue of subjective evaluations made by a predominantly male group; that the male members of the tenure committee were influenced in large part by personal conflict and animus; and that the reasons for Charging Party's non-reappointment are belied by record evidence both testimonial and documentary, that it is reasonable to conclude that Respondent's asserted defenses fail to withstand scrutiny and are indeed pretextual. See *McDonnell-Douglas v. Green, supra*. We accordingly conclude that there is reasonable cause to believe that Charging Party's sex was a factor in that decision.[10]

Charging Party further alleges that she is paid less than male Assistant Professors because of her sex. Respondent's personnel records indicate that four of eight Assistant Professors in the Music Department at the time of the filing of the charge were female; that male and female Assistant Professors within the Department perform basically the same duties; that the average period of employment with Respondent was four years for Assistant Professors of both sexes; and that without significant exception the female Assistant Professors possess teaching and recital experience and education comparable to that of their male counterparts.[11]

Respondent's records further show that female Assistant Professors in the Music Department receive average annual salary increases of $419 while male Assistant Professors receive average increases of $510 annually. Additionally, the records indicate that the salary for each female Assistant Professor is within the range of $8,350 to $9,450 for a ten-month period while the salary of each male Assistant Professor is within the range of $9,150 to $12,000 for the same period of time.

Given the similar qualifications and duties of the male and female Assistant Professors, we find it reasonable to infer that the disparity in compensation is based, at least in part, on sex. See *McDonnell-Douglas v. Green, supra; Gates v. Georgia-Pacific Corporation, supra*.

Charging Party further alleges that Respondent, in the person of the Chairman and Head of the Music Department, retaliated against her in violation of Section 704(a) of Title VII, as amended, by refusing to grant her a customary letter of commendation following a recital because she filed charges of discrimination with the Commission.[12] With respect to this allegation, in a signed statement, the Department Head stated that:

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[10] Our findings concerning Respondent's generally discriminating compensation policy affecting female employees in the Music Department, made *infra*, further support this conclusion of individual discrimination. *McDonnell-Douglas v. Green, supra*.

[11] The only Assistant Professor who holds more than a Master's Degree is a male with a PH.D. He however, unlike certain of the females, possesses no recital or other professional performance experience.

"Her charge has no validity. I did not intend to penalize her. Even though faculty recitals are not required, it is almost always my practice, when faculty members play a recital, to write a short note thanking them for preparing and playing the recital. I have probably done this for [CP] after each of her recitals. Because I knew that [CP] had many letters of commendation from me for past recitals, I felt it would be enough this time to go back stage after her recital and compliment her verbally, which I did. Two or three days later she asked my secretary if I intended to write a letter of commendation. I replied, through the secretary, that I didn't intend to write one. I had called the University Legal Counsel office and asked about writing the letter. I was advised that I should not make any written communication that could be used against the University at a later time as the University, from a legal standpoint, had been placed in a defensive position."

Thus it is clear that the decision not to issue the commendation was based, at least in part, on the fact that Charging Party had a charge of discrimination pending against Respondent. The refusal, therefore, constituted a violation of Section 704(a).

Decision

There is reasonable cause to believe that Respondent engaged in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964, as amended, by failing to reappoint Charging Party because of her sex and thereby denying Charging Party tenure; by discriminating against Charging Party and females as a class in the Music Department by denying them equal compensation because of their sex; and by retaliating against Charging Party because she filed a charge of discrimination with the Commission.

MEDICAL SCHOOL FACULTY TENURE PROCEDURES WERE SEX BIASED; MINORITIES AND FEMALES IMPROPERLY EXCLUDED FROM NON-FACULTY JOBS; SEX-DESIGNATED JOB CLASSIFICATION WAS BIAS; HIGH SCHOOL REQUIREMENT WAS BIASED AGAINST NEGROES

Decision of the Equal Employment Opportunity Commission, Decision No. 74-53, November 12, 1973.

TITLE VII—CIVIL RIGHTS ACT OF 1964

Sex Discrimination—Medical School Faculty—Promotions—Tenure Procedure—Statistical Evidence.—There was reasonable cause to believe that a medical school's promotion and tenure procedures were biased against females where statistical evidence showed a wide disparity between the number of male and female faculty members. Use of highly subjective criteria when applied almost exclusively by males discriminated against female faculty members on the basis of sex. Denying a female faculty member promotion and tenure, with resultant discharge, was sex discrimination where it was based on more stringent requirements than had been applied to similarly situated males in the past. Refusal of a research grant to the female faculty member because of her pending wrongful discharge was also sex bias, 42 U.S.C. Sec. 2000e.

Back reference.—¶ 1325.

Sex discrimination—Medical School Faculty—Wage Differential—Lack of Justifying Evidence.—Payment of a significantly lower average wage to female medical school faculty members than was paid to similarly situated males was improper sex discrimination absent the existence of evidence justifying the wage differential. 42 U. S. C. Sec. 2000e.

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[12] Section 704(a) states in relevant part that:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."

Because of the reliance on citizen-initiated complaints in Title VII proceedings, the Commission and the courts have broadly construed the scope of protection afforded by this section of the Title. See, e.g., Commission Decision 72-0975, CCH EMPLOYMENT PRACTICES GUIDE ¶ 6358, citing *Pettway v. American Cast Iron Pipe Co.*, [2 EPD ¶ 10,011] 411 F. 2d 998 (5th Cir. 1969). See also *Barela v. United Nuclear Corporation*, [4 EPD ¶ 7857] 462 F. 2d 149 (10th Cir. 1972).

Back reference.—¶ 1548.

Sex Discrimination—Medical School Faculty—Hiring—Statistical Evidence.—Statistical evidence failed to support a claim of sex discrimination in a medical school's faculty hiring practices where the percentage of females on the faculty compared favorably with the national percentage of those holding representative degrees. Whether the degree requirement would indicate sex bias as not a valid basis for job performance is open to further study. 42 U. S. C. Sec. 2000e.

Back reference.—¶ 1166.

Sex Discrimination—Medical School Faculty—Reprisals for Employee's Objections to Discrimination—Denial of Lecture Assignments.—Denial of lecture assignments to a female medical school faculty member after she filed a sex bias claim was improper retaliation for the employee's objection to discrimination. 42 U. S. C. Sec. 2000e.

Back reference.—¶ 1350.

Race and Sex Discrimination—Statistical Evidence—Medical School—Non-faculty Positions—Hiring and Job Classifications.—Statistical evidence indicated race and sex bias in a medical school's non-faculty hiring and job classifications where employment figures showed significant underrepresentation of minorities and females in most job categories when compared to the percentage minority persons and women held to the local population. 42 U. S. C. Sec. 2000e.

Back reference.—¶ 2575.57.

Sex Discrimination—Medical School Janitorial Positions—Job Classifications—Maintenance of separate janitoral job classifications by a medical school was improper sex discrimination where sex was not shown to be a bona fide occupational qualification. Division of the janitorial work into a "heavy" classification for males and a lower paid "light" classification for females was dscriminatory assignment of jobs on the basis of sex. 42 U. S. C. Sec. 2000e.

Back reference.—¶ 1007.

Racial Discrimination—Medical School—Non-faculty Positions—High School Education Requirement—Absence of Business Necessity.—A medical school's requirement that applicants for certain non-faculty jobs have a high school education improperly discriminated against Negro job applicants, absent a showing of justifying business necessity. Though the high school education requirement was neutral on its face, it had a discriminatory impact on minorities who were statistically less likely to meet the qualification. 42 U. S. C. Sec. 2000e.

Back reference.—¶ 1433.

FULL TEXT OF EEOC DECISION

Summary of Change

Charging Parties allege that Respondent University has engaged in and continues to engage in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964, as amended, by denying females promotions to tenured positions in Respondent's Medical School faculty because of their sex. Charging Party alleges that she was denied a promotion to such a tenured position because of her sex, and that she was retaliated against for opposing such discriminatory practices.

Charging Parties further allege that Respondent continues to engage in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964, as amended, by discriminating against women as a class in hiring, promotions, wages, job classifications and in general terms and conditions of employment, and by taking reprisals against those opposing such practices.

Jurisdiction

Respondent University is a private educational Institution which receives support from the state. It employed approximately 9,000 persons during the 1972 calendar year and is an "employer" within the meaning of Section 701(b) of the Act.

The original charge herein was received March 17, 1972 and was subsequently amended, pursuant to EEOC Procedural Regulations, 29 CFR 1601.11. The original charge was deferred to the State Human Relations Commission on April 5, 1972, and we assumed jurisdiction on June 23, 1972, pursuant to EEOC Procedural Regulations, 29 CFR 1601.12(b)(v), within the time limitations prescribed by Section 706(b) and (d) of Title VII.

Summary of Investigation

I. *Promotions—Medical School Faculty.*—Charging Parties allege that female employees as a class have been denied promotions to tenured positions in respondent's School of Medicine on the basis of sex.

Academic tenure is a system where faculty appointments in an institution of higher education are continued generally until retirement. At Respondent University, Associate Professors and Professors are normally tenured, while Assistant Professors and others below this rank are not tenured. If a faculty member fails to achieve tenure within seven years after his appointment, his services in the tenure system are terminated.

Under the tenure procedures in Respondent's Medical School, the head of a candidate's department makes a recommendation to the Dean of the School concerning the granting or denial of tenure to an eligible candidate. If the recommendation is favorable, the Dean appoints a committee of tenured faculty members to consider the candidate's qualifications. The committee issues a report and recommendation. For a candidate to be granted tenure, this recommendation must be concurred in by the Executive Committee of the Faculty, the Vice Chancellor for Health Professions, and the Office of the Provost. An unfavorable determination at any stage can result in denial of tenure.

Respondent's records reveal that a greatly disproportionate number of those involved in the decision of whether to grant tenure under the above procedures, are male. The department heads listed for Respondent of Medical School are male. The faculty committee, which is composed of tenured faculty members, often may consist entirely of males due to the small number of tenured females on the Medical School faculty. Respondent's records show the following numbers of tenured full time faculty members, by sex, as of January 1972:

	Number	Tenured	Tenured males/females total/faculty (percent)	Tenured males/females total tenured faculty (percent)
Males	351	115	29.4	95.8
Females	42	5	1.3	4.2
Total	393	120		

Broken down another way, Respondent's statistics show that 32.4 percent of all males are tenured while only 11.9 percent of all females are tenured.

In deciding whether to grant or deny tenure to a candidate, highly subjective criteria often are used. For example, the criteria set forth in Respondent's Faculty Handbook for an Associate Professor are as follows:

An Associate Professor should have completed all formal academic preparation for a teaching career and should have had substantial experience in teaching, research, advanced study, or applicable non-academic professional experience. He should have demonstrated a capacity and will to maintain teaching effectiveness and should have a capacity for continuing growth, as a teacher, as a scholar, and as a member of his profession. He should have made substantial progress in attaining eminence in a scholarly or professional field.

He should have the capacity for consistently mature performance in course and curriculum planning, in the guidance and counseling of students and of younger staff members, and in participation in the activities of the university.

The criteria for a Full Professor are similarly amorphous:

The rank of professor recognizes the attainment of authoritative knowledge and reputation in a recognized field of learning, and demonstrated achievement in maintaining a teaching effectiveness of a high order. The professor should have achieved distinctly superior stature in his field through research, writing, professional practice, leadership in professional and learned organizations, or in administrative service.

Statistics reveal that, under this system, recent promotions in the Medical School have been disproportionately granted to males. For the years 1966–71, the record reveals the following promotion statistics for Assistant Professors in the School of Medicine:

Year	Number of assistant professors			Percent females	Number of assistant professors promoted		
	Male	Female	Total		Male	Female	Total
1966-67	84	11	95	11.5	8	0	8
1967-68	97	19	116	16.3	8	1	9
1968-69	105	27	132	20.4	10	2	12
1969-70	118	23	141	16.3	5	1	6

[In percent]

Year	Assistant professors promoted		All	Promotions by sex	
	Male	Female		Male	Female
1966-67	9.5	0	8.4	100	0
1967-68	8.2	5.2	7.7	88.8	11.1
1968-69	9.5	7.4	9.1	83.3	16.6
1969-70	4.2	4.3	4.2	83.3	.6

The above statistics indicate that of 35 promotions from 1966 to 1971, 31 or 88.5 percent were granted to men while 4 or 11.4 percent were granted to women. During this period, women constituted a minimum of 11.5 percent and a maximum of 20.4 percent of Respondent's Assistant Professors. In three of the four years, the percentage of women promoted was significantly less than the percentage of female Assistant Professors.

Broken down by departments within the School of Medicine, Respondent's tenure records show the following:

	Total tenured faculty	Tenure females
Anatomy	7	0
Biochemistry	6	0
Anesthesiology	6	0
Pharmacology	3	1
Microbiology	4	0
Pathology	16	0
Medicine	18	0
Surgery	8	0
Pediatrics	10	1
Radiology	6	0
Community medicine	1	0
Otolaryngology	4	0
Obstetrics and gynecology	3	0
Orthopedic surgery	1	0
Physiology	7	0
Neurology	3	0
Neurological surgery	1	0
Psychiatry	15	3

Courts often have observed that proof of discrimination is seldom direct. See, e.g., *United States v. Jacksonville Terminal Co.*, [3 EPD ¶8324] 451 F. 2d 418 (5th Cir. 1971); *Marquez v. Ford Motor Co.*, [3 EPD ¶8156] 440 F. 2d 1157 (8th Cir. 1971). Often an inference of discrimination must be drawn from the totality of the circumstances. See *Lowry v. Whitaker Cable Corp.* [5 EPD ¶8440] 472 F. 2d 1210 (8th Cir. 1972). In this case, tenure decisions are made by a group consisting almost entirely of males. The standards used are highly subjective. Statistics reveal that significantly fewer females than males are granted tenure, relative to their proportion on the Medical School faculty. As pointed out in a similar context in *Rowe v. General Motors Corporation*, [4 EPD ¶7689] 457 F. 2d 348, 359 (5th Cir. 1972):

> Such methods for promotion . . . would enable an individual foreman, if he were so inclined, to exercise racial discrimination in his selection of candidates for promotion . . . All we do today is recognize that promotion . . . procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that matter, not really known to management. We and others have expressed skepticism that Black persons dependent directly on decisive recommendations can expect nondiscriminatory action. (Footnote and citations omitted.)

We believe, and Respondent's tenure statistics indicate, that the treatment which females can expect from males under similar circumstances should be viewed with equal skepticism. Accordingly, we find reasonable cause to believe that the tenure procedures now utilized in Respondent's Medical School, consisting of highly subjective criteria applied almost exclusively by males, discriminate against female faculty members on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964, as amended.

II. *Compensation.*—Charging Parties allege that female faculty members receive lower compensation than males in Respondent's Medical School. The evidence shows the following average salaries for males and females in the School of Medicine:

	Male		Female	
	Number	Average salary	Number	Average salary
Professor	47	$39, 481	1	$42, 000
Associate professor	49	32, 387	5	26, 496
Assistant professor	117	26, 795	20	21, 982
Instructor	25	23, 607	4	21, 895

With the exception of one female professor, the average salary for females is significantly lower than the average salary for males at all job levels and among males and females having substantially the same responsibilities. Evidence also shows that males are granted higher salary increases than females. Title VII prohibits discrimination with respect to compensation. Under Title VII, insubstantial differences in job duties do not justify different wages rates. See *Krumback v. John Oster Mfg.* 313 F. Supp. 257 (D.C. Wisc. 1970); Comm. Dec. No. 71-1103, CCH EEOC Decisions (1973) ¶6203 (1971). Based upon the above evidence, and in the absence of evidence justifying the wage differential, we find reasonable cause to believe that Respondent discriminates against females in its School of Medicine in payment of wages.

III. *Hiring—Faculty.*—Charging Parties allege that Respondent treats females disparately in hiring for faculty positions, both in the Medical School and in the University as a whole.

(A) *Medcal School Hiring.* Respondent's records show the following faculty composition by sex for the Medical School:

	Male		Female	
	Number	Percent-	Number	Percen
1970-71	303	86. 8	46	13. 2
1971-72	331	88. 7	42	11. 3
1972-73	340	88. 5	44	11. 5

Our investigation indicates that Respondent recruits nationally for Medical School faculty positions. In order to determine whether Respondent has discriminated against the males on a statistical basis in hiring for these positions, it is thus necessary to examine Respondent's employment practices in light of national statistics showing the relative number of females qualified for such faculty positions.

Direct statistics indicating the proportion of females qualified for Medical School faculty positions are not available. Statistics showing the ratio of females receiving the degrees which are considered necessary by Respondent for a teaching position in Respondent's Medical School are available however, and serve as an indication of the relative number of qualified females.[1] Respondent's applicant statistics are unavailable.

Of Respondent's Medical School faculty, some 75 percent have M.D. degrees and some 23 percent have Ph.D. degrees, primarily in the biological sciences. The following tables indicate the percentage of females nationally having these qualifications:[2]

	Male	Female	Percent female
M.D. degrees earned, by sex, United States:			
1949-50	5,028	584	10.4
1954-55	6,683	331	4.7
1959-60	6,645	387	5.5
1964-65	6,832	472	6.4
1969-70	7,615	699	8.40
1970-71	8,110	809	9.07
Ph. D. degrees earned, by sex, in fields related to medicine, United States, 1970-71:			
Pathology	62	6	8.8
Pharmacology	141	20	12.4
Physiology	204	41	16.7
Microbiology	264	59	18.3
Anatomy	126	23	15.4
Biochemistry	436	81	15.7
Bacteriology	34	8	5.2

From 1960 through 1969, females received 15.8 percent of the doctorate degrees awarded nationally in the biological sciences and 3.4 percent of the doctorate degrees awarded in the physical sciences.

These statistics indicate that the proportion of females in Respondent's Medical School faculty does not compare unfavorably with the proportion of females receiving M.D. and Ph.D. degrees nationally. While Title VII permits the use of statistics to establish a pattern of discrimination[3] based upon the above statistical information, we find no reasonable cause to believe that Respondent has discriminated against females in hiring for medical school faculty positions, as alleged.

(B) *University-wide hiring.* Respondent's records show the following faculty composition by sex for the University as a whole:

	Male		Female	
	Number	Percent	Number	Percent
1970-71	1,585	80.5	383	19.5
1971-72	1,628	79.1	431	20.9
1972-73	1,649	77.4	482	22.6

As in the medical school, our investigation indicates that Respondent recruits nationally for its university-wide faculty positions. Statistics show the following percentages of women on college and university faculties, nationally.[4]

[In percent]

	Universities	Colleges and universities
1968-69	14.8	19.1
1972-73	16.5	20.0

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[1] We do not speak to the question of whether such degree requirements in themselves unlawfully discriminate against classes protected by Title VII. This is a question of first impression and we reserve judgment thereon pending further study.

[2] Source: Digest of Educational Statistics, U.S. Dept. of Health Education and Welfare, 1972.

[3] See *Parham v. Southwestern Bell* [3 EPD ¶ 8021] 433 F. 2d 421 (5th Cir. 1970), *U.S. v. Dillon Supply* [2 EPD ¶ 10,256] 429 F. 2d 800 (4th Cir. 1970).

[4] Source: American Council on Education.

A comparison of Respondent's employment statistics with the above figures reveals that Respondent employs a greater proportion of female faculty members than are employed nationally. Such a comparison does not, of course, account for possible discrimination against females at colleges and universities in general. According to Respondent's records some 25 percent of its faculty members have attained an M.A. degree as their highest degree and some 50 percent have attained Ph. D. degrees.[5] National statistics show the following percentages of females that have attained these degrees:[6]

M.A. Degrees Awarded—All Fields—United States 1970–71

Men	138, 146
Women	92, 363
Total	230, 509
Percent women	40. 6

Ph. D. Degrees Awarded—All Fields—United States 1970–71

Men	27, 530
Women	4, 577
Total	32, 107
Percent women	14. 7

Between 1960 and 1969, 11.6 percent of the recipients of doctoral degrees were female. While possession of such degrees may not always be a valid prerequisite to teaching, these statistics are one of the best indications of the percentage of females qualified, by Respondent's criteria, to teach at Respondent University.

The above statistics, comparing the proportion of females in Respondent's faculty with the proportion of females in other college and university faculties and with the proportion of females receiving M.A. and Ph. D. degrees, show no disparities sufficient to make a *prima facie* case of discrimination.

On the basis of these statistics, and lacking other evidence of sex discrimination in faculty hiring, we find no reasonable cause to believe that Respondent has violated Title VII by treating women disparately in its overall hiring practices.

IV. *Terms and Conditions.*—There is insufficient evidence to support Charging Parties' allegation concerning discrimination against women as a class in other terms and conditions of employment. Accordingly, we reserve decision thereon.

V. *Individual Denial of Promotion.*—With regard to Charging Party's allegation that she was denied a promotion and discharged because of her sex, the following facts are undisputed. Charging Party was hired by Respondent in June, 1967, as an Assistant Professor in the Biochemistry Department. On October 27, 1971, the tenured faculty members of the Biochemistry Department, consisting of five males, met and unanimously decided that Charging Party should not be recommended for promotion to a tenured position. According to the minutes of the meeting:

> All other things being satisfactory, her [Charging Party's] production of scientific publications probably would have been adequate quantitatively to support her promotion, although their scientific interest and relevance to biological systems seem remote. However, because of the marked deficiencies in [Charging Party's] performance, particularly in teaching, and in a more general way, her performance as a communicative and interacting colleague led to the conclusion that she could not perform as a faculty member in this Department in a manner consistent with the standards that have been established.

Respondent informed Charging Party by letter on March 8, 1972, that her appointment would be terminated. In response to Charging Party's request for a statement explaining her termination, Respondent replied that Charging Party had not satisfactorily met the criteria for promotion to Associate Professor stated in the Faculty Handbook, as previously quoted. Subsequently, Respondent notified Charging Party that it would not accept a grant which Charging Party had been awarded by the National Institute of Health to finance research by Charging Party. The reason for refusing the grant was Charging Party's impending termination.

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[5] See footnote 1, *supra.*

[6] Source: Digest of Educational Statistics, *supra.*

In support of its position, Respondent alleges that Charging Party was unable to organize lecture material and present it in a coherent fashion, lacked rapport with students, and generally was inadequate as a lecturer. Respondent claims that Charging Party's teaching inadequacies were evidenced by an evaluation of Medical School faculty conducted by first year medical students, in which Charging Party received the worst rating in overall ability, lecture presentation, and effectiveness.

The record shows that Charging Party received her Ph.D. from the Massachusetts Institute of Technology in 1959. She was affiliated with six honorary and professional societies. Her employment experience included a fellowship with the Mellon Institute and Associate Professorship at Vassar College, and a position as senior chemist with Westinghouse Laboratories. She had published sixteen experimental papers and had several manuscripts in preparation. She had been recommended enthusiastically to the University by a number of professors familiar with her work. After being hired by the University in 1967, her contract was renewed in 1970. Until 1971, when the question of her tenure arose, the record reveals no negative comments on Charging Party's five year performance record.

Our investigation indicates that the Chairman of Respondent's Biochemistry Department when Charging Party was hired had written Charging Party of the criteria for promotion to a tenured position. These criteria consisted of election to the American Society of Biological Chemists and the publication of scholarly research. At the time she was denied tenure, Charging Party had met these criteria and was not advised by the new Department Chairman, who took over in June, 1971, that they would be changed.

As noted, Respondent cites Charging Party's alleged teaching deficiencies as a primary reason for denying her tenure. To substantiate this position, Respondent relies primarily on only four lectures given by Charging Party during her five years of employment. The record further discloses that the student evaluations of Charging Party's teaching ability, which Respondent cites, were comparable to those of a male faculty member who was promoted to a tenured position in July, 1971. For the 1969–1970 year, Charging Party and the male faculty member received the following ratings:

	Honors	Pass	Fail	Do not remember
Charging party	13	70	12	
Male colleague	6	75	7	1

Again, for the 1971–72 year, Charging Party and the male colleague received similar ratings.

The record further shows that Charging Party's qualifications were, in many respects, arguably superior to those of males who were granted tenure. One male who was promoted was not elected to membership in the American Society of Biological Chemists. Both he and another male who was [were] promoted had significantly fewer publications than Charging Party. While Charging Party had previous teaching experience, as an Associate Professor at Vassar, both males had only been post doctoral fellows.

Finally, our investigation reveals that Charging Party was given no advance notice of her alleged deficiencies. A male colleague whose performance had been considered deficient was given notice and an opportunity to improve. Subsequently, he was granted tenure.

The above evidence establishes that:

(1) The decision to deny Charging Party tenure which led to her being terminated and the refusal of her research grant was made entirely by male faculty members;

(2) Charging Party had met the standards for promotion set forth when she was hired;

(3) Charging Party's record reveals no significant deficiencies prior to the time she was denied tenure and, in fact, shows that Charging Party's contract had been renewed by Respondent;

(4) Respondent's negative evaluation of Charging Party's teaching ability was based primarily upon four lectures given by Charging Party in her five years at the University;

(5) Charging Party's teaching ability appears comparable to that of a male faculty member who was promoted;

(6) Charging Party's qualifications in other areas were in many ways superior to those of male faculty members who were promoted; and

(7) Charging Party was given no advance notice of her deficiencies, although a male faculty member was given such notice.

Based upon the evidence, and particularly in view of our finding that Respondent has followed a general pattern of discriminating against females in granting tenure, we conclude that Respondent has applied its standards differently to Charging Party than to similarly situated male faculty members. Where similarly situated persons of different sexes receive dissimilar treatment, it is reasonable to assume, in the absence of evidence to the contrary, that sex was a factor in the dissimilar treatment. See *King v. Laborers Local 818*, [3 EPD ¶ 8198] 433 F. 2d 273 (6th Cir. 1971). An employment action based in part upon an unlawful consideration is not saved by the fact that other non-discriminatory considerations may also have been present. *King v. Laborers Local 818, supra.* Consequently, we find reasonable cause to believe that Respondent engaged in an unlawful employment practice in violation of Title VII by failing to promote and discharging Charging Party and by refusing her research grant.

VI. *Harassment and Retaliation.*—Charging Party alleges that Respondent harassed her and retaliated against her because of Charging Party's opposition to Respondent's employment policies. Charging Party alleges that such retaliation included:

(1) failure to be advised of faculty meetings; (2) not being introduced to guest speakers; (3) being denied secretarial assistance; (4) having her charges of sex discrimination referred to in a joking manner before faculty and students; and (5) being denied teaching assignments.

Respondent denies these allegations, asserting that Charging Party was informed of meetings in the same manner as every other faculty member in the Department; that she was not intentionally disregarded in terms of guest speakers scheduled to visit the Department; that she was not denied secretarial assistance, but that assistance was delayed due to the shortage of secretarial help and the arduous nature of the service desired; and that her interpretation of remarks made by a male Associate Professor in the Bio-Chemistry Department during a lecture, referring to sex discrimination, was subjective and had no reference to the EEOC discrimination charge.

Record evidence is insufficient to support the first four allegations made by Charging Party. With that regard to Charging Party's allegation that she was denied teaching assignments because of her opposition to unlawful employment practices, the record reveals the following. From the 1968–69 school year through the 1971–72 school year, Charging Party delivered three to six yearly lectures in graduate biochemistry. Charging Party's charge was originally received by the Commission March 1972. The record indicates that Charging Party's opposition to Respondent's employment practices was well known. In 1972–73, the first school year after Charging Party filed her charge, Charging Party received no lecture assignments. Charging Party also was notified subsequently that she would receive no such assignments for the 1973–74 school year. Further, Charging Party's name was omitted from a faculty directory published by Respondent for the 1972–73 school year although it had been included in previous directories.

Under Section 704(a) of Title VII, it is an unlawful employment practice for an employer to discriminate against any of his employees because of opposition to any practice made unlawful under Title VII. The protection afforded a complaining party under Section 704(a) has been broadly construed by Courts because of the reliance on citizen initiated complaints in Title VII proceedings. See Commission Decision 72-0975, CCH EEOC Decisions (1973) ¶ 6358, citing *Pettway v. American Cast Iron Pipe Co.*, [2 EPD ¶ 10,011] 411 F. 2d 998 (5th Cir. 1969). See also *Barela v. United Nuclear Corporation*, [EPD ¶ 7857] 462 F. 2d 149 (10th Cir. 1972). It appears from the record that Respondent's differential treatment of Charging Party before and after 1971–72 school year was based at least in part upon the fact that Charging Party has filed a charge of employment discrimination against Respondent during that time and had otherwise openly opposed Respondent's employment practices. Consequently, we find reasonable cause to believe that Respondent engaged in a violation of Section 704(a) of Title VII by denying Charging Party lecture assignments beginning with the 1972–73 school year.

VII. *Non-Faculty Hiring and Job Classification.*—Charging Parties allege that Respondent discriminates against female in hiring and job classifications for non-faculty positions. Respondent University is located in an area with a 20.7 percent minority population, a 20.1 percent Negro population, and a 52 percent female population. Respondent's records show the following breakdown, by race [7] and sex, of non-faculty employees at the time of our investigation:

Classification	Caucasian		Negro		Total minorities	
	Number	Percent	Number	Percent	Number	Percent
Officials and managers	221	99.04	11	4.68	14	5.96
Professionals	4,900	93.42	93	3.68	345	6.58
Technicians	328	88.65	42	11.35	42	11.35
Sales workers	41	100	0	0	0	0
Office and clerical	1,837	99.35	11	.60	12	.65
Craftsmen	149	90.30	14	8.49	16	9.70
Operatives	123	89.13	15	10.87	15	10.87
Laborers	42	93.33	3	6.67	3	6.67
Service workers	686	74.73	183	19.93	232	25.27
Total	8,327	93	472	5.2	627	7

	Male	Female	Both	Percent female
Officials and managers	208	27	235	11.49
Professionals	3,692	1,553	5,245	29.61
Technicians	199	171	370	46.22
Sales workers	10	31	41	75.61
Office and clerical	113	1,736	1,849	93.89
Craftsmen	163	2	165	1.21
Operatives	108	30	138	21.74
Laborers	42	3	45	6.67
Service workers	605	313	918	34.10
Total	5,140	3,866	9,006	42.93

These statistics indicate that minorities are significantly underrepresented in all categories except service workers, and particularly in the office and clerical and sales workers categories. Females are significantly underrepresented in all categories except sales workers and office and clerical. Title VII permits the use of statistical probability to infer the existence of a pattern of discrimination *Parham v. Southwestern Bell, supra; U.S. v. Dillon Supply, supra.* Based upon the above statistical evidence, we find reasonable cause to believe, that Respondent has discriminated against minority and female non-faculty employees, by excluding them from certain job classifications on the basis of race and sex respectively.

VIII. *Sex Designations—Job Classifications.*—At the time of our investigation the record shows that Respondent maintained job classifications containing sex designations for janitorial positions.[8] The "janitor (heavy cleaning)" classification was primarily male while the "janitress (light cleaning)" classification was primarily female. Wages for the janitor classification were some 15 percent higher than for the janitress classification. Title VII prohibits job assignments based upon sex absent a showing that sex is a bona fide occupational qualification. Respondent has made no such showing. Thus, we find reasonable cause to believe that Respondent's maintenance of separate janitorial classifications for males and females is in violation of Title VII.

IX. *High School Requirement.*—The Commission's investigation disclosed that Respondent requires a high school education or an equivalent, as a prerequisite to employment in the Senior Secretary, Senior Clerk, Gardener Foreman, Area Foreman, Area Supervisor, Zone Supervisor, Elevator Dispatcher, Groundsman, Elevator Starter, Elevator Operator, Janitor and Janitress jobs.[9]

According to 1970 census Bureaus statistics, of the total persons age 25 and over in the SMSA who have completed high school only 4.7 percent are Negro. An employment practice which, though neutral on its face, has a disparate impact upon minority employees is a violation of Title VII absent a showing by Respondent of business necessity. See *Griggs v. Duke Power Co.*, [3 EPD ¶ 8137]

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[7] This issue, while not specifically alleged by the charge, arose in the course of our investigation and is so like or related to the charge as to be appropriate for decision herein. See *Sanchez v. Standard Brands*, [2 EPD ¶ 10,252] 431 F. 2d 455 (5th Cir. 1970).

[8] See footnote 7, *supra*.

[9] See footnote 7, *supra*.

401 U.S. 424 (1971). Respondent has made no such showing of business necessity. Accordingly, we find reasonable cause to believe that Respondent's high school requirement discriminates against Negro job applicants in violation of Title VII.

CONCLUSION

There is reasonable cause to believe that Respondent has engaged in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964 as amended, by using tenure procedures in its Medical School which discriminate against female faculty members, and by paying lower wages to females than to male Medical School faculty members.

There is reasonable cause to believe that Respondent has engaged in unlawful employment practices in violation of Title VII by discriminating against Charging Party because of her sex in denying her promotion to a tenured position, attempting to terminate her employment, and refusing to accept her research grant, and by retaliating against Charging Party because of her opposition to such practices.

There is reasonable cause to believe that Respondent has violated Title VII by discriminating against minority and female non-faculty employees by excluding them from certain job classifications on the basis of race and sex respectively.

There is reasonable cause to believe that Respondent has violated Title VII by maintaining sex designated job classifications for janitorial positions and by maintaining a high school education requirement which discriminates against Negroes.

There is not reasonable cause to believe the allegations concerning hiring for the Medical School and the University faculties.

LAYOFF OF PREGNANT WORKER WITHOUT PREFERRED RECALL WAS SEX BIAS

Decision of Equal Employment Opportunity Commission, Decision No. 71-2309, May 28, 1971.

Title VII—Civil Rights Act of 1964

Sex Discrimination—Pregnant Employee—Request for Maternity Leave—Discharge.—The discharge of an employee requiring maternity leave, because the employer could not make reasonable accommodation to give her the leave and guarantee her return to work amounted to sex discrimination where the employee was not given preference in recall. The employer did not have to guarantee her return to the job, but it should have given the employee a recall preference. 42 U.S.C. Sec. 2000e.

Back reference.—¶ 1310.50.

FULL TEXT OF EEOC DECISION

SUMMARY OF CHARGE

Charging Party alleges that Respondent engaged in an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964, by denying her a leave of absence and discharging her because of her sex (female).

JURISDICTION

Respondent, the owner and operator of residential and business properties throughout the United States, employed over 25 persons at the time the instant charge was filed.

The charge was filed on December 3, 1968, within the jurisdictional time limitations prescribed by Section 706(d) of Title VII.

SUMMARY OF INVESTIGATION

Charging Party was hired by Respondent as a bookkeeper on March 1, 1968.

It is undisputed that in June, 1968, Charging Party requested maternity leave of two months. The request was denied and on September 30, 1968, she was discharged.

Charging Party asserts that initially her supervisor granted her request for leave, but later reversed his decision, stating that the Company had no pregnancy leave policy for small branch offices.

Respondent denies the charge and contends that it has no leave policy in its small offices.[1]

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[1] **Four persons are employed in the office of the facility.**

Evidence of record demonstrates that Respondent has granted one leave since 1961. This leave was granted to an office receptionist only after she secured a temporary replacement satisfactory to Respondent.

The bookkeeping position requires expertise and familiarity with Respondent's method of bookkeeping. Respondent has an eight-week training program for its bookkeepers.

Evidence of record reveals that Charging Party voluntarily began working part-time on September 17, 1968. Respondent informed Charging Party that she was needed full-time. Evidence of record demonstrates that the services of a full-time bookkeeper are required. Charging Party continued to work part-time until she was discharged on September 30, 1968.

Respondent's personnel records indicate that leaves of absence for illness had been granted only where the employee had accrued sick leave.

At the time of her discharge, Charging Party had accrued approximately seven days sick leave.

The policy of the Commission with regard to maternity leave generally is stated in its decision in Case No. LA 68–4–538E, issued June 16, 1969. CCH EEOC Decisions "1973" ¶ 6125. In that decision, we noted that the employer's Personnel Practice Code which provided for granting of maternity leave of absence without pay together with reinstatement following such leave comported "generally" with the Commission's policy. We did not address the issue presented in this case, i.e. whether an employer who cannot reasonably be expected temporarily to replace an employee during pregnancy leave is under any obligation to afford that employee preference in recall following the leave.

We take this occasion to indicate that such an obligation is, in the circumstances presented herein, imposed upon the employer. To determine otherwise would result in unlawful as well as unnecessary discrimination against female employees whose pregnancy requires extended absence from a position in which temporary replacement is barred by business necessity.

In the instant case, although Respondent was willing to give Charging Party (a relatively new employee) some leave, it asserts with considerable proof that its operation cannot function efficiently unless a full-time bookkeeper is available.

In these circumstances, we conclude that Respondent's business is such that employees, of either sex, who request extended leave can be afforded only limited accommodation. The reasonable requirements of Respondent's business preclude a guarantee of reinstatement, but do not preclude the maintenance of a preferred recall "list." Charging Party's discharge makes recall impossible and rehire speculative. Accordingly, we conclude that Respondent's discharge of Charging Party—as opposed to an extension of leave with preferred recall—violated the Act by discriminating against her because of her sex-related necessity to absent herself from her employment.

DECISION

Reasonable cause exists to believe that Respondent has violated Title VII of the Civil Rights Act of 1964, as alleged.

MATERNITY LEAVE FOR PREGNANT WORKER WAS NOT SEX BIAS

Decision of Equal Employment Opportunity Commission, Decision No. 72–0372, August 24, 1971.

Title VII—Civil Rights Act of 1964

Sex Discrimination—Pregnant Employee——Maternity Leave Requirement—No Sex Bias.—Requiring a pregnant employee to go on maternity leave at the seventh month of pregnancy was not sex bias where the job required bending, lifting and climbing and where the company doctor had individually evaluated her condition. Individual treatment is required in order not to be discriminatory. 42 U.S.C. Sec. 2000e.

Back reference—¶ 1310.

Full Text of EEOC Decision

The Commission has considered the Field Director's Findings of Fact issued June 16, 1971, and has examined the entire record. Charging Party has not filed exceptions. Exceptions filed by Respondent do not raise material issues. The

Commission adopts the Field Director's Findings of Fact to the extent that they are consistent with the following.

As noted in the Findings of Fact, Charging Party was required to take maternity leave upon completion of her seventh month of pregnancy despite her physician's recommendation that she be permitted to work through her eighth month of pregnancy. It is undisputed that Charging Party's job requires a substantial amount of bending, lifting, and climbing. Based on the content of Charging Party's job, together with Charging Party's physical condition, Respondent's physician determined that Charging Party should not work beyond the completion of her seventh month of pregnancy. The record indicates that Respondent has permitted other females in other jobs to work beyond the seventh month of pregnancy.

In determining the time for commencement of an employee's maternity leave, the principle of non-discrimination requires that individuals be considered on the basis of their individual capacities and not on the basis of any characteristics attributed to the group. 29 CFR 1604.1(a). We find the facts, summarized above, sufficient to indicate that Respondent's treatment of Charging Party is both reasonable and substantially in accordance with the guidelines of this Commission. Cf. *Schattman v. Texas Employment Commission*,—F. Supp. —(D.C. Tex. 1971), 3 EPD ¶ 8146.

There is not reasonable cause to believe Respondent violated Title VII of the Civil Rights Act of 1964, as alleged.

NON-REAPPOINTMENT AND SALARY LEVEL OF FEMALE FACULTY MEMBER WERE NOT BASED ON SEX

Decision of Equal Employment Opportunity Commission, Decision No. 74-87, February 12, 1974.

Title VII—Civil Rights Act of 1964

Sex Discrimination Claim—Female Assistant Professor—Non-reappointment—Salary—Evidence of Bias.—Non-reappointment of a female faculty member was not improperly based on her sex where evidence showed faculty and student complaints about her job performance, indicated duplication of specialization between her and more extensively qualified faculty members, and showed declining enrollment in the female faculty members' classes. A claim of sex-biased salary differential was also unsupported by evidence. 42 U.S.C. Sec. 2000e.

Back reference.—¶ 1068.

Full Text of EEOC Decision

SUMMARY OF CHARGE

Charging Party,[1] a female, alleges [in charge filed on April 20, 1972] that Respondent Employer has engaged in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, by failing to reappoint her [on June 30, 1973[2]], by paying her a salary lower than that received by male faculty members of the Foreign Language Department, and by discriminating against her with respect to terms and conditions of employment, all because of her sex.

JURISDICTION

Respondent is a state supported institution of higher learning employing approximately 8,000 persons, nearly forty-five percent of whom are females. The Commission received the charge on April 20, 1972 and it was filed the same day, within the time limitations prescribed by the Act.[3]

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[1] The aggrieved person having died during the pendency of her charge, her executrix has been substituted as the Charging Party in her stead. *Krause v. Sacramento Inn*, 479 F. 2d 988, 5 EPD ¶ 8608 (9th Cir. 1973).

[2] The paradox of a filing date which antedates the date of the allegedly discriminatory non-reappointment is explained by the fact that when Respondent notified Charging Party of her non-reappointment Charging Party was entitled to take action thereon, notwithstanding that no alleged violation had yet occurred. See *Meredith v. City of Winter Haven*, 134 F. 2d 202, 206 (5th Cir. 1943), rev. on other grounds 320 U.S. 228 (1943). Accord, *Henderson v. Eastern Freight Ways, Inc.*, [4 EPD ¶ 7810] 460 F. 2d 258 (4th Cir. 1972).

[3] Charging Party mailed her charge in error, although apparently in good faith, to the Wage-Hour Division of the Department of Labor. The Labor Department received her charge on April 18, 1972. The 180 day period of limitations within which a charge must be filed was tolled as of that date. *Culpepper v. Reynolds Metal Co.*, [2 EPD ¶ 10,138] 421 F. 2d 888 (5th Cir. 1971); *Bo[illegible] v. Baton Rouge Marine Contracting Co.*, [3 EPD ¶ 8107] 437 F. 2d 1011, n. 16 ([illegible] Cir. [illegible]), and Charging Party's charge was filed with the Commission upon its receipt from t[illegible]bor Department on April 20, 1972.

SUMMARY OF INVESTIGATION

From September 1, 1968 to June 30, 1969, Charging Party was employed as an Instructor of French in Respondent's Department of Foreign Languages. After a year on leave without pay to engage in graduate studies in France, Charging Party returned to Respondent University and was appointed as an Assistant Professor for the period September 1, 1970 to June 30, 1973. On February 29, 1972, prior to the expiration of her appointment and in accordance with Respondent University's policy governing appointments, promotions, retirements, and related matters.[4] Charging Party was notified that her contract would not be renewed upon its expiration on June 30, 1973.

Charging Party alleges that she was non-reappointed because of her sex (female). Respondent denies the charge and contends that Charging Party was non-reappointed because of uncooperativeness with her colleagues, student complaints, duplication of specialization, and a declining French enrollment.

Testimonial evidence of record from male and female members of the Foreign Language Department indicates that Charging Party was uncooperative in determining departmental business and made it difficult for other faculty members to maintain an effective working relationship with her. Testimonial evidence from colleagues of both sexes further indicates that individual faculty members of the Foreign Language Department received numerous unsolicited complaints from Charging Party's students about her teaching methods, expectations, and classroom behavior.

Documentary evidence of record demonstrates that there was duplication of specialization between Charging Party and several male members of the French language faculty who possessed more extensive educational backgrounds in French and greater seniority than the Charging Party. Documentary and testimonial evidence also show that as of the date Charging Party received notice of non-reappointment, student enrollment in Respondent's French classes had declined to the lowest point in three years. Accordingly, we find Charging Party's allegation of non-reappointment because of sex unsupported by evidence of record.

With regard to Charging Party's allegation of salary discrimination, credible testimonial evidence of record indicates that the salary offered to a prospective member of Respondent's Foreign Language Department is determined by the availability of funds, supply and demand, comparison of salaries of incumbent faculty members, and degrees and experience. Documentray evidence of record shows that the salary of $9,000 per academic year which Charging Party received as an Assistant Professor of French with a B. A. degree in her area of instruction was greater than the salary received by male members of the Foreign Language Department with comparable educational qualifications and similar lengths of employment. Additionally, the evidence reveals that Charging Party was the only Assistant Professor on the French Language faculty who possessed less than a Masters or Doctorate degree in French.[5] Accordingly, we conclude that evidence of record does not support Charging Party's allegation of salary discrimination.

Finally, with regard to the allegation of discrimination in terms and conditions of employment, the allegation is uncorroborated by evidence of record. Credible testimonial evidence from female colleagues of Charging Party indicates that female members of the Foreign Language Department were included in committee meetings and were not discriminatorily denied their choice of classes or class times. Accordingly, we do not credit Charging Party's allegation.

DECISION

Reasonable cause does not exist to believe that Respondent violated Title VII of the Civil Rights Act of 1964, as amended, as alleged.

DENIAL OF PROMOTION AND DISCHARGE WAS RACE BIAS—LIBEL SUIT WAS IMPROPER RETALIATION

Decision of Equal Employment Opportunity Commission, Decision No. 74-77, January 18, 1974.

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[4] Faculty Handbook app. D, at 47 (1971).

[5] We do not speak to the question of whether such degree requirements in themselves unlawfully discriminate against classes protected by Title VII. This is a question of first impression and we reserve judgment thereon pending further study.

Title VII—Civil Rights Act of 1964

Racial Discrimination—Denial of Promotion—Ecidence of Bias.—Denial of promotion to a Negro employee was improper race bias where the employee was qualified, reasons given for the denial were pretextual, Negro professional employees were virtually absent from the employer's operation in the state, and where the employee's supervisor had exhibited racial animosities. 42 U. S. C. Sec. 2000e.

Back reference.—¶ 1325.

Racial Discrimination—Discharge of Negro Employee—Pretextual Basis.—Discharge of a Negro employee was improper race bias where evidence showed that purported justification based on employee fraternization bans was pretextual in nature and that other reasons advanced for the discharge were fabricated. 42 U. S. C. Sec. 2000e.

Back reference.—¶ 1065.

Racial Discrimination—Retaliation for Filing Charge—Libel Suit.—An employer's libel suit against an employee was improper retaliation for his objections to discrimination where the libel action was based on racial discrimination charges filed with the EEOC by the employee. The board privilege carried with the filing of an EEOC charge barred libel actions against the bias claimant where there was no publication of the alleged libelous statements to persons other than EEOC officials and employees. 42 U. S. C. Sec. 2000e.

Back reference.—¶ 1350.

UNIVERSITY'S DISCHARGE OF FEMALE, DENIAL OF TENURE, AND LOWER PAY RATES WERE SEX BIAS

Decision of Equal Employment Opportunity Commission. Decision No. 74-93, March 7, 1974.

Title VII—Civil Rights Act of 1964

Sex Discrimination—University—Discharge of Female Faculty Member—Retaliation—Harassment.—A female faculty member was subjected to improper sex bias and retaliation for her objections to bias where she was harassed by her chairman, treated differently than similarly situated males, and discharged despite her outstanding qualifications. Failure of the female faculty member to obtain her Ph. D. was an invalid pretext for the discharge where she had almost completed her dissertation and where males were granted reappointment despite failure to complete degree requirements. 42 U.S.C. Sec. 2000e.

Back reference.—¶ 1068.

Sex Discrimination—University—Female Faculty Member—Denial of Tenure—Harassment. A female faculty member was improperly denied tenure on the basis of her sex where her department chairman, whom evidence showed had a negative attitude towards female faculty members, solicited negative evaluations of the candidate and disregarded or underemphasized positive recommendations. 42 U.S.C. Sec. 2000e.

Back reference.—¶ 1325.

Sex Discrimination—University—Female Faculty Members—Rates of Pay.—A university discriminated against female faculty members where statistical evidence showed that they received lower rates of pay than their male counterparts and where the university failed to show the existence of objective standards justifying the disparity. 42 U.S.C. Sec. 2000e.

Back reference.—¶ 1576.

Full Text of EEOC Decision

SUMMARY OF CHARGE

Charging Party A, a female, alleges that Respondent has engaged and is engaging in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964, as amended, by discharging her in retaliation for her opposition to employment practices made unlawful by Title VII. She further alleges that Respondent is in violation of the Act by discriminating against her and females as a class with respect to compensation and terms and conditions of employment, and by discriminating against females as a class with respect to hiring, job classification, tenure maternity leave, and intimidation all because of her/their sex.

Charging Party B, a female, alleges that Respondent has engaged and is engaging in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964, as amended, by denying her maternity leave, by denying her tenure, and with respect to her terms and conditions of employment and compensation, all because of her sex.

JURISDICTION

Respondent is a private institution providing educational services and employing in excess of 25 persons. The Commission received the charges on August 28, 1972 (A) and January 17, 1973 (B), and deferred them to the appropriate state agency on September 5, 1972 (A) and January 29, 1973 (B). The charges were filed with the Commission on November 6, 1972 (A) and March 31, 1973 (B) within the time limitations prescribed by the Act.[1]

Initially, Respondent asserts that the Commission is without jurisdiction to consider the allegation raised by Charging Party B with respect to tenure, since the decision to deny her tenure was made in January 1972, when Respondent was specifically excluded from coverage of the Act. We find that, although the preliminary decision was made in January 1972, the Charging Party was not formally notified of the decision until August 1972 and Charging Party's contract did not terminate until the end of the 1972–1973 academic year. In a similar situation, the court in *Johnson v. University of Pittsburgh*—F. Supp. —, 5 EPD ¶ 8660 (D.C. Pa., 1973) stated that:

"... the 1972 amendments cannot be rendered nugatory by making a decision before March 24, 1972, to become effective thereafter as a discriminatory discharge and refusal to grant tenure thereafter is as much a violation of the Act as any other sexual discrimination."

Since the effective date of the decision was considerably after the effective date of the 1972 amendments, we find no merit in Respondent's jurisdictional argument.

SUMMARY OF INVESTIGATION

I. Discharge—Charging Party A

Charging Party was hired by Respondent in September 1967 as a part-time lecturer in the School of Arts and Sciences, Fine Arts Department. She attained the position of Assistant Professor in 1969 and began her full-time teaching career. In a letter dated August 21, 1972, Charging Party was informed by Respondent that she would not be reappointed following the 1972–1973 academic year. Charging Party alleges that Respondent refused to reappoint her because she protested certain of Respondent's employment practices which she believes were made unlawful by Title VII of the Civil Rights Act of 1964, as amended. Respondent alleges that the primary reason for not renewing Charging Party's contract was that she had not attained her Ph.D.

The record indicates that Charging Party had the following qualifications. She received her B.A. Degree from Radcliffe College, with honors; she was the recipient of a Fulbright Fellowship; she received her M.A. from Radcliffe-Harvard in Fine Arts; and she received her Ph.D. from Harvard in the spring following the decision not to reappoint her.

She has written or translated several publications and has others in progress. Her student evaluations are outstanding. Subsequent to the decision not to renew her contract, approximately forty letters were spontaneously sent to the school administrators by concerned alumnae, students, and others, each of which praised in highest terms the Charging Party's teaching ability, scholarship, and personal concern for and dedication to her students. Respondent has never denied that Charging Party is an outstanding professor.

Evidence of record also shows that Respondent has awarded tenure to persons who have not received their Ph.D. Degrees and that a male assistant professor who taught in the department with Charging Party was not dismissed until he had taught for seven years without receiving his Ph.D. (One year of full-time teaching outside of Respondent University was not counted toward his probationary period.) The Provost at Respondent University recommended that this man's probationary period be extended for another year. Although this recommendation was not followed, he was offered a "less than full-time appointment" for the following year since that "would be a year in which (his) work on (his) dissertation should be approaching the climax and . . . the extra time would be useful." This was done in spite of the fact that the Provost considered him to be a "troublesome man." Another male on the faculty was allowed to hold a part-time teaching position and a part-time administrative position at Respondent University, when he had failed to obtain his Ph.D. after six years of teaching.

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[1] Although the charges were received and filed separately, we deemed them appropriate for consolidation in this decision, due to the similarity of the allegation against the same Respondent.

Charging Party was in her fourth year of full-time teaching at Respondent University and had taught full time at another university for one year. No offer of part-time employment was made to Charging Party. Respondent's Dean of the Faculty of Arts and Sciences stated that it was he who had made the decision that Charging Party should not be reappointed. He further stated that "I have no idea how close (Charging Party's) dissertation is to being done. I made no inquiries of her advisor at Harvard." As noted, Charging Party was awarded her Ph.D. in the spring following the decision not to appoint her. Based upon the preceding evidence, we conclude that Respondent's allegation that Charging Party was terminated because of her failure to obtain a Ph.D. is, at the least, pretextual. Further, there is sufficient evidence that Charging Party was treated differently than similarly situated males to infer that her sex was a factor in her termination. See *King v. Laborers Local 818*, [3 EPD ¶ 8198] 433 F. 2d 273 (6th Cir. 1971).

In addition to evidence that Charging Party was treated differently than similarly situated males, there is further evidence that Charging Party's opposition to harassment in her department, based upon her sex, was an additional factor in her termination. Evidence of record indicates that Charging Party was well accepted by members of her department and university personnel as a whole until the school year beginning in 1972. A new Chairman was hired for the Fine Arts Department beginning in the 1970-1971 school year. In the words of one of Respondent's faculty members, he had an attitude of "condescension toward women." Two female students state that they were told by the Chairman that they should not go to graduate school but leave the places for men. Another female student states that she was told by the Chairman that she should marry and produce bright children, rather than going to graduate school. Other students objected to his stereotyping of men and women during his classroom lectures. One of the conditions which the Chairman set for taking the Chairmanship was "Commitment of a minimum of $10,000 for the salary of a new male department member." The Charging Party alleges that she was subjected to numerous incidents of harassment by her department chairman, both isolated and of a continuing nature, all of which are supported by copious witness testimony and documentation, and all of which she believes occurred because of her sex. For example, among other things, the Charging Party was required by the Chairman to direct a number of these, while a male faculty member who had recently been hired was not required to direct any; the Chairman assigned two difficult and time-consuming non-teaching jobs to Charging Party, while assigning only one substantive job to the male faculty member; and Charging Party's request for graders for her larger classes was denied by the Chairman, who had graders himself.

When her communications with the Chairman did not serve to stop the harassment, Charging Party complained directly to the Dean of Faculty and Dean of Liberal Arts and finally in the spring of 1972, brought charges against the Chairman to the Committee on Faculty Personnel, alleging harassment because of her sex.

The Dean of Faculty stated that he believed that the Charging Party did receive treatment which could be classified as "harassment" from the Chairman. In June 1972 the Committee on Faculty Personnel reported to the President of the University that "the administration should address itself without delay to the question of "administrative competence" on the part of Charging Party's Department Chairman. Althought the Chairman subsequently resigned his position, Charging Party was informed in August 1972 that her contract would not be renewed. After the student body of the University learned of this decision, approximately 800 students signed a petition and submitted it to the university administration. The petition stated, "We the undersigned believe that Assistant Professor (Charging Party A) has been unfairly treated, largely due to sex discrimination, by this University and call for a renewal of her contract in June 1973."

CONCLUSIONS AS TO CHARGING PARTY A

We conclude that Charging Party's protests to the Deans and to the Committee on Faculty Personnel constituted opposition to a practice made unlawful by Title VII, within the meaning of Section 704(a) of the Act. We already have determined that Respondent's primary reason for discharging Charging Party fails to withstand scrutiny. In the absence of a reasonable alternative explanation for the decision not to reappoint Charging Party, which followed so closely after her formal protest, we find reasonable cause to believe that Respondent's refusal to reappoint Charging Party was partially a result of Charging Party's opposition and was an unlawful employment practice within the meaning of Section 704(a). See *Pettway v. American Cast Iron Pipe Co.*, [2 EPD ¶ 10,011] 411 F. 2d 998 (5th Cir 1969).

We find Respondent's argument that the University is not responsible for the acts of a Department Chairman to be without merit. It is clear in this case that Respondent failed to maintain an atmosphere free of intimidation and insult based on employees' Title VII status,[2] and that Respondent University ratified, if it did not initiate, Charging Party's discharge.[3]

II. Denial of Tenure—Charging Party B

Under Respondent's rules for obtaining tenure, faculty members must apply for tenure review and promotion during their sixth year of teaching, if they want to continue in Respondent's employ beyond their seventh year of teaching. Accordingly, Charging Party B filed an application for tenure review during the 1971–1972 academic year, her sixth year in Respondent's employ. Respondent decided not to award tenure to Charging Party. Charging Party alleges that this decision was made because of her sex (female). Respondent denies the allegation and says that the decision was based on Charging Party's shortcomings as a teacher.

Charging Party received her B.A. Degree from Smith College and her M.A. and Ph.D. Degrees from Columbia University. She began her full-time teaching career at Respondent University in 1966. She has had numerous publications, some in one of the most prestigious art history journals in the country. One of her publications is the only statistical survey of the status of women faculty in college-level art departments. She has a book in progress which has tentatively been accepted for publication. She is the associate producer of a documentary film for television. She presented a paper at the College Art Association's Annual Convention, and she has taught a wide variety of courses. Student evaluation of Charging Party's teaching ability is mixed, although what adverse criticism there is seems directed at her manner of presentation, rather than any more substantive issue such as knowledge of her material, scholastic ability, preparation, or dedication to her students. Prior to the appointment of her Department Chairman, beginning in the 1970–1971 academic school year, Charging Party was apparently well respected by her peers. She had, in fact, received three Faculty Research Fund Awards from Respondent, as well as a National Endowment for Humanities Fellowship and a Kress Foundation Grant.

Charging Party was one of two female faculty members of the Fine Arts Department (See Section I of this decision for the treatment received by the other female faculty member and for the attitude of her Department Chairman toward women, in general). Like the other female professor, Charging Party was subjected to harassment by the Department Chairman. The testimony of several witnesses including both male and female faculty members reveals that she was made the subject of ridicule and verbal abuse by the Chairman on a continuing basis, while males on the faculty were not treated in such a manner. It is clear from the evidence of record that both the Dean of the Faculty of Arts and Sciences and the Dean of Liberal Arts were aware of the Chairman's harassment of Charging Party through complaints made both by the Charging Party and by others.

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[2] See *Anderson v. Methodist Evangelical Hospital*, — F. Supp. — (W. D. Ky. 1971) [3 EPD ¶ 8282] aff'd [4 EPD ¶ 7901] 464 F. 2d 723 (6th Cir. 1972).

[3] Respondent's citation to a decision of the National Labor Relations Board holding that department heads are not supervisors within the meaning of the National Labor Relations Act is inapposite. The term "supervisor" is given a specific technical definition in the N. L. R. A., in accord with the purposes of that Act. Title VII contains no such limitation. Further, it is clear that an employer has an obligation under Title VII to take reasonable steps to prevent harassment of any employee by any employee, where that harassment is based upon race, color, religion, sex or national origin. See *Anderson v. Methodist Evangelical Hospital*, supra.

Charging Party's application for tenure came up for review in January 1972. In August 1971 the Dean of Liberal Arts sent a memorandum to the Dean of the Faculty of Arts and Sciences in which he stated:

"I just spoke for some time to (the Department Chairman). The major thing on his mind is that he will not recommend B for tenure."

The record indicates that two other members of the Department, one of whom was newly hired and did not know Charging Party, and at least one student were approached by the Chairman and specifically told to write negative recommendations to Charging Party's tenure committee. None of them did so. Prior to the tenure review, Charging Party requested that the Dean of the Faculty of Arts and Sciences remove the Department Chairman from her tenure committee, on the grounds that her tenure review would be prejudiced by his discriminatory attitude toward her as a woman, and because she considered a candidate's department chairman to be the most important and influential person sitting on a tenure committee. Her request was denied by the Dean, who told her that she should "trust the system."

It is clear from the report of the tenure committee, in which it is recommended that Charging Party be denied tenure, that primary emphasis was placed on the subjective negative comments contained in four letters which were solicited by Charging Party's Department Chairman, while the favorable comments in these letters were ignored. There were nine other letters presented to the Committee, all of which acclaimed Charging Party's scholarship and ability, several of which were written by particularly eminent scholars. Only one of these was mentioned in the Committee report, and it was dismissed as having been written by "her mentor". He is considered to be a prominent authority in Charging Party's field. One favorable letter, which was written by the other female member of the department, was not even submitted to the Committee. The one female committee member testified to sexist remarks which were made by male members of the committee during the consideration and stated that she wrote a letter protesting the majority opinion.

Subsequent to her Department Chairman's resignation (See Section I of this decision for the circumstances), Charging Party applied for reconsideration of the decision of the Tenure Committee under the then Acting Department Chairman. Her request was denied.

Based upon all of the circumstances described above, we conclude that Charging Party's sex was at least a factor in Respondent's decision to deny her tenure. See *Lowry v. Whitaker Cable*, — F. Supp. — (W. D. Mo., 1972), aff'd — F. 2d — (8th Cir. 1973). *Bradington v. I. B. M.*, 360 F. Supp. 845 (DC Md., 1973). It is well settled that an employment action prompted in part by an unlawful consideration is not saved by the fact that other non-discriminatory considerations may also have been involved. See *King v. Laborers Local 818*, 433 F. 2d 273 (6th Cir. 1971).

III. Maternity Leave—Individual and Class

Charging Party B alleges discrimination in Respondent's disposition of her request for maternity leave and further alleges that Respondent's maternity leave policy discriminates against females as a class. The record indicates that Respondent follows no formal policy on maternity leave. There is insufficient evidence concerning how Respondent has administered its informal policy to reach a finding on these issues. Accordingly, we withhold decision on these issues.

IV. Class Hiring, Job Classification, Intimidation and Compensation

The faculty of the College of Arts and Sciences consists of persons holding the titles (in descending order of rank) of Professor, Associate Professor, Instructor and Lecturer. A large percentage of persons in the first two categories and many in the third hold Ph.D. degrees. In attempting to resolve Charging Parties' class allegation of discrimination in hiring, job classification, intimidation and compensation, questionnaires were sent out to all Department heads in the University.[4] As nearly as can be determined, the response to these questionnaires was both candid and detailed. Statistical data cited herein is based upon submissions by Respondent and responses to the Commission's questionnaires, and represents the most accurate evidence which could be obtained concerning Respondent's employment practices. Any minor discrepancies in such data result from the fact that information was compiled on different dates, and thus reflects intervening employment decisions.

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[4] The professional situations surrounding faculty selection and compensation in Respondent's professional schools differ markedly from those in the School of Arts and Sciences. Accordingly, we concentrate our analysis on the School of Arts and Sciences, where both individual Charging Parties were employed.

3. Hiring and Job Classifications

According to a 1972 study of "Women at (Respondent) University," done by Respondent, females constitute the following numbers and percentages of the full-time faculty in the School of Arts and Sciences, by rank:

	Total	Male	Female	Female percent
Professor	63	54	9	14
Associate professor	74	70	4	5
Assistant professor	103	87	16	15
Instructor	22	14	8	36
Lecturer	7	6	1	17

Of Respondent's overall faculty, approximately 75 percent have Ph.D. degrees, and most of the remaining 25 percent have M.A. or equivalent degrees. The record does not specify what proportion of those with Ph.D. degrees attained those degrees after being hired. Our investigation indicates that Respondent hires nationally for faculty positions.

Direct statistics concerning the percentages of females, nationally, who are qualified to teach on Respondent's faculty are not available. The best available statistical evidence for comparative purposes concerns the number of females who teach nationally in similar positions, and the number of females who have attained the degrees which Respondent considers necessary for most faculty positions:[5]

PERCENT OF FEMALES TEACHING, NATIONALLY

	Universities	College and universities
1968-69	14.8	19.1
1972-73	16.5	20.0

DEGREES AWARDED, ALL FIELDS, UNITED STATES

Degree	Year(s)	Total	Male	Female	Percent female
M.A.	1970-71	230,509	138,146	92,363	40.6
Ph.D.	1970-71	32,107	27,530	4,577	14.7
Ph.D.	1960-69	154,111	136,182	17,929	11.6

It often has been stated, both by the Courts and the Commission, that an inference of discrimination can be drawn from significant statistical disparities, such as disparities between the proportion of a protected class in an employer's workforce and the proportion of protected class members in the area where the employer does his hiring, who would be qualified to work for that employer.[6] While a comparison of Respondent's employment statistics with the best available statistics concerning qualified females in Respondent's national hiring area reveals possible disparities at the M.A. level and within individual departments, there are no disparities sufficient in themselves to establish overall a *prima facie* violation of Title VII.

With regard to job classifications, the 1972 study of "Women at (Respondent) university" found that "women are 14 percent of the Arts and Sciences faculty including 8 percent of the tenured faculty." It is apparent from the statistics that women are disproportionately concentrated in lower level, nontenured positions in the School of Arts and Sciences. It is not clear, however, whether this is a result of any unlawful employment practices by Respondent. Evidence submitted by Respondent indicates that, while tenure decisions involve many subjective criteria and are made predominantly by males, there are a significant number of females on tenure committees and females are granted tenure in approximately the same proportion as they are considered for tenure. Based upon the available evidence, then, we are unable to conclude that Respondent has unlawfully discriminated against females in the area of job classification. Similarly, aside from the treatment of the individual Charging Parties, we are unable to conclude that Respondent has followed a practice of intimidating females as a class. Consequently, we withhold decision on the issues of hiring, job classification, and intimidation.

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[5] We do not speak to the question of whether such degree requirements, in themselves, unlawfully discriminate against classes protected by Title VII.

[6] See, for example, *Parham v. Southwestern Bell Telephone Co.*, [3 EPD ¶ 8021] 433 F. 2d 421 (8th Cir. 1970) *U.S. v. Hayes International* Corp., [2 EPD ¶ 10,061] 415 F. 2d 1038 (5th Cir. 1969), Commission Decision No. 72-0066, CCH EEOC Decisions (1973) ¶ 6296.

B. *Compensation.* The average salaries for full time faculty members in Respondent's School of Arts and Sciences, Engineering, College, and the Graduate School, according to statistics supplied by Respondent, are as follows:

	Male	Female
Professor	$21, 530	$17, 777
Associate professor	16, 001	13, [illegible]
Associate professor	12, 550	11, 807

Respondent's records further indicate that, with one exception, where salaries for female and male Professors and Associate Professors can be compared in a given Department in the School of Arts and Sciences, females are paid at the lowest level in the Department:

Department salaries (descending order)

Professors:	
Biology:	
Male	$25, 000
Do	18, 600
Female	16, 800
Psychology:	
Male	25, 200
Do	19, 500
Female	18, 500
Do	17, 300
Romance languages:	
Male	21, 700
Do	20, 500
Female	18, 500
Do	16, 100
Associate professors:	
Classics:	
Male	21, 500
Female	13, 500
Education:	
Male	13, 800
Do	7, 000
Female	7, 000
German:	
Male	13, 000
Do	12, 600
Female	12, 400
History:	
Male	15, 800
Female	15, 000
Male	14, 900
Do	12, 600
Do	12, 600

We recognize that there may be factors besides sex which could explain the lower salaries received by females in this case. In the context of an educational institution, prior experience, length of experience, highest degree, area of specialization, institutions attended, number of publications, and several other factors could enter into salary determinations. Which of these factors are considered by Respondent and how much weight is given to each are subjects which would be uniquely within the knowledge of Respondent, however. Respondent has been given ample opportunity in the instant case, but has failed to come forward with a consistent, non-discriminatory explanation of how it determines salary levels or why females are concentrated in the lowest salary levels of the Professor and Associate Professor job classifications. Respondent, in fact, has made only unsubstantiated general statements that it does not discriminate and has cited only vague criteria which may be taken into account in making salary determinations, and which apparently leave a great deal of latitude for subjective judgment.[7] The Commission has recognized that such subjective criteria are a ready vehicle for discrimination.[8] The statistics which have been cited concerning salaries paid to female Professors and Associate Professors, coupled with Respondent's failure to show any alternative explanation, lead us to conclude that Respondent's subjective criteria have been applied so as to achieve a discriminatory result, and that sex is the only identifiable factor explaining the salary disparities for these positions in the School of Arts and Sciences. Consequently, we find reasonable cause to believe that Respondent has discriminated against female faculty members as a class in the School of Arts and Sciences by paying them lower wages for substantially similar work, because of their sex.

[*Conclusion*]

There is reasonable cause to believe that Respondent has engaged in an unlawful employment practice, in violation of Title VII of the Civil Rights Act of 1964, as amended, by discharging Charging Party A because of her sex, and because of her opposition to unlawful employment practices.

There is reasonable cause to believe that Respondent has engaged in an unlawful employment practice in violation of Title VII by denying tenure to Charging Party B, because of her sex.

There is reasonable cause to believe that Respondent has engaged in an unlawful employment practice in violation of Title VII by discriminating against female faculty members in the School of Arts and Sciences in payment of compensation, because of their sex.

We withhold decision on the issues of maternity leave, hiring, job classification and intimidation.

TERMINATION OF WHITE MUSIC TEACHER WAS RACE BIAS

Decision of Equal Employment Opportunity Commission, Decision No. 74-106, April 2, 1974.

Title VII—Civil Rights Act of 1964

Racial Discrimination—White Music Teachers—Failure to Rehire—Qualifications—"Needs of Black Students"—Affirmative Action.—Non-rehire of an otherwise qualified white music teacher for failure to meet the "needs of black students" was impermissible race bias where no analysis, other than a subjective evaluation based mainly on the teacher's race, was used in the disqualification of the teacher. The unsupported assumption that the white teacher could not meet the needs of black students did not justify the race-related dimissal. A claim that the termination of the teacher was justified by an affirmative action plan requiring recruitment of minorities and females was rejected since such plans did not authorize preferential treatment based solely on race. Race bias claims of a second white music teacher were rejected for lack of supporting evidence. 42 U.S.C. Sec. 2000e.

Back reference.—¶ 1065.

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[7] For example, Respondent has cited "levels of credentials," "qualifications" and "experience" as possible considerations, without defining the meaning of these amorphous terms or stating the weight given to each.

[8] See Commission Decision No. 72-0721, CCH EEOC Decisions (1973) ¶ 6330, *U.S. v. Sheetmetal Workers, Local 36*, [2 EPD ¶ 10,083] 416 F. 2d 123 (8th Cir. 1969), *Rowe v. General Motors*, [4 EPD ¶ 7689] 457 F. 2d 348 (5th Cir. 1972).

Full Text of EEOC Decision

SUMMARY OF CHARGE

Charging Parties all[illegible]at Respondent Employer engaged in an unlawful employment practice in [illegible]n of Title VII of the Civil Rights Act of 1964, as amended, by failing to reh[illegible]hem as Music Instructors because of their race (Caucasian) and by retaining in their place two less qualified black instructors.

JURISDICTION

Respondent Employer is a public educational institution providing educational services, and is an "employer" within the meaning of Section 701(b) of the Act, as amended. The charges were filed within the time limitations prescribed by Section 706(e).

SUMMARY OF INVESTIGATION

Charging Parties A and B were both employed as "annual contract" Music Instructors in Respondent's Music Department.[1]

It is undisputed in the instant record that Respondent was faced with a drop in student enrollment for the Fall of 1973,[2] and consequently was required to reduce its number of faculty positions.[3]

In order to implement its staff reduction program, Respondent determined that individual decisions concerning termination would be made in accordance with a policy adopted November 1, 1972 by the District Board of Trustees (a series of criteria to be used in establishing individual qualification). The implementation of this policy as it affected the Charging Partes is the focal point of this case.

Specifically, the gravamen of Charging Parties' charges is that they were dismissed not on the basis of individual qualifications but for the asserted unlawful reason that Respondent was maintaining a quota or fixed ratio of black teachers to black students and that as a consequence their race made them expendable. The outcome of this case depends upon a thorough analysis of a somewhat unique set of facts which the Commission recognizes involves a sensitive area of the law (cases dealing with the question are only now just arising).

CHARGING PARTY A

We initially address ourselves to the circumstances surrounding the objection of Charging Party A. A was hired on an annual contract basis in September 1970 and was rehired for the 1971–72 and 1972–73 academic years. Respondent raises no dispute as to A's academic qualifications (B.A. in Music from the University of Miami, and at the time of the instant charge, 10 credits completed towards achieving a Doctoral of Musical Arts). Nor has Respondent offered any criticism as to A's work as a professional musician or as to his performance as an instructor in the Music department.

When Respondent became aware that staff reductions would be necessary for the 1973–74 academic year it informed its college personnel in a memorandum dated November 2, 1972, that staff cut-backs would be made according to guidelines entitled "Criteria for staff reduction."

In mid-November at a faculty meeting, respondent's President discussed the guidelines and assured the staff that reductions would not be based upon the race of the individual,[4] and that department chairmen would be responsible as to who would be released.

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[1] Annual contract teachers are hired at the college on a year to year basis for the first three years of employment. Thereafter, if a teacher is hired for a fourth year tenure status attaches.

[2] An approximate 8% decrease in student enrollment for the 1973–74 academic year was projected.

[3] Respondent's projections for reduction of its professional staff was 33 persons. [Memo dated December 19, 1973 concerning staff reductions.]

[4] The record indicates that both black and white faculty were disturbed about the effect of the staff reductions. Blacks expressed a time-tested concern that since they had been hired in meaningful numbers only since 1970 they would be "first fired." This concern has not gone unrecognized by the Federal Courts. See e.g. *Watkins v. Steel Workers, Local 2369*, — F. Supp. — (E. D. La. 1974) 7 EPD ¶ 9130 and *Rowe v. General Motors*, [4 EPD ¶ 7689] 475 F. 2d 348 (5th Cir. 1972). Whites, on the other hand, were concerned that Respondent's Affirmative Action Program could become a subterfuge resulting in unlawful "preferential treatment" in contravention of Section 703(j) of Title VII, a rather commonly expressed concern these days. See *Commonwealth of Pennsylvania v. O'Neill*, — F. 2d — (3rd Cir. 1972), 5 EPD ¶ 7974. Cf. *DeFunis v. Odegaard*, 82 Wash. 2d 11 507 P. 2d 1169 (1973), cert. granted — U. S. L. W. — (U.S. Nov. 19, 1973).

With the Music department scheduled for a cut back of two instructors, Respondent was required by its November 1972, "Criteria for staff reductions" to evaluate its annual contract instructors for purposes of discharge or retention.[5] Respondent's criteria provided for the termination of annual contract personnel before those on continuing contract (tenured staff). An instructor is evaluated and ranked by the department chairman in each of five categories (with accompanying written comments) on a ranking sheet[6]; given a numerical score in each category; and finally given an overall average score which determines final ranking within the department. F, the Music Department Chairman rated each of the five instructors on annual contract in early November, 1972. His results in order (highest to lowest rank) were as follows: (1) Charging Party A, (2) C, (3) D, (4) Charging Party B, (5) E.[7] Thus, according to F's evaluation, concurred in by Director of the Humanities Division, the two instructors selected for dismissal were B (white) and E (black).

The next chronological date of relevance is December 13, 1972, when, according to Charging Party A, F personally informed him that he would be dismissed that it was not his (F's) original recommendation; and that he had been overruled by higher administration officials for reasons associated with the college's Affirmative Action program. F corroborated these averments in a statement made to the EEOC representative.

On December 18, 1972, Charging Party A received his formal discharge notice. It read as follows:

"Due to the decrease in student enrollment experienced this academic year, it is necessary to reduce the staff of the college. A careful review of all positions and all personnel has been made in accordance with the guidelines recommended by a faculty administration committee, approved by the Board of trustees, and in accordance with State Board of Education Regulation 6A-8.33 (5).

This is to officially advise you that you will not be recommended for appointment for the 1973-74 contract year."[8]

Respondent's Executive Vice President, in response to a number of written questions submitted by the EEOC representative, stated that the reason Charging Party A's contract was not renewed was because, "Student enrollment is directly related to the basic requirement that the college be responsive to the changing needs of the community." Testimonial evidence of record helps clarify G's cryptic statement. Apparently Respondent's higher officials did not believe Charging Party A should be retained because he did not meet the requirements of item E of the November 1972 memo, "Capacity to meet the needs of the community."[9]

H, Respondent's Vice President viewed item E as a broad category, primarily referring to the ability to relate to and meet the needs of the students. Also included in item E, according to H, is the instructors ability to contribute to the cultural needs of the community, and by taking part in community activity.

In a hand written, undated and signed notation on F's original "ranking sheet," H reevaluated Charging Party's ability to meet the item E criteria, and concluded as follows:

"E. Capacity to meet needs of community. Needs of the campus and department to better meet the needs of black students places top priority for need for black instructors. The fact of need change Div. recommendation for ranking." (sic).

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[5] These criteria are derived from State Board Regulation 6A-8.33(5) subtitled, Issuance of Continuing Contracts. Section (5) provides the following: "Should the Board have to choose from among its personnel who are on continuing contracts as to which should be retained, among the criteria to be considered shall be educational qualifications, efficiency, compatibility, character, and capacity to meet the educational needs of the community." The same criteria apply to those on annual contract, according to Respondent.

[6] The five "ranking sheet" categories are: (A). Educational Qualification or Equivalent, (B) Efficiency in Performance, (C). Compatibility, (D). Character and, (E). Capacity to Meet the Needs of the Community.

[7] D and E are the two black instructors referred to by Charging Parties in their charge.

[8] Charging Party A was also provided with an undated document drafted by F and identified as "Annual Contract Pool." The text of the letter is instructive and reads in relevant part as follows:

"A is completely compatible with the community college philosophy and works at it. He is respectable and well mannered in relationships in the college and community. A has aided in the instruction of the woodwind ensemble which has presented 10 on and off campus performances in the past year. A is a very conscientious instructor and is respected by his peers for his professional playing ability. . . . Due to the projected campus staff reduction plan and considering the departmental needs, I regretfully place A in the surplus pool (even though our department is presently understaffed)."

[9] The November 1, 1972 Memo provides that "Capacity to meet needs of the community" is determined by (1) shifts in enrollment, (2) changes in program, (3) evidence of service to community, and (4) technological advancement in education.

Thus, as a result of this "evaluation" Charging Party A, the most senior Music Department instructor (along with C) was removed from first ranking and placed fourth. E, originally recommended for layoff along with B, and the most junior instructor, was elevated to a second place ranking and retained.[10]

On the basis of the foregoing it is clear that Charging Party A was not retained on the faculty primarily because of his race.[11] Our inquiry, however, does not stop here, for at this point we must consider whether Respondent's apparent defenses (the need for black instructors in order to meet the needs of black students and implementation of its affirmative action program) justifies its race-related employment decision. See *McDonnell Douglas v. Green*, — U.S. —, 93 S. Ct. 1817 (1973), 5 EPD ¶ 8607.

CAPACITY TO MEET THE NEEDS OF BLACK STUDENTS

Charging Party A's Contributions to the Music Department

With respect to this aspect of Respondent's defense the evidence of record demonstrates that Charging Party was indeed a great asset to Respondent's Music Department and the student body. For example, only A and C were qualified to teach all five required courses.[12] D was capable of teaching all but Music History. Neither B nor E were qualified to teach Musical Organization or Music History.

Regarding the teaching of individual instruments, three of the five annual contract teachers (D, E, and B) taught piano.[13] D also taught percussion. C taught brass and A taught woodwinds, with a specialty in double reed (Oboe and Bassoon). According to testimonial evidence of record no other tenured or annual contract teachers were capable of teaching double reed. Respondent does not challenge this fact.

Based upon Charging Party A's qualifications summarized above and other evidence of record, we can only conclude that he was an accomplished musician and a qualified and valuable member of the Music department. This conclusion is further buttressed by evidence that approximately 150 students protested his dismissal. In an article appearing in the January 31, 1973, edition of the campus newspaper, a reporter investigated the cause of the protest. He reported that the reason for the student unrest was that A was the only double-reed woodwind instructor at Respondent, and that his dismissal jeopardized the educational objectives of many music department students. The students, according to the article, felt their needs could better be served by releasing keyboard teachers since in the words of one student, "we have so many they're coming out of our ears."

The EEOC representative interviewed several students involved in the protest and obtained a copy of the petition. The facts show that of the approximately 150 signatories to the petition 15 were of Spanish speaking ancestry and at least five were black.[14] The language of the petition is probative. It reads as follows:

"We the undersigned, vehemently object to the dismissal of A, instructor of Music at

As serious students of music we fully appreciate the high caliber of musical knowledge and guidance that A displays not only as a musician but as a fine human being.

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[10] A Professor in the Humanities Department averred in a sworn statement that in a meeting he initiated with F concerning the circumstances surrounding Charging Party A's termination, F told him that his (F's) original recommendations, concurred in by Division Director, were overruled by higher officials and that "higher administration informed the division director and the department chairman that no black was to be dismissed in the music department."

[11] The fact that Respondent's decision not to retain Charging Party A may have also been predicated upon other lawful considerations relates only to remedy and does not affect our conclusion herein on the merits. *King v. Laborers, Local 818*, [3 EPD ¶ 8198] 433 F. 2d 273 (6th Cir. 1971); *Bradington v. IBM*, [6 EPD ¶ 8695] 360 F. Supp. 845 (D. C. Md. 1973); Commission Decision No. 70-925, CCH EEOC Decisions (1973) ¶ 6158. See also *U.S. v. Hayes International Corp.*, (N. D. Ala. 1973) 7 EPD ¶ 9164.

[12] These are: Theory of Music, Sightsinging, Humanities 201, Musical Organization, and Music History.

[13] The evidence of record indicates that there was a surfeit of piano teachers in the department.

[14] The record further demonstrates that 33 of these students (including four black music students) presented the petitions to H for his consideration. According to the newspaper article, *supra*, H accepted the petition and commented that formal student evaluation of faculty and peer evaluations could aid the division and department chairmen in the future, reinforcing or contradicting what they recommended.

In times such as ours, where emphasis is placed on quality education we cannot permit the loss of such a qualified teacher."

The Commission, finds this evidence of the protest worthy of consideration. At the very least, it casts doubt on H's assertions that A was not contributing to the needs of the department or campus.

Additional evidence of record, in the form of F's undated letter identified as "Annual Contract Pool," also indicates that Charging Party A was active in service to the community, to wit; his "10 on and off campus performances in the past year." In our judgment, this constitutes an integral part of Respondent's "Criteria to meet the needs of the community." Furthermore, Respondent makes no specific claim and adduces no evidence that either shifts in enrollment or changes in program within the Music department resulted in the diminution of A's value to the department.

The Subjective Nature of Respondent's Evaluation Process

The bald assertion by H, concurred in by I that Charging Party A was incapable of meeting the "[N]eeds of the campus and department to better meet the needs of Black students . . ." is further rendered specious where, as here, no careful analysis was performed by H and I as to whether Charging Party A could or could not "meet the needs of Black students" or whether E was any more qualified to do so. It is the Commission's position that merit and fitness which bear on job performance should be measured by objective standards insofar as practicable.[15] The Commission and the Courts have frequently recognized the hazards involved in making employment decisions based upon "subjective criteria." Such subjective considerations may often operate to disqualify an otherwise well qualified person. In the instant circumstances, F's original recommendations were based upon an evaluation of an individual's performance in five categories—a structured attempt at objectivity. We note that the recommendations of F (a white male) reflect no pattern of racial discrimination—the two lowest ranked instructors were a black female and a white male, while a black male and two whites were recommended for retention. On the other hand, F's superiors (H and I), reversed him without detailed evaluation of each instructor's ability to satisfy item E of the November 1972 Memo. Such a practice can be a ". . . ready mechanism for discrimination . . . much of which can be covertly concealed . . . ." *Rowe v. General Motors Corp.*, [4 EPD § 7689] 457 F. 2d 348 (5th Cir. 1972). Although *Rowe* involved subjective selection criteria exercised by whites to the disadvantage of blacks, it has been the Commission's experience that regardless of the race or sex of the evaluator, subjective criteria are suspect and provide a convenient tool for the discriminator. See e.g., Commission Decision Nos. 73-0479 and 74-15, EPG ¶ 6381 and 6394, respectively. There is no claim or evidence in the instant case that such an evaluation is impossible.

The Commission and the Courts must be careful not to give credence to the misconception or "stereotype" indicated by H's written remarks.

It is the Commission's judgment that Respondent's refusal to rehire Charging Party A because of its misbegotten assumption that only black teachers could meet the needs of black students is no different from a similar argument (but with the races reversed) made by an all-white Board of Education in a 1966 school desegregation case.[16] In *Smith*, the school board argued that race was a rational and permissible criteria as a basis for the employment of teachers. The board argued that black teachers would be unable to communicate with white students, that "rapport between teacher and pupil . . . may be unattainable where they are of different races . . . ." The Court emphatically rejected this race per se argument as a basis for judging either an applicants qualifications or the district's needs, stating that,

". . . this applies equally to considerations described as environmental or ability to communicate or speech patterns or capacity to establish rapport with pupils when these descriptions amount only to euphemistic references to actual or presumed racial distinctions."

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[15] In *Jackson v. Poston*, — App. Div. 2d — (N. Y. Supp. Ct., No. 18296, September 14, 1972) 5 EPD ¶ 8025, (a non-Title VII case) the appellate court affirmed the lower court's holding that Respondent Civil Service Commission had violated its statutory authority when it gave a preference for appointment to individuals who "have a recognizable identification with Black or Spanish-speaking minority communities," based upon subjective evaluations. The court held that experience with race, or ethnic problems could be considered in evaluating an individual for a particular job or promotion, but only where objective standards are used to measure that such experience is reasonably related to job performance ability and only where the Respondent had delineated what positions required as an essential qualification the ability to identify with the particular racial or ethnic community.

[16] *Smith v. Board of Education*, — F. 2d — (8th Cir. 1966), 1 EPD ¶ 9753.

We view the Eighth Circuit Court of Appeals logic and reasoning as consistent with Title VII principles. However, by so agreeing, we do not suggest that an employer can never consider an individuals ability to relate and communicate to a particular racial or ethnic or sex group based upon that individuals total life experience (cultural, educational, and otherwise), where such abilities are required as essential ingredients for successful performance of the particular job in question. *See Commonwealth of Pa. v. Glickman*, —F. Supp.—(W. D. Pa. 1974), 7 EPD ¶ 9125.[17]

The caveat, of course, is that objective, specific and reviewable criteria be utilized Cf., Commission Decision 74–15, EPG ¶ 6394, and *Jackson v. Poston, supra* at fn. *15*.

Accordingly, we find that Respondent's defense that Charging Party A was not capable of meeting the needs of the department and black student body is without merit and does not justify Respondent's race-related dismissal.

Respondent's Affirmative Action Defense

With respect to Respondent's affirmative action defense it is axiomatic that Affirmative Action Programs must be administered in a manner legally consistent with the non-discriminatory principles of Title VII and other anti-discriminatory statutes and orders. See *Glickman supra*. Furthermore, a basic premise of Title VII is that employment opportunities are accorded primarily to individuals as distinguished from groups. Thus when Respondent began its Affirmative Action Program in early 1970 as required by the Department of Health, Education and Welfare it was presented with a situation delimited by narrow parameters. On the one hand, Respondent was required to initiate and implement in good faith an Affirmative Action Program for the recruitment and hiring of qualified females and minorities. Numerical goals aimed at increasing female and minority employment over a number of years are the cornerstone of such a plan.[18] On the other hand, Respondent may not violate Section 703(j) [19] of Title VII which proscribes "preferential treatment." See *Glickman, supra*.

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[17] In a case arising under the Civil Rights Act of 1871, 42 U. S. C. 1983, and the Equal Protection clause of the Fourteenth Amendment, the Third Circuit Court of Appeals in *Porcelli v. Titus*, [2 EPD ¶ 10,310] 431 F. 2d 1254 (1970), affirmed the lower court opinion that the Newark School Board did not violate the petitioner's rights when it appointed a number of blacks to various administrative positions. The Newark School System employed only 10% black administrators, while the school population was 72% black. The Board argued that it had an affirmative duty to appoint qualified black administrators because the Board had, in the past, practiced racial discrimination by excluding blacks from these positions. The Appellate Court strongly endorsed the "carefully considered" opinion of the trial court, and quoted the following language from Chief Judge Augelli's Findings:

"A fair evaluation of the record supports the conclusion that the promotional lists were suspended and the examination system abolished, not simply to appoint Negroes to promotional positions, *but to obtain for these positions qualified persons, white or black, whose qualifications were based on an awareness of, and sensitivity to, the problems of educating the Newark school population.*

"The Court is satisfied that in abolishing the examination procedure, there was no intention on the part of the Board to discriminate against white persons or exclude them from consideration for promotional positions. No inference of any such intention can be gleaned from the record. The testimony of several of the witnesses * * * shows that, despite a desire to provide an avenue for the appointment of more Negro administrators, the ultimate objective of the Board was to promote those persons most qualified to suit the needs of the Newark school system. *There is nothing in the record to indicate that the Board was attempting to appoint Negroes in numbers proportionate to the school population.*" (emphasis supplied) 302 F. Supp. at 732–733.

[18] As to whether employment goals are required by federal court order as part of a remedy to overcome the vestiges of past discrimination [See, e.g., *Glickman supra*, *Carter v. Gallagher*, [3 EPD ¶ 8335] 452 F. 2d 315 (8th Cir. 1972), cert. denied, [4 EPD ¶ 7818] 412 U.S. 939 (1972); *Castro v. Beecher*, [4 EPD ¶ 7783] 459 F. 2d 725 (1st Cir. 1972); *N. A. A. C. P. v. Allen*, [4 EPD ¶ 7669] 340 F. Supp. 703 (M.D. Ala. 1972); *U.S. v. IBEW Local Union, 212*, [5 EPD ¶ 8411] 472 F. 2d 634 (6th Cir. 1973), or are required under Executive Order 11246. Chief Justice Burger's admonishment in *Griggs v. Duke Power Co.*, (infra, at page 15) remains the guiding principle.

[19] Section 703(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

It is this latter requirement that often proves troublesome. Both the Commission and the Courts, however, require strict adherence to the following principle enunciated in *Griggs v. Duke Power Co.*, [3 EPD ¶ 8137] 401 U.S. 424 (1971):

"Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." The importance of this requirement is reflected in the cautionary words of the Third Circuit Court of Appeals in *Commonwealth of Pennsylvania v. O'Neil*—F. 2d —, (3rd Cir. 1972), 5 EPD ¶ 7974:

"Opening the doors long shut to minorities is imperative, but in so doing we must be careful not to close them in the face of others, lest we abandon the basic principle of non-discrimination that sparked the effort to pry open these doors in the first place."

In light of the foregoing principles, and based upon the following analysis of evidence of record, we must find that Respondent's affirmative action defense does not justify its decision not to rehire Charging Party A.

The instant record contains testimonial and documentary evidence that Respondent, in setting up its Affirmative Action Program, proclaimed as its 1974-75 objective a faculty employment profile containing a percentage of black teachers equaling the percentage of black students.[20]

In implementing its Affirmative Action program, Respondent's higher level officials were especially pressed when faced with a faculty reduction requirement in 1973-74. In a letter dated November 3, 1972, Executive Vice-President reported to the Office of Civil Rights at H. E. W. that in meeting its Affirmative Action Program, "It will be a difficult task but we have set the objective of holding the minority group percentages through this staff reduction program."

G. was quoted as saying that staff reductions will continue to follow the college's Affirmative Action Program, and that the percentage of blacks and minority group employees would not be reduced. "At the end of the reduction period," stated G. "we will have an equal or greater percentage of minority group people." [21]

We are thus presented with numerous conflicting statements by Respondent's officials concerning the college's Affirmative Action Program in the context of a lay-off situation (Compare Respondent's statement to the faculty in November 1972, supra at page 3, with G's November 3, 1972, letter to H. E. W., Office of Civil Rights, supra at page 17).

Such evidence must be viewed in light of the other data available in this case, for as courts have often observed, proof of Title VII discrimination is seldom direct. See *Marquez v. Ford Motor Co.*, [3 EPD ¶8156] 440 F. 2d 1157 (8th Cir. 1971) and *U.S. v. Jacksonville Terminal Co.*, [3 EPD ¶8324] 451 F. 2d 418 (5th Cir. 1971). Often an inference of discrimination must be drawn from the totality of the circumstances and while one factor standing alone might not warrant an inference of discrimination, a coalescense of factors may suffice to so demonstrate. See *Lowry v. Whitaker Cable Corp.*, 472 F. 2d 1210 1210 (8th Cir. 1972), affirming— F. Supp.— (W. D. Mo. 1972) 5 EPD ¶8439.

According we likewise find that Respondent's affirmative action defense does not justify Respondent's actions herein and conclude that Charging Party A was not retained because of his race in violation of Section 703(a) of Title VII.

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[20] At this time, we make no final determination as to the Title VII legality of this asserted "fixed" quota or ratio, since the evidence of record is not conclusive that such a ratio is, in fact, Respondent's H. E. W. mandated policy. However, we must express our concern as to the serious abuses that may result with such a ratio. Not only does it border perilously close to the proscribed "employee preference or prejudice" doctrine, see EEOC Guidelines on Discrimination Because of Sex 29 C. F. R. 1604.2, but it also tends to run counter to the Section 703(j) prohibitions of Title VII. Moreover, maintaining a "fixed" ratio or percentage of black faculty equaling the percentage of black students applies with similar logic to ratios for other racial, ethnic, religious and sex groups. Furthermore, such a practice tends to result in a maximum percentage regarding the number of each group employed, as well as offering an employer an excuse to limit the number of minority students. *Glickman, supra*. It also creates the unwanted (and unsubstantiated) view that only blacks can teach and relate to blacks and only whites can teach and relate to whites, etc., a concept that was hopefully removed from debate when this nation recently moved from segregated to unitary school systems at the elementary and secondary levels. Our comments here do not in any sense depart from the standards which this Commission has consistently applied in arriving at a showing of prima facie discrimination based upon statistical evidence. *Glickman, supra*.

[21] Respondent's records indicate that an approximately equal percentage of black and white faculty were discharged (4½%), thus meeting G's prediction.

Charging Party B

With respect to Charging Party B's allegation that his termination was a race-based decision by Respondent, we are unable to so agree. B was originally recommended for discharge based upon Department Chairman F's evaluation of the five selection criteria set forth in the November 2, 1972, Memorandum. There is no evidence of record that this evaluation or recommendation was influenced by racial considerations. Accordingly, in light of the evidence of record we conclude that Charging Party B's discharge was not predicated upon race.

Decision

There is reasonable cause to believe that Respondent has engaged in a violation of Title VII of the Civil Rights Act of 1964, as amended, by failing to rehire Charging Party A because of his race, as alleged.

There is not reasonable cause to believe that Respondent has engaged in a violation of Title VII of the Civil Rights Act of 1964, as amended, by failing to rehire Charging Party B because of his race, as alleged.

RACIALLY BIASED NONREAPPOINTMENT OF WHITE FACULTY MEMBER

Decision of Equal Employment Opportunity Commission, Decision No. 74-95, March 6, 1974.

TITLE VII—CIVIL RIGHTS ACT OF 1964

Racial Discrimination—White Faculty Member—Termination—Pretextual Basis—Evidence.—Reasonable cause existed to believe that a white faculty member was terminated from his job at a predominantly Negro college because of his race where non-renewal of his contract was based on spurious reasons and on criteria not applied to similarly-situated Negro faculty members. Insufficient evidence existed to make a finding concerning the alleged racially biased discharge of other white faculty members. 42 U.S.C. Sec. 2000e.

Back reference.—* 1065.

Full Text of EEOC Decision

SUMMARY OF CHARGE

Charging Party alleges that Respondent discharged him because of his race (Caucasian) in violation of the Civil Rights Act of 1964, as amended. He further alleges that Respondent has discharged seven other Caucasian employees because of their race.

JURISDICTION

Respondent, a state university, is an employer within the meaning of section 701(b) of the Act, as amended. It employed more than 150 employees during the calendar year of the alleged violation. The charge was timely filed.

SUMMARY OF INVESTIGATION

Charging Party, an Associate Professor of English at a predominantly Black state university, alleged that he was discharged from his teaching position without the benefit of any official explanation because of his race (Caucasian).[1]

Respondent contends that although it does not provide explanations for discharges, there were valid reasons for failing to renew Charging Party's contract, and that his race was not among these reasons.

More specifically, Respondent listed the following four factors it considered before reaching its decision to discharge Charging Party: (1) there was a decrease in the number of English majors, and therefore, less faculty was needed; (2) there were an excessive number of student withdrawals from Charging Party's classes; (3) Charging Party failed on one occasion to turn in a course outline to his department chairman; (4) Charging Party had received a poor professional evaluation that year (1972) from his department Chairman and the Dean of College of Arts and Sciences.

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[1] Charging Party was initially employed by Respondent in September of 1971. Respondent by means of a letter dated December 15, 1972, notified Charging Party that he would not be reappointed to the faculty at the expiration of his then current contract.

With respect to the merits of each of these reasons the evidence of record demonstrates the following:

(1) *Decline In English Majors.*—Enrollment records of three other departments in the College of Arts and Sciences (History, Mathematics and Elementary Education) showed an even greater decline in majors; yet, no faculty members from these departments were discharged. Moreover, despite Respondent's alleged concern over declining enrollment in the English Department it is significant, we think, that Respondent hired two new faculty members in the English department for the academic year following Charging Party's departure.

(2) *Excessive Student Withdrawals.*—In the academic year 1971-2, the English department was comprised of eleven faculty members, six Black and five White. During that year, the six Black teachers had the same or higher withdrawal rates as Charging Party but were not discharged. During the next school year, three English teachers who also had higher withdrawal rates than Charging Party were not discharged.

(3) *Course Outline.*—The Chairman of the English department (Black) stated to the Commission representative that the use of course outlines depends on the type of course taught, and whether or not it had ever been taught before. In Charging Party's case, failure to submit an outline was not, in his opinion, considered a serious matter.

(4) *Professional Evaluation.*—In March 1972, selected performance evaluations were made of 18 faculty members [12 Black and 6 White] in the School of Arts and Sciences by the Chairman (Black) of the Humanities Division.[2] Charging Party, whose performance was rated at this time, received a score of 80 out of 100. Of seven Black faculty members who received the same or lower scores none were discharged. Charging Party's department chairman stated that although he considered Charging Party's score marginal, he considered Charging Party's overall performance satisfactory and recommended that he be retained on the faculty.

On the basis of the foregoing evidence, we find that Respondent's reasons for discharging Charging Party do not withstand scrutiny. Commission Decisions No. 72-0777 and 74-15, CCH EEOC Decisions (1973) ¶ 6331 and 6394. It is obvious that reasons (1) and (3) are spurious, and that the second and fourth justifications for discharge were applied only to Charging Party, and not to similarly situated Black faculty members.

Courts have often observed that proof of discrimination is seldom direct. See, e.g., *United States v. Jacksonville Terminal Company*, [3 EPD ¶ 8324] 451 F. 2d 418 (5th Cir. 1971); *Marquez v. Ford Motor Company*, [3 EPD ¶ 8156] 440 F. 2d 1157 (8th Cir. 1971). Often an inference of discrimination must be drawn from the totality of the circumstances, and while one factor standing alone might not warrant an inference of discrimination, a coalescence of factors may suffice to so demonstrate. See *Lowry v. Whitaker Cable Corporation*, [5 EPD ¶ 8440] 472 F. 2d 1210 (8th Cir. 1973), affirming—F. Supp.—(W.D. Mo. 1972), EPD ¶ 8439. In this case, one major circumstance to consider is the fact that the entire process of determining who shall or shall not be reappointed is apparently accomplished in a highly subjective, essentially non-reviewable, manner. It is clear from the evidence presented above with respect to Respondent's reasons for not reappointing Charging Party, that any guidelines which Respondent does maintain are at best nebulous and have indeed been applied in a highly subjective, unequal manner without the benefit of notice.[3] Any employment policy maintained in this way can operate to disqualify an otherwise qualified person. This is so particularly where, as here, those who make the employment decisions are members of a racial group different from that of the person adversely affected. As pointed out in a similar context in *Rowe v. General Motors Corp.*, [14 EPD ¶ 7689] 457 F. 2d 348 (5th Cir. 1972):

"[Such] methods for promotion . . . would enable an individual foreman, if he were so inclined, to exercise racial discrimination in his selection of candidates for promotion. . . . All we do today is recognize that promotion . . . procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that matter, not really known to management. We and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect nondiscriminatory action." (Footnote and citations omitted). At 359.

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[2] The Commission has been unable to determine, either why only a few evaluations were made, or why these 18 were selected from the total faculty.

[3] It is undisputed that Charging Party was not given any specific reason for his discharge.

The Commission has come to the same conclusion in cases where the Charging Party was a female and the employment decision was made by males without the benefit of formal written, reviewable and objective guidelines. Commission Decisions No. 74–53 and 74–15, CCH EEOC Decisions (1973) ¶ 6410, and 6394. Although *Rowe, supra* involved subjective selection criteria exercised by Whites to the disadvantage of Blacks, and Commission Decisions No. 74–53 and 74–15 involved the use of such criteria by males to the disadvantage of females, we cannot close our eyes to such methods simply because of the race or sex of the evaluator(s). It has been our experience that, notwithstanding the race or sex of the evaluator(s) the use of subjective criteria in circumstances where discriminatory treatment has been demonstrated provides a convenient tool for further unlawful treatment.[3]

CONCLUSION

We conclude that in the totality of the circumstances presented in this case it is reasonable to believe that Respondent's asserted defenses for failing to reappoint Charging Party fail to withstand scrutiny and are pretexual. See *McDonnell-Douglas v. Green*, — U.S. — (1973), 5 EPD ¶ 8607. Accordingly we conclude that there is reasonable cause to believe that Respondent improperly considered Charging Party's race when it made the decision not to retain him on the faculty.

Charging Party also alleges that seven of his White colleagues were discharged because of their race. Respondent contends that they were all dismissed for substandard performance, and that their race was not considered.

There is insufficient evidence of record to allow us to determine at this time whether Respondent's performance defense as to Charging Party's colleagues has any merit. Numerical performance evaluations were not made on any of these faculty members and the record contains no other performance criteria or standards concerning these individuals.

The absence of such performance evaluations and criteria is further compounded by the fact that the employment circumstances surrounding each of these faculty members varies considerably. For example, they are employed in three different schools of the university and their individual backgrounds, ranks and teaching assignments are not similar. Moreover, the circumstances surrounding each individual's discharge do not, either by themselves or collectively evidence racial discrimination; nor do we gain any support for Charging Party's class allegation from the overall employment situation as reflected in the evidence of record. Although it is undisputed that over a three year period (1971–4) only White faculty members were discharged it is also undisputed that at the time the charge herein was filed, Respondent's faculty was at least one-third White and that during the academic year following Charging Party's discharge (1973–4) Respondent hired 21 new faculty members, of whom ⅓ were White. Accordingly, we are unable, in the absence of other evidence, to make a finding at this time on Charging Party's class allegation.

DECISION

There is reasonable cause to believe that Charging Party was discharged because of his race in violation of Title VII of the Civil Rights Act of 1964, as amended.

We make no finding concerning the discharge of seven other White faculty members.

Mr. O'Hara. Tomorrow this committee will meet in this room at 10 o'clock in the morning. There is a quorum call now in the House, so I will at this time adjourn the meeting with my thanks to the witnesses for their appearances.

Mr. Powell. Thank you very much, Mr. Chairman, and I certainly want to be of any assistance that either myself or the agency can be, in your efforts here.

Mr. O'Hara. Thank you.

[Whereupon, at 12:20 p.m. the subcommittee recessed, to reconvene at 10 a.m. of the following day, Friday, August 9, 1974.]

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[3] We must always remember that discriminatory preference for any group, minority or majority is precisely and only what Congress has proscribed. *Griggs v. Duke Power*, 3 EPD ¶ 8137; 401 U.S. 424 (1971).

CIVIL RIGHTS OBLIGATIONS OF INSTITUTIONS OF POSTSECONDARY EDUCATION

FRIDAY, AUGUST 9, 1974

House of Representatives,
Special Subcommittee on Education
of the Committee on Education and Labor,
Washington, D.C.

The subcommittee met at 9:45 a.m., pursuant to recess, in room 2261, Rayburn House Office Building, Hon. James G. O'Hara [chairman of the subcommittee] presiding.

Present: Representatives O'Hara, Erlenborn, Dellenback, and Benitez.

Staff present: Jim Harrison, staff director; Webster Buell, counsel, Elnora Teets, clerk; and Robert Andringa, minority staff director.

Mr. O'Hara. The Special Subcommittee on Education will come to order.

Yesterday we began that phase of our hearings which is intended to deal with the question of what a postsecondary education institution ought to do and ought to be to qualify for participation in Federal education programs, including, but not limited to student financial aid programs.

Yesterday we heard from Chairman John Powell of the Equal Employment Opportunity Commission, and we spent 2 hours discussing the perception rightly or wrongly held throughout the postsecondary education community—that some Federal agencies under color of statute, Executive order, rule, regulation or guideline, are suggesting, encouraging, urging, pressuring or requiring postsecondary institutions to afford preferential treatment to some individuals on the grounds of the race, sex or ethnic origin of those individuals.

I emphasized at the beginning of yesterday's hearing that I would not assume as proven the existence of this kind of preferential treatment until all the facts were in. But I also emphasized that I will not pretend to neutrality as to whether or not preferential treatment on the grounds of race, sex, religion or ethnic origin is constitutionally proper or legally justifiable.

There is, I suggested, as far as I am concerned, no such thing as reverse discrimination. Whenever an individual's race, sex, or ethnic background is utilized as a reason for giving that individual something which is denied to another individual, that is simple discrimination, without qualifying adjectives or justification. If it exists, we ought to find it out and stamp it out—whoever the alleged beneficiary, whoever the proposed victim, whatever the alleged motive.

Our witness list today will be headed by Mr. Peter Holmes, Director of the Office for Civil Rights, Department of Health, Education, and Welfare. Mr. Holmes is accompanied by Mr. St. John Barrett, Deputy General Counsel; Mr. Charles Cooke, Jr., Deputy Assistant Secretary for Legislation (Education); and Dr. Mary Lepper, Director, Higher Education Division, Office for Civil Rights.

We would like very much to hear from you, Mr. Holmes.

STATEMENT OF PETER E. HOLMES, DIRECTOR, OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, ACCOMPANIED BY ST. JOHN BARRETT, DEPUTY GENERAL COUNSEL; CHARLES M. COOKE, JR., DEPUTY ASSISTANT SECRETARY FOR LEGISLATION (EDUCATION); MARY M. LEPPER, DIRECTOR, HIGHER EDUCATION DIVISION, OFFICE FOR CIVIL RIGHTS; AND TONY MILES, ASSISTANT GENERAL COUNSEL, CIVIL RIGHTS

Mr. HOLMES. Thank you, Mr. Chairman.

Let me just for the record, if I may, introduce an additional person with me today and that is Mr. Tony Miles, Assistant General Counsel, Civil Rights, in the Department of Health, Education, and Welfare. I have a statement, Mr. Chairman, that I will proceed to give. I understand the time constraints on the subcommittee, and of course we will be glad to come back if you or the subcommittee deem this desirable.

Mr. O'HARA. Thank you very much.

Mr. HOLMES. On behalf of the Office for Civil Rights I appreciate the opportunity to discuss with you the variety of compliance responsibilities in the area of higher education assigned to our Office in the Department of Health, Education, and Welfare. There are no less than five civil rights authorities administered by OCR with which the vast majority of our Nation's colleges and universities must assure compliance. With your indulgence, I would like to present a brief overview of the various authorities under our jurisdiction, as well as an explanation of the steps an institution must take to insure compliance with them.

In 1964 the Congress enacted the Civil Rights Act, title VI of which was addressed to nondiscrimination in federally assisted programs. Pursuant to section 602 of the act, the Department was authorized and directed to secure the compliance of all recipients of Federal financial assistance with the requirements of section 601.

One of the major groups of such recipients consists of approximately 2,700 institutions of higher education. Commencing in 1965, all colleges and universities which applied for financial assistance from the Federal Government were required to sign an assurance of compliance stating that they would adhere to the provisions of title VI; that is, admit applicants and treat students without regard to their race, color, or national origin.

The overwhelming majority of institutions signed and filed this assurance and, commencing in 1967, we asked each to furnish us with compliance reports indicating student enrollment by racial/ethnic group: for example, Negro, American Indian, Oriental, and Spanish-surnamed Americans, as well as other information to assist us in evalnating the institution's compliance status. These reports continue to be required on a biennial schedule.

On the basis of this data, complaints filed with the Office and other information available to us, we have, since 1968, conducted a series of onsite compliance reviews, which have given us an opportunity to review the current practices of several institutions of higher education, with respect to recruitment and admission, scholarships and financial aid, student services and facilities.

Further, we have required State college systems that previously maintained racially segregated institutions to take steps to eliminate the vestiges of the formerly dual systems. In evaluating a college's compliance status we would, for example, be interested in both current and past efforts to recruit minority students and faculty. If a college recruits students, it must conduct its recruitment activities so as to include contacts with potential minority group applicants in a comparable manner. In the area of financial aid, we seek to insure that minority group students participate on an equitable basis in the various financial assistance programs operated by a college or university.

A number of financial aid programs are available to students through the Office of Education. The educational opportunity grant, college work-study, and direct student loan programs enable many economically disadvantaged students to pursue their educations. Office of Education statistics show that about 25 percent of such program beneficiaries are minority students.

Other areas subject to review include: Counseling and tutoring, to assure that minority students receive these services in like manner to all other students; student activities, to assure that minority group students are free to participate in all college-supported activities; and student housing, to assure that students are assigned to or are free to select college dormitories and other institution-supported housing in a nondiscriminatory manner.

In instances where discriminatory practices have been identified, either during an onsite review or a complaint investigation, title VI regulations call for institutions to take corrective action to eliminate any current discriminatory practices and overcome the effects of past discrimination and, further, they permit the implementation of affirmative efforts where conditions have resulted in limiting participation by persons of a particular race, color, or national origin.

If an institution subject to title VI fails to take corrective action to eliminate identified discriminatory practices, OCR exhausts all efforts to achieve voluntary compliance before resorting to administrative enforcement proceedings to terminate Federal assistance.

If the Government prevails in an administrative hearing, Federal moneys can be terminated. Any institution that has its funds terminated may participate once again in Federal programs by eliminating discriminatory practices. To date, successful voluntary negotiation has rendered it unnecessary (with one exception) to impose fund sanctions against an institution of higher education. We have recently concluded negotiations with eight States cited in the decision of the U.S. District Court for the District of Columbia in the case of *Adams v. Richardson.*

The Department, as directed by the court, requested comprehensive plans designed to insure equal educational opportunity and achieve desegregation of their formerly racially dual systems of higher education. Eight States—Arkansas, Florida, Georgia, Maryland, North Carolina, Oklahoma, Pennsylvania, and Virginia—submitted acceptable plans and their implementation will be closely monitored by the Office for Civil Rights.

Louisiana, which refused to submit such a plan, has been sued in U.S. District Court by the Department of Justice for an order that it comply with the provisions of title VI. A plan submitted by Mississippi has been adjudged inadequate, and the Department has requested the Attorney General to take appropriate enforcement action to secure compliance as quickly as possible through the judicial process. In carrying out our compliance determination responsibility, we have been, in many instances, asked also to advise institutions seeking to expand previous efforts at reaching minority group students.

Contract compliance responsibilities pursuant to Executive Order 11246, as amended, have been delegated to the Secretary of Health, Education, and Welfare, who in turn has delegated such responsibilities to OCR. The Executive order prohibits Federal contractors, including colleges and universities, from discriminating in employment on the basis of race, color, sex, religion, or national origin, and requires contractors to take "affirmative action" to insure that applicants for employment and employees are treated without regard to such factors. This covers all conditions of employment, including recruitment, promotion, transfer, termination, salary and benefits, and training.

Affirmative action regulations, known as Revised Order No. 4, and issued by the Labor Department, are designed to broaden employment opportunities for minorities and women and to eliminate policies and practices which, by intent or effect, have excluded or limited female and minority group employment.

There are some 900 institutions of higher education which come within the jurisdiction of the Executive order by virtue of their status as Federal contractors. Such institutions maintain their eligibility for Federal contract funds by insuring that their employment policies and practices relate to all persons in an equitable fashion.

Further, they must develop plans for affirmative action, which are expected to (1) contain an analysis of their work force to identify underutilization of women and minorities and a commitment to steps with goals and timetables for overcoming such underutilization, and (2) identify those policies and practices which have an adverse impact on female and minority employees and commit the institution to specific corrective action which will be taken to eliminate such adverse impact.

The Office for Civil Rights comes into contact with contractor institutions by conducting complaint investigations, general periodic compliance reviews of a contractor's employment posture, and preaward compliance reviews. This procedure regularly follows from a request by a Federal contracting agency for a determination of eligibility of an institution with whom it is about to negotiate a contract. All contracts of $1 million or more must receive a civil rights clearance, and such a clearance is granted if the proposed contractor is able to demonstrate compliance with the Executive order.

When deficiencies in employment procedures are identified, a contractor is required to undertake corrective action. If voluntary compliance cannot be achieved, an administrative hearing must be initiated. If such a hearing supports a finding of noncompliance, existing contracts are terminated, and the contractor is barred from future contract awards. Eligibility for Federal contracts can eventually be restored if the institution takes the necessary measures to come into compliance.

Title IX of the Education Amendments of 1972 runs parallel to Title VI of the 1964 Civil Rights Act, though its reach is confined to educational institutions which discriminate on the basis of sex. OCR recently published a proposed regulation for the enforcement of title IX, which provides that no person shall be discriminated against because of sex in any education program or activity that receives Federal financial assistance. This provision applies, with certain selected exceptions, to all educational institutions, including those in higher education.

By law, these institutions must offer all their benefits and services (including employment) without regard to sex to receive Federal assistance. We expect title IX to serve as a major compliance tool in insuring equality of opportunity in education. Complaint investigations, compliance reviews, and enforcement activities will be undertaken in a fashion similar to that under title VI of the 1964 Civil Rights Act.

The Executive order, title VI, and title IX require recipients of Federal financial assistance to insure nondiscrimination. There are two primary differences between these authorities. First, while titles VI and IX reach virtually all of the Nation's higher education institutions (over 2,700), the Executive order reaches only those institutions which are Federal contractors (approximately 900).

Second, "affirmative action" in employment is required under the Executive order, in the absence of a finding of specific discrimination by the institution. Thus, while this Department is responsible for insuring the compliance of virtually all colleges and universities with a broad nondiscrimination mandate, no more than a third of these same institutions is currently required to develop, implement, and maintain an acceptable affirmative action plan.

Voluntary action (as distinguished from that required by the Executive order) is permitted under both title VI and title IX in areas such as student admissions and employment. For example, the great number of colleges and universities developing affirmative action programs are, for the most part, responding to the specific requirement of the Executive order that they do so. On the other hand, the great increase in minority enrollment in institutions of higher education that has been witnessed in recent years derives, in great part, from affirmative admissions and assistance programs undertaken for minority students on a voluntary basis.

Finally, OCR administers two other congressional mandates prohibiting discrimination in federally assisted prgrams. The Public Health Service Act contains provisions that bar sex discrimination in the admission of individuals to health training programs benefiting from certain types of Federal financial assistance. The provisions—sections 799A and 845—apply to any school of nursing, medicine, osteopathy, dentistry, veterinary medicine, optometry, pharmacy, podiatry or public health or any training center for allied health personnel.

Before Federal assistance under title VII or title VIII of the act can be awarded, such institutions must submit assurances that they will admit men and women on a nondiscriminatory basis. Further, institutions must operate their programs so that no individual is treated or participates differently from any other on the basis of physical or mental handicap. We anticipate publication of a regulation for this statute by the end of the present fiscal year. This is the first program designed to prohibit discrimination against handicapped persons, and we are presently developing compliance techniques and an enforcement strategy to make this program a reality with respect to virtually all federally assisted facilities, including colleges and universities.

The Department also anticipates that the Department of Labor will delegate responsibility for the enforcement of section 503 of the Rehabilitation Act as that section affects institutions of higher education. Section 503 establishes an affirmative action responsibility on Federal contractors (similar to the current Executive order program) with regard to the employment of physically or mentally handicapped persons.

To summarize, OCR is currently responsible under a variety of statutes for (1) insuring nondiscrimination on the basis of race, color, national origin, sex, and physical or mental handicap by all Federally-assisted higher education institutions in the admission and treatment of students and in employment, (2) insuring nondiscrimination on the basis of religion by such institutions with respect to employment, and (3) insuring the development and implementation of affirmative action programs by higher education institutions receiving Federal contracts.

I trust that this general description of the various programs we administer is of assistance to you in understanding the mission of the Office for Civil Rights. I would be happy to address questions that you may have concerning particular aspects of those programs.

Mr. O'Hara. Thank you very much, Mr. Holmes. I want to begin by congratulating you on your response to the subcommittee's request for information. You have provided us with exactly the kind of information we are seeking to form the basis for these hearings. We want you to know just what your legal authorities are, how you implement those authorities, and what you are doing there. That is the first requirement, I think, to conducting a sensible set of hearings.

I would appreciate it, and I don't know if you are prepared to do this and perhaps you are not, and, if so, you can tell us or perhaps one of your associates might be able to do it. As you know, one of the areas about which you receive the greatest complaint has to do with the so-called affirmative action programs. You have regulations under which the affirmative action programs are devised.

I have before me Revised Order No. 4, which you spoke of in your testimony. That has to do, I guess, really with the Office of Federal Contract Compliance, those institutions that are also contractors with the Federal Government.

Mr. Holmes. Yes, Revised Order No. 4 was issued by the Office of Federal Contract Compliance and is applicable to all agencies in which responsibility for Executive Order 11246, as amended, was delegated by the Secretary of Labor. Thus, it is applicable to industrial contractors as well as higher education contractors—any Federal contractor.

Mr. O'HARA. I wonder if it would be possible for you to lead us through Revised Order No. 4, as you apply it to institutions of higher education who are Federal contractors.

Mr. HOLMES. Yes. I would be glad to.

Mr. O'HARA. Do you have a copy of Revised Order 4 before you? I have some copies here myself.

Mr. HOLMES. It is in this document. I would prefer, if you don't mind, to give you a general nature of our program and then ask Dr. Lepper as well as Mr. Miles and others to interject. I might note, too, Mr. Chairman, that the Office for Civil Rights, in October 1972, in order to further explain and clarify the provisions of Revised Order No. 4 for higher education institutions issued the Higher Education Guidelines under Executive Order 11246, a copy of which I would be glad to provide the committee if you don't already have it.

Mr. O'HARA. We would appreciate it.

Mr. HOLMES. As a general matter, higher education institutions that participate as Federal contractors must have an affirmative action program. The Executive order requires written affirmative action plans for institutions with 50 or more employees and a contract of $50,000 or more within 120 days from the commencement of a contract.

It is our responsibility to review those affirmative action programs that have been developed by the higher education institutions to determine whether they meet the requirements of Revised Order No. 4. Basically, the components of an affirmative action plan are as follows:

A number of specific analyses regarding recruitment process, selection process, salary levels. There are other specific analyses.

Dr. LEPPER. Utilization analysis.

Mr. HOLMES. The primary analysis is the utilization analysis. This is, in effect, a work force profile. An institution determines the number of women and minorities in its current workforce. Then it makes a determination as to the availability of women and minorities in relation to its normal recruit pool.

Mr. O'HARA. For instance, if talking about Ph. D. faculty members, you would be looking at what?

Mr. HOLMES. If you are talking about a political science department, you are talking about a nationwide pool of Ph. D.'s in political science.

Mr. O'HARA. You have in your office somewhere the numbers of minorities and women in each of those pools?

Mr. HOLMES. Let me ask Dr. Lepper to respond.

Dr. LEPPER. We can respond quite accurately to that in terms of women, because the Office of Education requires all institutions to submit a yearly report on earned degrees. We do not have that information as it applies to minorities in the same format. We are proposing to attempt to collect that data because institutions are having to use a number of informal sources in determining the availability of minorities. In the Office of Education report they are not required to collect the data on the basis of race, but only on the basis of sex as far as earned degrees.

Mr. O'Hara. But, in any event, you make the best estimate you can from the best source you can get of what the available pool contains in terms of minorities and women?

Dr. Lepper. Yes. In addition to that, there have been a number of studies which the institutions themselves have done and have shared with us where they have gone to the top 30 Ph. D-producing institutions in the Nation and asked them, not only for the people that are in process of getting Ph. D.'s, but dividing them down below just an earned degree in political science and going to a degree in political science with a specialty in public administration and international relations.

Mr. O'Hara. And that is the basis under a utilization study then?

Dr. Lepper. For academic employees. We use census data, standard metropolitan area, for nonacademic employees and for staff support personnel.

For professional employees for the staff we use the census data, standard metropolitan area for nonacademic staff employees, for the support people.

Mr. Holmes. But that basic workforce profile and availability information forms the basis for the utilization analysis.

Mr. O'Hara. Thank you.

Mr. Holmes. More often than not, one would determine underutilization.

Mr. O'Hara. I would expect so.

Mr. Holmes. That is underutilization of women and minorities compared to their availability.

Mr. Dellenback. May I ask a peripheral question? In our discussions, it has been determined the Executive order deals with minorities in terms of race, sex, or national origin. Is there anything done on a comparable basis with religion and national origin?

Mr. Holmes. With national origin most definitiely and we include national origin minorities and description of minorities.

Mr. Dellenback. When you say "minorities," you are lumping race, color, and national origin?

Mr. Dellenback. What about religion?

Mr. Holmes. We have not focused on this from the standpoint of the affirmative action requirements principally because the Department of Labor has not issued any specific guidance to the various agencies delegated the responsibility for enforcing the Executive order with regard to the subject. This is not to say, though, we have not dealt with it, because we have considered individual complaints of religious discrimination in employment.

But as far as doing a utilization analysis, we have not focused on religion absent guidelines.

Mr. O'Hara. Now we have completed our underutilization analysis. What do you do then?

Mr. Holmes. Well, on the basis of the degree of underutilization we ask the institution to develop a program including goals and timetables, for trying to correct underutilization. Most programs, I think, are 3 to 4 years in length. Thus the institution will, on either a department-by-department basis or organizational unit-by-organizational unit basis, set for itself some goals and timetables designed to focus efforts in recruitment and what-have-you on trying to narrow the gap between what is available in the labor market and what is actually employed in the workforce.

Mr. O'Hara. Let me ask you this question in terms of the goals and timetable. In giving guidance to the institutions in terms of setting of goals and timetables, if you find underutilization, do you suggest that the goal and timetables be the achievement of utilization by the end of the 3- or 5-year period or coming as close to that as you can, or is your goal and timetable more in terms of the new hires as it were, or the new promotions?

Dr. Lepper. It is that we ask, first, before it sets goal and timetables, that the university try to identify where its problems are—whether it is insufficient in the recruitment or selection, or retention processes. We ask the university to look at all of these processes.

It may be that, in fact, the university does not need goals and time tables for new hires; rather, other employment practices may be serving to create underutilization.

Mr. O'Hara. Pay and so forth?

Mr. Holmes. Right. We ask the university to identify its problems and to propose solutions and the written plan gives us an opportunity to monitor progress in overcoming problems.

Mr. O'Hara. But you have to accept a plan. I mean if the contractor comes up with a plan, let's suppose you found underutilization and you suggest to the proposed contractor he come up with a plan.

Mr. Holmes. May I correct something, Mr. Chairman?

We don't find it. They find it.

Mr. O'Hara. They find it, all right.

Mr. Holmes. Through their utilization analysis and then they submit the information to us along with their proposed corrective action.

Mr. O'Hara. Have you ever found a submitted plan to be unsatisfactory?

Mr. Holmes. Yes.

Mr. O'Hara. All right, what are the criteria you use for judging the satisfactory performance or acceptability?

Mr. Holmes. I don't think we have, and please correct me if I am wrong, Mary. I don't think we have found a submitted plan unsatisfactory because of the level of goals, for example, that they have established for themselves. I may stand corrected on this. Most of the submitted plans are unsatisfactory simply because they have not done the basic data analyses that are required by Revised Order No. 4, the basic utilization analysis.

It is a rather substantial undertaking for a very large institution. We have had some difficulties, quite candidly, with many institutions in their developing the required statistical information, in connection with their work force profiles and overall utilization analysis. This has been the primary problem we have had insofar as unacceptable plans are concerned.

Mr. O'Hara. Let me ask. Let's suppose and let's take a hypothetical institution, and you find they have an all-white, male faculty completely. So when you do your utilization study you say, "Well, I see some disparities here between your faculty and what the available pools are and it would probably be a good idea for you if you want a

Federal contract to come up with some affirmative action proposal that would seek to remedy that."

They then turn in a proposal that says: "During the next 5 years we will attempt to have our new hires, we will, by changing our recruitment practices, completely abandon the old buddy system, we will have it so that our new hires reflect the composition of the pool."

Would that be considered an adequate response in that hypothetical case?

Mr. HOLMES. Yes.

Dr. LEPPER. I was going to say I think you hit on the key point, which was not so much the goals, but that they review their recruitment and selection practices and submit to us, not just goals and timetables for numbers of new hires, but how they are changing those recruitment and selection processes in order to reach a goal. There are some psychological factors involved here that might prevent the university, despite any kind of efforts it might make, from being able to reach a stated goal. For example, external perceptions of the university from minorities that the university is not interested in their employment and, therefore, insufficient number applied; or certain women believing it futile to apply to certain departments in the university. So we would be far more interested in looking at the process by which they were going to overcome it than the actual setting of numbers.

Mr. DELLENBACK. May I ask a question at this point? Is your objective to make certain that the affirmative action plan be a plan where the procedures followed in any given year are nondiscriminatory, as you consider the practices to be nondiscriminatory? Or, is your goal to make certain that the resultant statistic situation reflects nondiscriminatory treatment? Do you see the difference?

I see great difficulty in doing both of these particular things and I am interested in where your emphasis really is.

Mr. HOLMES. The emphasis has to be on the process and a nondiscriminatory process, one would reasonably conclude, is going to yield results. We are asking contractors to predict what a reasonable result might be given the establishment of a nondiscriminatory process.

It will yield results. If you look at the plan, Congressman, and 5 years later it has shown no results it raises a substantial question, in any reasonable person's mind, as to whether the processes that were operative in the preceding 5 years were, in fact, neutral on this subject of race.

I don't think it is conclusive evidence in and of itself that the process was so.

Mr. DELLENBACK. You express this statement down at the bottom of page 3.

> In instances where discriminatory practices have been identified, either during an on-site review or a complaint investigation, Title VI regulations call for institutions to take corrective action to eliminate any current discriminatory practices and overcome the effects of past discrimination.

Now, again using the example that has been given, let's assume you had 1,000 white males in a given situation, and also assume there is a 20-year turnover so that in any given year 50 new employees would be added. Of these 50 new employees, let's assume that 10 of these would be minority and 20 would be female and the balance would be white males.

In the first year of practice, would you expect to get approximately that breakdown? If so, at the end of 5 years you are not going to have thrown the 1,000 into any kind of numerical situation that is reflective of the total availability. It may take until all the initial 1,000 employees are gone before you get to it—if the law of averages works out and they follow the above practice.

The thing I am not clear about is which you are pushing for?

Would you insist the next year and next year and next year they go beyond that number of minority hirings—they go beyond that in females they take in—so that the resultant mass would overcome the effects of past discrimination?

Mr. HOLMES. Let me try to respond, and this is the question the chairman, I think, was striving at and we have not specifically responded. The OFCC regulations, in effect, suggest that in the life of the plan, or the end of the life of the plan, the 5 years, that goals aim toward parity. If the work force is 20 percent female, Ph. D., political science, one would expect that the composition of the faculty in X political science department at X University would be 20 percent female. That is not a quota.

We can get into that next, but let me try to respond here. As a practical matter, let me just note several things. The analyses that Dr. Lepper referred to, the recruitment analysis, selection analysis, salary equity analysis, promotion analysis, are, in our estimation much more important to correcting discriminatory factors in the employment process of an institution. We, quite candidly, do not attempt to make an issue of parity at the end of a 5-year period.

One of the most important factors, of course, in establishment of goals and timetables after a utilization analysis is turnover rate. You will find, particularly now in higher education employment, that the turnover rate is not that great, or employment opportunity has tightened. We ask the contractor to set reasonable goals, which would lead toward a reflection of availability over a 5-year period.

Inasmuch as this is a relatively young program the focus of our attention in the program thus far has been on the development of plans and not on the monitoring of plans. So we have not, Congressman Dellenback, been going back into each institution on an annual basis.

We do ask institutions from which we have accepted affirmative action plans to submit annual reports to us, but the emphasis right now has been on the development of plans.

Mr. DELLENBACK. Let me ask one more question so I am clear as to what you have been saying. What if a given institution looked at hiring and promotions and all sorts of internal practices, and they came to you with an affirmative action plan which showed very clearly that in solicitation, in hiring, and everything else that follows thereafter, they really were on target in following the nondiscriminatory practice. If they did these things, but said nothing about what they would have in composition 5 years hence, would that be acceptable?

Mr. HOLMES. No.

Mr. DELLENBACK. All right, let's return to the example we were talking about—deleting the mathematics and assuming a 20-year term because you also realize that is very important—would it be sufficient if what they said they would have in 5 years was reflective of the following policies for a 5 year period. That would mean, of course, that three-quarters of the mass, on average, would not have changed at all; however, one-quarter of the mass would have changed. Would that be sufficient?

Mr. Holmes. I indicated to you we would not take exception to that type of establishment of a goal.

We would urge the institution, as the regulations propose, that the goal be parity, but we will not, and we have not gotten hung up with an institution over that issue, if we think that the actions it is proposing to take are with regard to salary equity and broadening the recruitment process.

The goal, I think, everybody must keep in mind is a flexible thing. We are not talking about a quota. We have not talked about a quota in this program. It has been confused in the public's mind. I think that has been overcome. There is an understanding of the distribution between goals and quotas, that we are looking for them to try to reasonably estimate what the effect of their now neutral nondiscriminatory affirmative action program will produce in terms of results.

Mr. Dellenback. How can you expect them to reach parity in totality unless they discriminate in their current practices?

Mr. Holmes. You mean unless they discriminate in future practices?

Mr. Dellenback. Yes. How can you take a situation which is determined this way?

Mr. Holmes. It can be done without any discrimination in reaching parity. That is simply by considering on the merits, like they had not done previously, females or minorities on the same basis as males.

Mr. Dellenback. However, wouldn't averages say to you that you will not reach it in 5 years if you have any sort of long-range turnover?

Mr. Holmes. I think so.

Mr. Dellenback. Therefore, if you insist or push toward parity within a shorter period than 5 years in an institution that has anything substantially beyond that in turnover, you can't possibly achieve that parity, except in a bizarre unique accidental situation, unless, during those 5 years, you follow the thing which, for a catch phrase, has been called "reverse discrimination."

Mr. Holmes. Yes.

Dr. Lepper. We have accepted some plans that have established goals that do not reflect parity and we have accepted those plans in contrast to the strict, I guess, interpretation of order 4. This has occurred when an institution has been able to demonstrate in its in-depth analysis that, for instance, employment applications may be running 4 to 1 male-to-female. Since we urged institutions to select on the basis of merit as you indicated there would be a chance that parity could not be reached, so these institutions have been working out a weighted formula based upon kinds of applications they are getting and again we must go back to availability because availability varies greatly in institutions of higher education by discipline.

Certain disciplines, education, the social sciences, may be able to predict a higher new hires rates and retention rate for women and minorities than other disciplines where the availability is less. That is why we would not insist that goals reflect the parity of nationwide or international availability.

We recognize that certain institutions are going to have a better opportunity to recruit the people that are available in certain fields and there are lesser known institutions that will not have the same opportunity. Even if the national availability of women in biochemistry is 1 percent the University of Iowa, for example might not have the same opportunity to hire these women as Harvard University or MIT.

Mr. DELLENBACK. It is just as well there is no one on the committee from Iowa. If you hit Michigan, Oregon, New York, or California, you might have been in trouble—but not Iowa.

I don't mean to beat this horse to death. Personally, I very much want to proceed to parity in the resultant mass as well as in the current practices. However, I must confess that the way I read you, you are saying you will urge an institution to exercise practices on a current and immediate future basis which, viewed in and of themselves, would not reflect parity. You would urge this in order that the change in the mass would occur more rapidly than normal turnover would bring about.

Now, if you say to me, "No; what we are really concentrating on is the increment added each year. We are focusing solely on that increment and don't want institutions to go one jot or tittle beyond parity in what they do with that increment." Then, I have great difficulty in seeing how the mass is going to be brought to parity more rapidly than the normal turnover would bring it.

Dr. LEPPER. I would like to give you an example of a university I won't name that this year in their recruitment—and this one I know about because it was in the department of political science—changed both their recruitment practices and the composition of their selection committee, and after getting some 200 applications, they ranked the applications without regard to race or sex because there was still some uneasiness in this predominantly white male faculty.

Three women were the top three candidates for the jobs. Using nondiscriminatory measures, the three women still came up on top. They had to explain this phenomenon to their president to insure that they, in fact, did not use sex as a determining factor.

I would suggest to you that to remove the discrimination that has historically existed, we could have a reasonably good chance at meeting, for most universities, a better reflection of women and minorities based on their merit.

Mr. DELLENBACK. I assume that the merits of those who have been discriminated against—given a free flow—would still come to the top, which would bring about a change in plans. Just making a purely hypothetical case, if I were a young white male interested in going to law school and I applied for admission to a law school and was not able to get in and later found out that there were others who were admitted to the law school who had poorer qualifications than I because the law school was interested in trying to build up the mass and was discriminating within the current input, there might be a chance that that case would go somewhere.

Mr. O'HARA. No; because of the time involved in pursuing it, it would take too long.

Mr. DELLENBACK. Surely, justice would never grind that slowly.

Thank you. That is what is troubling us, and I am sure it troubles you, too. How do we write a law that will bring about a reaching of these goals: namely, equity for the current interim and equity with regard to the total picture. Then, how do you administer the laws that we write? At present, I am troubled as to how we are doing both.

I appreciate what you have given us in testimony this morning. You have been helpful, and I thank you.

Mr. Chairman, may I speak out of order in connection with yesterday's hearing? Mr. Kemp wanted a brief introductory statement put in yesterday's hearing record and might I ask unanimous consent that it be inserted following my opening statement at the start of the hearing yesterday?

Mr. O'HARA. Yes; without objection.

Mr. HOLMES. Congressman Dellenback, Dr. Lepper gave me a note I would like to pass on to you. I appreciate your remarks in the employment area, that one of the ways these goals may be met is by increasing availability which is a different aspect of the whole issue, of course, than getting into the admissions aspects and what have you, which I know you want to discuss, too, Congressman, but with regard to minorities in the labor market for higher education and academic employment, the primary problem right now is availability of the minorities going through the education system and graduate programs, thus then joining the labor pool, if you will, for consideration for employment.

We feel, although those are higher, but still as to access to employment by women, there are signs or patterns of limited participation.

Mr. O'HARA. Let me say, in response to that, I picked a hard example for you deliberately, because I can find it in new hires and I gave an example where you had an all-white male faculty and you were talking about achieving parity and I picked it because I thought it would help us get some clarity in what we are doing. I recognize there are other kinds of situations and there are situations in which there have been patent disparities between men and women particiularly and in which there have been promotional discrimination between men and women and status and tenure disparities and so forth between men and women on faculties and I think those kinds of situations lend themselves a little better, some of them at least to the affirmative action kind of thing than do the new hires situation.

Mr. HOLMES. But, if you focus, Mr. Chairman, exclusively on that to the exclusion of the recruitment process the answer in effect is no higher educational employment.

Mr. O'HARA. I am not suggesting you focus on one or the other, but explaining I recognize that I presented perhaps one of the most difficult problems. Clearly, I have no quarrel whatsoever with the notion that you ought to and indeed must require institutions to recruit faculty in a manner that gives fair opportunity to all, to all qualified persons who apply for and want to obtain employment and to attain promotion and so forth and so on. I think there is no question about that.

What concerns me is that some institutions have been permitted to believe, or led to believe perhaps, but at least permitted to believe, that what is required of them is contained right here in revised order No. 4, whatever it is, and that what they must do, if they are going to avoid difficulty with the Office for Civil Rights compliance, is to file a program that achieves parity in their entire work force within a certain period of time. Perhaps you will accept goals that do less than that, but you certainly don't publicize that fact, I don't think, because at least many institutions are under the impression that the plan they submit has to be one that proposes achievement of parity within a certain time frame, unless it is clearly impossible, you know.

Mr. Holmes. Well, I am troubled. I am troubled now, Mr. Chairman, because we get into the goals with quota issue "reverse discrimination," a term that you do not accept, and I can appreciate that. In the employment decision or selection process, an institution, department, or what have you, will not in the guise of affirmative action requirements sacrifice the qualifications for the position, even minimum qualifications, if you will, for the position because of some, you know, requpirement that it may perceive that it must meet that quota at the end of 5 years.

They understand it as a goal.

Mr. O'Hara. I am not sure they do. You see, I know how people act, although I have not had any experience administering an institution of higher education. I have seen this in other fields including my own field. In my experience in politics where you set "goals, not quotas," and I mean that, goals, no mandatory quotas. Very quickly the one who is apt to be challenged and lose some tangible benefit perceives that the way to avoid being challenged and the way to avoid difficulty and loss of benefit is to achieve that goal even if he has to discriminate to do it.

So you have not "required" them to do it. No, no, they did that on their own, you know. But that was the practical effect in too many cases. And don't you think that it works that way sometimes with instituptions of higher education?

Mr. Holmes. I don't doubt that in some of the reverse discrimination complaints we have received in the last year or so, that you find examples of that happening. It is interesting that in a lot of the cases the employer will go on to defend the qualifications of the individual, the minority or the female that they employ, when they are faced with a complaint of discrimination.

Mr. O'Hara. He is in the position of "damned if you do and damned if you don't." He has two positions he feels he must maintain and one of them is that he didn't discriminate and, second, he did achieve his goal. So he has to argue those ways, I am sure.

Mr. Holmes. If he does not achieve the goal, he can demonstrate to us the good faith efforts made to meet the goal and we will be satisfied. As I said to Congressman Dellenback, this is a relatively young program and quite frankly the focus of our efforts has been at negotiation of plans and we have not reached the point to any significant degree where we are judging what good faith efforts were over a period of 5 or 10 years.

Mr. O'Hara. Let me ask because we are going to be in session shortly. Mr. Benitez has not had an opportunity to ask questions, so let me ask one question and then I will ask Mr. Benitez to direct whatever questions he might have to you.

Have you ever suggested to an institution of higher education that did its own profile and proposed its own affirmative action program and set its own goals, have you ever said to one of them, "Don't you think these goals are unrealistically high and don't you think you ought to reduce them because they are unrealistically high and will in all probability require you to discriminate in order to reach them? Have you ever told one of them that?

Mr. Holmes. I don't know of a specific case. Mary, maybe you do.

But I think we have and I do know we have told institutions that they have discriminated on the basis of race or sex, particularly in their advertising, when a statement that goes out in one of the journals says, "Minorities and women only are encouraged to apply."

They have got problems with us. Mary, do you have anything to add?

Dr. Lepper. I know of only two in which we suggested to them that perhaps their availability figures might be inflated and that they should look at this and submit revised goals as appropriate at the next year's go-round. We have not necessarily said to them your goals are too high.

But we have asked them to look at both the availability figures and the patterns of student enrollment, that there simply might not be there the opportunity to reach those goals.

Mr. O'Hara. You see, I don't imagine you get many complaints—and I suspect it is far less than the actual number who could make complaints—from those who feel they have been discriminated against by an institution's efforts to achieve its goals, because they don't really feel, and we are talking about a relatively well-informed segment of society, they have not really been led to feel that they have any legal rights in that respect, enforceable legal rights.

I think they refrain, at least some of them.

I am going to ask Mr. Benitez to address some questions.

Mr. Benitez. Thank you, Mr. Chairman. I have been puzzled by the variety of factors which you have to contend with. As I understand it, you are trying to achieve a nondiscrimination situation both faculty-wise, employee-wise and student-wise insofar as sex, race and also to minority persons.

Now, do you deal in the same way with these three types of disadvantaged groupings and do you assume that they are on an equal basis of efficiency as far as opportunities are concerned?

Mr. Holmes. Well, let's take sex and minorities, title IX and title VI, and your basic legislation, nondiscrimination legislation is the same. The regulations are somewhat different, but I think you will find, as a general matter, and maybe Mr. Barrett or Mr. Miles would like to respond to this also, that our approach in many of the problems we find are similar, whether it is a case of sex discrimination or racial or national origin discrimination.

Mr. Benitez. The reason I raised the question, for instance, is that the pattern of discrimination or of disadvantage operates sexwise not only among whites, but among blacks and among minorities, so you find that there is a built-in pattern of discrimination in these same categories where you are trying to avoid discrimination.

I was just interested in whether you felt, for instance, that you could take a female for the price of two or for the price of three. I can think of a Puerto Rican black girl who could be accepted because she complied in three different categories. How do you count them?

Mr. Holmes. Well, we are talking about the individual and discrimination is to an individual. That individual could be suffering from discrimination which would be prohibited under statutory authorities in a variety of ways, one, her language and language discrimination, speaks Spanish, but does not have an opportunity for bilingual education or instruction in the English language in the U.S. school system; and, second, because she is black; and, three, because she is a female.

Mr. Benitez. That is right.

Mr. Holmes. And, of course, all three situations could be dealt with.

Tony, do you have something to add?

Mr. Miles. I think there are a couple of things we could point out. One is, in terms of remedies, the procedures that an institution must follow in identifying qualified people and the like, that much of the techniques for trying to correct the situation will be very similar, whichever one of these groups you are talking about. I think we have discouraged people trying to get a double count, so to speak, for this, because they establish a requirement based on their level of utilization by each of these categories and they are hiring some people, you know, counting them then three or four different ways, which is not really addressing this issue.

Mr. Benitez. Well, I know that in the case of the Puerto Rican student we are faced many times with the problem that if they include these three presumed stigmas, they find it easier to get in than if they don't—say if they have only two or one. I was wondering if there was a conscious counting of this criteria?

Mr. Miles. It may be difficult to actually tell how much you are getting of this. I think in the utilization analyses that each institution is supposed to do in employment, they are supposed to report it in such a way that you can tell somebody is in this situation.

Mr. Benitez. Or in the case of black females?

Mr. Miles. Yes.

Mr. Benitez. I think that there is an unscientific basis, the increment in compensatory black female teachers, I think, is greater than black men.

Mr. Miles. I think we are asking for data which would show that. But I think what we have also shows that minority females have been the most discriminated against of all of the groups we are talking about.

Mr. Benitez. Now, the only other thing I would like to point out in reference to the question that Mr. Dellenback raised is what can be done to counteract or to accelerate the equalization objective? It would seem that pro and con debate will facilitate, so long as you have admission for only 10 persons and you have 50 applicants, in that situation I believe you have a discrimination in any case, if they are all qualified, so it would seem to me that in the resolution of the problem of civil rights, the question of overall opportunities and consequentially overall resources is crucial to any eventual answer to this question rather than splitting hairs oftentimes when you have just two or three available places.

Thank you, Mr. Chairman.

Mr. O'Hara. Thank you, Mr. Benitez.

Let me ask this, because our hypothetical dealt with a faculty problem and much of our discussions have been in terms of faculty and your responses to my questions have been really in terms of faculty to the extent they have been specific.

Let's talk about a large institution in a metropolitan center that employs a significant number of clerical personnel, of custodial personnel, or blue-collar workers of different kinds and machinists and what-have-you, do you go through the same sort of procedures?

Do you have any kind of different way of evaluating the goals in those sorts of situations?

Mr. Holmes. Generally, they are the same procedures. Of course, the availability information, as Dr. Lepper mentioned, would be your census data for your SMSA.

Mary, do you have anything?

Dr. Lepper. There we have asked universities to look at their job requirements to insure that; in fact, they are requirements that are job related.

Mr. O'Hara. Would you be just as willing to accept a proposed set of goals that did not achieve overall parity within the appropriate time frame or would you be less willing in nonprofessional employment.

Dr. Lepper. I don't think we can make a general answer to it because we would have to look at the reasons why they did not achieve it, the degree to which the university, in other words, had exercised good faith efforts and the degree to which factors that were beyond the control of the university's process prevented it.

Mr. O'Hara. For instance, you don't try to make a separate determination, you don't try to create a pool in most of those cases like you would, maybe in the legal department. Do you try ever to make a determination of the number or the composition of, for instance, secretaries those, say, possessing stenographic skills?

I imagine that is overwhelmingly female because of the patterns that prevail in that particular occupation. On the other hand, if you were looking at machinists, I think you would find the number of available machinists would be mainly male. Then you might find that even some race patterns within that, if you were looking, say, for plumbers and maybe among the pool of journeymen plumbers there might not be as many minority people as in the work force you have in the metropolitan area generally. Would you permit them to use separate skill pools or would you just apply to the metropolitan area charts?

Dr. Lepper. They do use the skill pool by the census data, that is, they are broken down by job categories in the availability of the people in the area by a specific skill.

Mr. O'Hara. The census data does take it that way then?

Dr. Lepper. Yes. We have relatively good data down through almost—well, they have run fourth-generation data that gets us down to the craftsmen level.

Mr. O'Hara. Any questions?

Mr. ERLENBORN. No questions.

Mr. O'HARA. Well, in light of the fact that the House is going into session, let me conclude our hearing. But first let me say to you I really again wish to compliment you on your appearance here today. You have been very helpful to the committee.

You answered the questions in an extremely straightforward and candid manner and you have been a fountain of information to us, of factual material, and we sometimes have a hard time getting factual material in an area that is so emotionally charged as this one. I want to compliment all of you and say to you that we will look forward to hearing from you again, as I am sure we will before these sets of hearings are concluded.

Mr. HOLMES. Thank you, Mr. Chairman.

Mr. O'HARA. Thank you very much. The Special Committee on Education will now stand in adjournment until Monday at 9:30 a.m.

[Whereupon, at 11:05 a.m. the subcommittee recessed, to reconvene at 9:30 a.m., Monday, August 12, 1974.]

CIVIL RIGHTS OBLIGATIONS OF INSTITUTIONS OF POSTSECONDARY EDUCATION

MONDAY, AUGUST 12, 1974

House of Representatives,
Special Subcommittee on Education
of the Committee on Education and Labor,
Washington, D.C.

The subcommittee met at 9:30 a.m., pursuant to recess, in room 2261, Rayburn House Office Building, Hon. James G. O'Hara [chairman of the subcommittee] presiding.

Present: Representatives O'Hara, Dellenback, Esch, Kemp, and Huber.

Staff members present: Jim Harrison, staff, director; Webster Buell, counsel; Elnora Teets, clerk; and Robert Andringa, minority staff director.

Mr. O'Hara. The Special Subcommittee on Education will come to order.

Our hearings on what postsecondary education institutions must be and what they must do in the field of equal opportunities in order to qualify for participation in Federal programs will be continuing for some time.

This morning we will take testimony from four outstanding presidents of institutions of higher education, who will talk to us about the basic attitude of American colleges and universities toward the issues involved in equality of educational opportunity and employment opportunity and the experience they have had at their respective institutions in this particular area of concern.

As we have done on several occasions in the past, we would like to have each of the witnesses make such statements as the witness chooses and withhold questions until all four witnesses have presented their statements. We will then question the entire panel all at once.

The witnesses this morning include Dr. Robben Fleming, president of the University of Michigan; Dr. Robert Randolph, president of Westfield State College in Massachusetts; Dr. James M. Hester, president of New York University; and Dr. George Roche, president of Hillsdale College, also in Michigan.

Dr. Fleming is scheduled to begin the testimony, and I wonder if my colleague Mr. Esch has any statement he would like to make. I understand, first, Dr. Fleming has the good fortune of being your constituent.

Mr. Esch. I have the good fortune of having him as my constituent. I would like to welcome Dr. Fleming to the panel. I think he needs no introduction.

Suffice to say the University of Michigan has been on the cutting edge of this issue, Mr. Chairman, and in a position, if I might say, of leadership. I think it is significant to what we are about here because the university communities have a responsibility perhaps in this field because they are more visual than many other institutions and, as a result, the changes that are being brought about in our society tend to focus on those institutions which have that degree of visibility, and the University of Michigan community, that I am pleased to represent, has generally been a community that has been quite visual but also has shown a great deal of leadership in this field.

The trials and tribulations that go with the problems of change and progress in areas of social change all have impacted upon the Ann Arbor campus; but, with the leadership of President Fleming and those in the academic area, I am pleased to say that I think they have shown some direction in which it might proceed. This is not to say it has not been without problems and trials, but I am pleased to present to the panel our president from Ann Arbor.

Mr. O'Hara. Dr. Fleming, we would like to welcome you.

STATEMENT OF ROBBEN W. FLEMING, PRESIDENT, UNIVERSITY OF MICHIGAN

Mr. Fleming. Thank you, Mr. Esch. Mr. Chairman and members of the committee, as you indicated, I am president of the University of Michigan. I happen also to be president of the Association of American Universities during the current year, but I speak primarily from my experience as an institutional administrator.

Your committee has held comprehensive hearings on student aid and other related items in recent weeks, and those of us in the university world are very grateful to you. Our problems are difficult, they are important, and they do need attention.

My comments are somewhat tangential to the main thrust of your inquiry. I should like to deal with the issue of eligibility conditions the Federal Government imposes on the receipt of Federal funds by an institution and the policies and procedures used in enforcing those conditions. That question is controversial, sensitive, and characterized by a good deal more heat than light.

Let me be specific in stating both the issue and the problems which accompany current efforts at resolution of these problems.

Though there are some people who will deny it, most observers will concede that both race and sex discrimination have occurred in colleges and universities. This being so, it is not surprising that Federal laws were passed which outlawed discrimination. These laws covered a wide range of activities, including student admissions, financial aid, employment and pay practices, sports activities, and so forth. Penalties for noncompliance included loss of eligibility for Federal funds, affirmative action for remedial purposes, back pay for past infractions, and so forth.

Effective law enforcement is, in large measure, a function of the acceptability of the law in question. Since laws which attempt to change deeply rooted social views cannot help but be controversial, any Federal agency which is faced with the enforcement problem has an unenviable task. Thus, those of us who are critical have an obligation to state our views in a constructive manner. I am critical; therefore, I shall try also to be constructive.

My starting point is one of agreement with the social objectives of legislation which tries to wipe out discrimination based upon race, sex, and ethnic origin. My criticism of Government programs designed to accomplish this objective is threefold:

In the first place, the programs tend to be overly bureaucratic and therefore burdened with administrative procedures which are nearly impossible to successfully administer.

Second, multiple and overlapping lines of jurisdiction among the courts, Federal and State agencies, and attempted private grievance systems confuse those who believe they have been wronged and harass university administrators.

Third, enforcement agencies tend to treat colleges and universities as though they were industrial plants or, at the very least, identical within their own ranks, both of which are far from the truth.

The first criticism—that Government agencies are overly bureaucratic—is illustrated by what the universities perceive to be an excessive demand for the production of documentary materials plus due-process deficiencies in allowing an appropriate hearing or appeal on the university's side of the case. In many cases the documents which are required are not in existence, particularly with respect to past practice.

It is enormously costly to manually prepare such materials, although if the demand were prospective rather than retroactive, much of it could be put on computers and be made more readily available. The relevance of some of the material is not evident; the cost of compiling the information would, I think, astonish the members of this committee; and I need not remind you of the precarious financial position of most colleges and universities today.

On the due-process front, universities are particularly disturbed by the way in which these matters are handled. Agency procedures and actions are inconsistent from one geographical area to another; attempts are made to withhold contracts before a fair hearing is accorded the institution; there are problems relating to the appeal process from regional offices; unreasonable time limits for response to agency interrogatories occur; and there are dubious standards of proof in establishing the existence of discrimination.

It appears to many of us that steps could be taken to remedy these deficiencies if the agencies were to provide better training for their field and regional staffs, if there were manuals providing for uniform standards and activities in the regional offices, if there were a policy of giving early notice to institutions of the status of their affirmative action plans and of impending compliance reviews, if there were written procedures guaranteeing institutions full and fair hearings before contracts are withheld, and if there were the right, not just a privilege granted at agency discretion, to appeal actions by regional offices.

The cost and administrative burden of compiling information naturally evokes little sympathy from those who feel that they have been discriminated against. Indeed, the cost and effort might be justified if it could be demonstrated that it is productive. On the contrary, it is evident that enforcement agencies are not staffed to examine and analyze the mountains of material which they are accumulating. Unless the whole procedure is a form of punishment which is designed to produce better conduct in the future, it is hard to see what really useful purpose it is serving.

Meanwhile, it is imposing an enormous burden on universities. Surely a far simpler system could be devised which would be at least as effective, and I am confident that the academic associations would join in a cooperative effort to devise such a system.

A second and, in some ways, even more aggravating problem is the multiple jurisdiction monstrosity which has been created. This confusing hodgepodge gives a wide variety of agencies power to move into the same or similar areas. The Department of Health, Education, and Welfare, the Labor Department, the Equal Opportunity Commission, the courts, and a series of State agencies all fish in the same general pond. Nevertheless, published figures show enormous case backlogs which cannot reasonably be expected to be handled.

Out of a long personal experience in private arbitration in the labor-management field, I would argue that there is a relatively easy way to cope with this problem. In the labor area, courts, and administrative agencies honor arbitration pacts which operate fairly and within the framework of the law.

If this rule prevailed in the area of discrimination, as it presently does not, there would be an incentive to universities to establish such private tribunals on an impartial basis. There would be a similar incentive to the grievant to utilize the system because it could be made quick and effective.

As things now stand, the grievant naturally wishes to have his cake and eat it, too, by having multiple forums and there is no incentive to a university to provide an impartial system at some cost to itself when there is no assurance that its ruling will be final.

We have done some experimenting with a similar, though not identical, tribunal system at the University of Michigan. Overall it has worked reasonably well, but it is now falling apart because impartial tribunal members do not want to waste their time serving on a body which has no capacity to make a binding decision and because grievants who appear before it do not wish to forego their further opportunities before other agencies.

Should the idea of private, impartial, binding tribunals appeal to this committee and should it be willing to consider requiring administrative agencies and courts to respect such decisions, providing they were fairly conducted and within the law, I am confident that an effective system could be devised with some speed.

Finally, Government agencies which have gained their principal experience with discrimination on the industrial scene tend to treat colleges and universities as though they were factories or, at the very least, identical within their own ranks. This is understandable since this is where most enforcement personnel seem to have had their experience and because their task is so overwhelming that they see no way of coping with it except in the most simplistic terms. The members of this committee are, of course, aware of how diverse is the academic community and how much it differs from an industrial operation.

From the university standpoint, the most sensitive aspect of this last problem is in the hiring of faculty. It is clearly in the best interests of the country to have universities hire as faculty members the most competent people they can find. Insofar as they have failed to do so in the past for reasons of discrimination, such practices should be abolished. The danger, however, is that the absence of discrimination will be judged solely on the basis of the statistical representation of individuals by sex, race, and ethnic origin.

It would not, in my view, be unfair to impose upon universities the burden of demonstrating, when challenged, that their choice of faculty members is based on a fair search for candidates and on the absence of any kind of discrimination.

To impose a statistical measure of success or failure is, I think, both unworkable and counterproductive. Unfortunately, it is not clear where the Federal agencies or the courts are headed in this respect.

Though I do not purport to speak for anyone but myself, I believe that my criticisms are widely shared by other presidents of universities. Certainly they are the criticisms which I hear in the course of our meetings.

I am critical of the system employed, not the individuals who seek to make it operate. The system imposes undue data collection responsibilities on the universities; and the data, when submitted, give rise to analytical problems which are beyond the time and energy capability of the agency. The web of interrelated enforcement responsibilities is confusing to all, enormously overburdened, incapable of coping with its backlog of cases, and susceptible of replacement by a far more efficient and expeditious system.

The practice of treating colleges and universities as though they were business firms ignores longstanding differences and practices which have contributed to the growth and development of a strong system of higher education in this country.

It would appear that the enforcement program on conditions of university eligibility for Federal funds is based upon a principal of punishment. I would argue that it would be more effective if it were based on a system of incentives. I do not see the university world fighting to preserve discrimination. Few if any segment of society are more likely to be favorable to a change in social practice. It is possible for the Government and the universities to work together in this respect. An indication from the Congress that it would welcome a new and more effective way of insuring compliance with its eligibility principles would, I am sure, be welcomed in the university community.

I appreciate this opportunity to appear before you, and I shall be glad to try to answer any questions which you may have later.

Mr. O'Hara. Thank you very much, Dr. Fleming. We would appreciate it if you could stay with us while we hear from the other members of the panel.

The next witness will be Mr. Robert Randolph, who is president of Westfield State College, Massachusetts.

STATEMENT OF ROBERT RANDOLPH, PRESIDENT, WESTFIELD STATE COLLEGE, MASSACHUSETTS

Mr. Randolph. Thank you, Mr. Chairman. I do not have a prepared statement but I would like to make a few comments on the issue.

Mr. O'HARA. Please do.

Mr. RANDOLPH. One of the major problems, it seems to me, which Dr. Fleming alluded to is the lack of understanding of the nature of an institution of higher education by those who purport to carry out the enforcement powers and lack of interest, as I have observed, of even finding out the nature of a particular institution, and they differ widely over the country.

This is terribly important. I would like to give a few illustrations of this for your edification. The appropriate methods of staff recruitment and selection, as published in the various guidelines of the Federal Government, oftentimes seem in conflict. For instance, in one section of the latest, I think, HEW guidelines, it says: "No institution should practice discrimination against any person." I think we would all agree with that on the basis of race, creed, color, sex, and religion.

In the very next paragraph, where an affirmative action program is described, it says: "An institution must show, in due time, appropriate representation of minorities," and so forth.

If you are in a period of no growth, as a majority of higher education is today, I think you can clearly see the problem. How are you ever if you are in a period of no growth? I need not get into such practices as tenure and matters of this kind.

Another aspect that we are required, to be eligible insofar as under Federal contracts, is in how we manage our business affairs—that is, purchase of goods and services from business firms and how we built our buildings, what contractors we use, and so forth.

Many of us are regional institutions. Many of us take pride, as we do at my institution in Massachusetts, in relating to our local communities in how we practice our business affairs.

You can see quickly one can run into conflicts if you are to maintain your close relationships with the local community and that local community does not have within it representative minority business organizations. To break these relations, let us say, to go 100 miles away to get a relationship with a minority contractor just so you can look like you are in compliance, it seems to me, is asking us for quite a bit.

I think most institutions want to expand the opportunity for relationships with contractors of all races and practices, full equal opportunity in that area.

Another illustration could be given in terms of admissions. Many institutions, in my judgment, have tried very, very hard to increase their representation of minorities and women in their enrollment. I think many mistakes have been made in this area, in my judgment.

But here, again, if you are a particular institution, regionally based, perhaps regionally funded, and expect to—perhaps not in law but in tradition—to give first choice to those within your area, yet on the other hand regulatory agencies are saying that you are not showing yourself in compliance, you must go to New York or go to Baltimore or go outside of your area—and many institutions have almost done this—and literally force minorities into your institution—I deplore this practice. I would almost call it racist. It gives many institutions all kinds of problems.

The matter of the faculty, including minorities in their selection, could be spoken of at length. Not enough is known about this. Many published articles speak of misrepresentation of minorities and women in terms of particular disciplines but, as I observed enforcement officials, not enough attention is placed on this.

For instance, my training happens to be in the field of economics, but there are fewer than 75 blacks in this country with Ph. D.'s in economics. Many are in graduate school, but they are not qualified yet. To expect each institution in the country to have a representative member of the black community on the economics staff is unthinkable. It is impossible literally. The same thing could be said for many other disciplines.

One could give many illustrations of this lack of recognition, but I would sincerely hope that the committee's deliberation and consideration be given to, as President Fleming said, the need for training of many staff members in the regional offices of these enforcement agencies. Thank you very much.

Mr. O'HARA. Thank you very much. You will also remain so we can question you?

Mr. RANDOLPH. Yes. Thank you.

Mr. O'HARA. Our next witness is president of New York University, James M. Hester, and, President Hester, we would like to hear from you.

STATEMENT OF JAMES M. HESTER, PRESIDENT, NEW YORK UNIVERSITY

Mr. HESTER. Chairman O'Hara and gentlemen of the subcommittee, I am pleased to be present today with Presidents Fleming and Randolph to discuss the impact of the civil rights statutes and Executive orders and regulations upon institutions of postsecondary education. Since I have been president of New York University for the past 12 years, my statement will reflect the experience of that institution.

As many of you know, New York University is a large, private, comprehensive institution with some 37,000 full- and part-time students, a full- and part-time faculty of 3,200, and a nonacademic staff of some 2,500 persons. Beyond this, we operate one of the Nation's major medical centers, with 4,500 nonacademic employees and 2,000 full- and part-time faculty members who teach, do research, and undertake patient care in our university hospital, Bellevue, and allied hospitals.

New York University has a long tradition of concern for educational and employment opportunities for women and members of minority groups. Moreover, we expend almost $40 million per year in Federal funds for research, training, and student assistance. Thus, our need to undertake an appropriate affirmative action program in accordance with Federal laws and regulations is clear.

The University's affirmative action planning to date: I would like first to describe our experience in seeking to comply with the affirmative action laws and regulations. Following the issuance of Executive Order 11246 and a request by the Office of Civil Rights, DHEW, for a statement of our intentions in this regard, we submitted a plan in December 1969 to that office setting forth our program for the establishing of affirmative action goals.

Over the next 2 years, as part of that program, we initiated a major effort to develop and assemble data to meet affirmative action requirements as we understood them. An officer was appointed to be responsible for developing training programs for minority nonacademic staff.

Shortly thereafter we organized faculty and other staff to participate in this movement to alert the total university community to the needs and sensitivities of affirmative action responsibilities. More than 70 meetings were held during the spring of 1972 involving several hundred people from all walks of university life to acquaint them with these requirements and to invite all interested persons to participate in developing our policies, programs, and procedures.

By June 1972 our basic organization evolved and the Affirmative Action Advisory Council was organized. The chairperson of this council is the director of the affirmative action program.

The council identified five areas of primary concern and established committees to explore each in depth:

Analysis and monitoring of status and goals.
Benefits review.
Grievance and complaint procedures.
Promotion, upgrading, and training programs.
Recruitment and public relations.

These committees, consisting of both council and noncouncil members, worked throughout the summer of 1972 and the 1972–73 academic year. Their reports and recommendations to the Affirmative Action Council are, and will be, the basis for the university's affirmative action plan.

Our achievements: The total program has unquestionably been beneficial in many respects. Through the university's office for affirmative action and its advisory council, we have developed a mechanism for communications that reaches throughout the university.

As a result of these continuing deliberations, the university has evolved procedures that are forcing us to become more self-analytical with regard to policies and practices. For example:

1. We have expanded our sources of recruitment far beyond those traditionally used for this activity. Our search network includes advertising as well as a university committee organized to bring to the attention of academic departments and administrators broader knowledge of qualified minorities and women professionals from both within and outside the university.

2. We have undertaken as well a more objective evaluation of existing faculty and staff, of applicants, and of salary and fringe benefits for the various categories of employees. Well-documented procedures have been established within the several faculties for recruitment, promotion, and salary increases.

3. We have developed a program for improving the status of women and minority employees of the nonacademic staff. A career counselor has been appointed to oversee this activity and to make recommendations to improve training.

4. For the past year, all nominations for faculty have been reviewed for compliance with affirmative action regulations.

5. Relatively little information had been collected up through March 1972 on our faculty and nonacademic staff population. The affirmative action program was a stimulus to develop more complete data and to analyze these data.

In short, the positive impact of these affirmative action efforts has been substantial for the university community. However, these significant achievements have to be balanced against other considerations.

Some problems resulting from affirmative action implementation:

1. The setting of numerical goals has been especially difficult for New York University because the affirmative action program came at a critical time in our history. We were beleaguered by a series of unusual problems that demanded the almost total effort of the central administration to insure the university's survival. Our financial outlook was bleak because of these factors.

Only through the undivided attention of the university administrators, deans, and large numbers of faculty were we able to emerge from under this cloud—at a great loss, to be sure. We sold off a campus, transferred our school of engineering and science to another institution, diminished our faculty by some 300.

As a result, it has been virtually impossible to develop realistic numerical affirmative action goals for the long term. However, we shall be attempting to establish such goals early this coming year.

2. At this point, I should like to indicate a major concern. In encouraging our department chairmen and deans to make specific numerical projections of their goals for hiring women and minority faculty members, we hope that we are establishing goals toward which good-faith efforts will be evaluated in a realistic fashion.

Undoubtedly many of the aspirations experienced in numerical terms will be impossible to fulfill. Nevertheless, unless ambitious goals are set forth, the thrust of the affirmative action effort is likely to be less vigorous than if more conservative goals are chosen.

No one seems to know how these goals will be treated in subsequent evaluations of compliance. This is one of the most delicate issues facing American colleges and universities at this moment. The Federal philosophy with regard to evaluating good-faith efforts to meet numerical goals needs to be spelled out clearly and quickly. There is considerable apprehension in the minds of many educators over this question.

3. New York University has been affected in a negative way by the implementation of recruitment goals for black and other minority faculty at many other institutions. Historically we had been in the forefront of the predominantly white institutions that welcomed minority faculty members. Since 1968, however, we have experienced a diminution in the number of such professionals because of extremely attractive financial offers made by these other institutions.

4. Increasing demands for data by the Federal agencies have become a costly and time-consuming burden throughout the university. And many times these data are to be supplied on exceptionally short notice. Also, we are asked to detail certain types of data such as a racial-ethnic census of students every 2 years without knowing whether previous reports have been evaluated in any manner or without clear indication of their usage.

Periodically, investigators from the Department of Labor will appear, as they have for more than a year now, to ask far-ranging questions on wages and hours pertaining to possible sex discrimination without indicating whether specific charges have been made against us.

5. The university has borne a significant additional burden from lawsuits under the civil rights legislation and related regulations. Since 1968, we have been involved in at least 43 complaints before the City of New York Commission on Human Rights, the New York State Division of Human Rights, the U.S. district court, and the Equal Employment Opportunity Commission. Every one of the 34 completed cases has either been dismissed, withdrawn, or resulted in a decision in favor of the university; nine cases are still pending.

It would seem that "affirmative action" is being used as an excuse for initiating many unfounded cases, at great expense to the university. We wonder whether the estimated cost of $350,000 per year we have experienced thus far to gather data, respond to legal actions prompted by Federal and other legislation, and to establish our affirmative action program should be the sole responsibility of the university.

In conclusion, we concur with the need for affirmative action programs and with the fundamental concept that discrimination must be overcome wherever it may exist. We pledge our best efforts to make the Federal agency higher education system for compliance a workable one.

Mr. O'Hara. Thank you very much, Dr. Hester.

Our final witness before we begin directing questions to the panel will be the president of Hillsdale College in the State of Michigan, Dr. George Roche. President Roche, would you give us some of your views, thoughts, and experience with affirmative action programs at Hillsdale?

STATEMENT OF GEORGE C. ROCHE III, PRESIDENT, HILLSDALE COLLEGE, MICHIGAN

Mr. Roche. Thank you very much. At the risk of either repeating or contradicting something that has already been said, I think perhaps I could begin by suggesting that one of the goals which most Americans have shared, one of the cornerstones of the American self-assumption, has been that each person should be judged as an individual, on the basis of his own merits.

Thus, at first glance, a program such as affirmative action is potentially attractive to many people since it promises action in eliminating discrimination. Most Americans agree that discrimination is wrong when it treats people as members of a group rather than as individuals.

However, the question which needs to be raised concerning affirmative action is: Who is discriminating? Is affirmative action the next step in achieving the American dream—or is it a new and particularly vicious form of discrimination?

At the heart of this matter lies a fundamental question concerning group rights versus individual rights. The HEW directives which now attempt enforcement of group proportional rights are pushing toward a major change in this Nation's traditional conception of equality and opportunity.

Affirmative action, which evolved from an attempt to end discriminatory practices, has now been elevated to the level of an ideology in its own right. The means has become the end. The bureaucracy which pressed affirmative action upon the academic community does so in the apparent assurance that discrimination is the means to achieve true equality. Individual merit is to be set aside in favor of a new, collective goal for the social order.

Nowhere have the results of affirmative action been more disappointing and damaging than in the field of higher education. In the earlier stages of affirmative action, it was not yet clear to many people within the academy what the program involved or how far reaching its effects would be. Many professors, secure in their own position by reputation or tenure, have only recently begun to appreciate the hiring difficulties of many schools and qualified scholars.

Most of those same professors have long recognized that blacks, members of other minority groups, and women have been denied various opportunities without proper regard to their qualifications. Those professors greeted with approval the Federal Civil Rights Acts of the midsixties and the Executive order banning further discrimination. They looked forward to the day when all individuals would be judged on the basis of their abilities, not on the basis of their sex, race, or group membership.

By the early seventies, many of these professors were facing a painful disappointment. The news was beginning to circulate that the programs presumably devised to fight the old discriminations were introducing new discriminations of their own, wholesale. In the name of public policy designed to remove discrimination from the academic community, the thrust of HEW affirmative action programs seemed to be demanding the deliberate introduction of discriminatory quotas.

Affirmative action, through a mixture of idealism, excess zeal, and political authority, seemed to be destroying precisely those values which it had been brought into existence to protect. Equality of opportunity had been increasingly set aside in favor of equality of result, thus denying the whole basis of professional qualification or individual achievement.

The new programs were treating people as members of groups rather than as individuals, and the reaction within the academic community began to be increasingly critical. Columbia University Philosophy Professor Charles Frankel fumed: "We haven't had this kind of intervention since the days of Joe McCarthy."

John Bunzel, president of California State College at San Jose, agreed:

> I've heard cases of people hiring someone just to avoid a hassle with the Federal Government. I know of people who have gotten letters saying, "Your qualifications are excellent but we are looking for a black or a woman this year."

Reverse discrimination has been the direct and inevitable result. A quota, goal, guideline, or whatever which enforces hiring preferences according to sex or race can do so only by denying otherwise qualified candidates proper consideration for the same position. Affirmative action quotas are, by nature, inflexible. Such quotas can achieve their announced end only by enforcing the very discrimination they once set out to stop.

Meanwhile, what effect does affirmative action have upon the minorities we are trying to help? Here the story is saddest of all.

One of the casualties of affirmataive action has been the black college and university. Competition has become so intense for qualified black professors that the black schools are losing their most qualified faculty members to those large, prosperous, predominantly white institutions that can afford to pay substantially higher salaries.

Meanwhile, qualified minority members are also penalized by affirmative action. What quotas and special privileges are saying all too clearly is that the minority member just doesn't have what it takes and, as the result, must be given what he is unqualified to earn.

Even the minority member who earns his competence will surely be undermined as the result. The suspicion will be present in his mind and everyone else's that his success may be due to special privilege, not talent and hard work. No one resents this aspect of affirmative action more bitterly than the qualified minority member himself.

One of those highly qualified blacks is Prof. Thomas Sowell of the University of California of Los Angeles, now on leave at the Urban Institute in Washington, D.C. In response to what has become known as an affirmative action letter, Sowell stated his case plainly.

SEPTEMBER 18, 1972.

PROF. FRANK C. PIERSON,
Chairman, Department of Economics,
Swarthmore College,
Swarthmore, Pa.

DEAR PROFESSOR PIERSON: This morning I was pleased to receive a letter from Swarthmore College, an institution for which I have long had respect, and reports from which have added to my admiration.

Then I opened the letter and learned that "Swarthmore College is actively looking for a black economist . . ." and the phrase that came immediately to mind was one from a bygone era, when a very different kind of emotionalism was abroad, and a counsel facing Senator Joseph McCarthy said, "Sir, have you no shame?"

What purpose is to be served by this sort of thing? Surely a labor economist of your reputation must know that unemployment among black Ph.D's is one of the least of our social problems, and has been for years—long before "affirmative action." In general, even, the salary is no higher at a top college than at less prestigious institutions for a given individual. So you are doing very little for black faculty members with broadcast recruiting campaigns like this (I note the letter is mimeographed). Maybe you think you are doing something for race relations. If you are going to find a Swarthmore-quality black faculty member, that is one thing. But Swarthmore-quality faculty members are found through Swarthmore-quality channels and not through mimeographed letters of this sort. Many a self-respecting black scholar would never accept an offer like this, even if he might otherwise enjoy teaching at Swarthmore. When Bill Allen was department chairman at UCLA he violently refused to hire anyone on the basis of ethnic representation—and thereby made it possible for me to come there a year later with my head held up. Your approach tends to make the job unattractive to anyone who regards himself as a scholar or a man, and thereby throws it open to opportunists.

Despite all the brave talk in academia about "affirmative action" without lower quality standards, you and I both know that it takes many years to create a qualified faculty member of any color, and no increased demand is going to increase the supply immediately unless you lower quality. Now what good is going to come from lower standards that will make "black" equivalent to "substandard" in the eyes of black and white students alike? Can you imagine that this is going to reduce racism? On the contrary, more and more thoughtful people are beginning to worry that the next generation will see an increasing amount of bigotry among those whites educated at some of the most liberal institutions, where this is the picture that is presented to them, however noble the rhetoric that accompanies it.

You and I both know that many of these "special" recruiting efforts are not aimed at helping black faculty members or black or white students, but rather at hanging onto the school's federal money. Now, I have nothing against money. I have not been so familiar with it as to have contempt for it. But there are limits to what should be done to get it, and particularly so for an institution with a proud tradition, at a time when the government itself is wavering and having second thoughts about this policy, and when just a little courage from a few men in "responsible" positions might make a difference.

Yours sincerely,

(Signed) THOMAS SOWELL.

Professor Sowell has ample reason for his anger. A young black woman with an IQ of 142 and comparable grades and recommendations was told by a national organization that she should be eligible to receive financial aid for legal studies if her scores were low enough. The scores were too high; the aid was denied.

Another young black applied for a well-publicized doctoral fellowship specifically for black students. The fellowship was denied to this student, despite his brilliant academic record, because his social and political views were insufficiently militant.

The current thrust toward "helping" the minority member in pursuit of his education seems determined to penalize real achievement wherever it appears.

Meanwhile, the unqualified minority member is also cheated in the education which affirmative action promises. In the early 1960's, a great drive was underway to bring minority students to predominantly white schools. Between 1964 and 1970, the number of blacks on previously white campuses jumped 173 percent, from 114,000 to 310,000.

The promise held out to a generation of young blacks was a lifetime of material success within "the system," a promise which higher education could not hope to deliver, especially since many of these minority students attracted to the campus were unprepared for the life and work which was thrust upon them.

Just as many of these students are ill-prepared to participate in higher education, so are many of their professors ill-prepared to offer a quality experience to their students. Affirmative action has greatly aggravated this tendency. The attempt to achieve a statistically adequate representation of women and ethnic groups on college faculties has tended to produce a rush to discover sufficient numbers of well-qualified professors with minority credentials.

In actual practice, the numbers demanded of such minority types far exceed the qualified people available. Thus a strange new word has entered the affirmative action dialog. Today we talk about the appointment of persons who are not qualified but who are "qualifiable." In point of fact, the guidelines state: "Neither minority nor female employees should be required to possess higher qualifications than those of the lowest qualified incumbent."

Has merit come to mean only equality on the lowest level of performance? Not only does this do an injustice to the institution and the students coming in contact with faculty members unqualified to hold their positions but also it excludes from consideration large numbers of an entire generation of young scholars, quite well qualified to hold a position, yet often rendered ineligible by virtue of their nonmembership in an HEW-approved minority group.

Unfair discrimination and the lowering of standards go far beyond reverse discrimination. Today even well-qualified blacks are passed over for consideration because they are not from the ghetto. The search is not merely for blacks but for "authentic ghetto types."

Not only have the bad results of this program been visited upon those minorities which the program was intended to help but the institutions through which these minorities seek to obtain an education have also been damaged.

The briefest examination of a completed affirmative action plan should make it abundantly clear how high the costs are in preparation of the original material. It has been estimated by the business manager of a large Midwestern university that $1 million would be necessary to make the transition to the new set of records and procedures demanded by affirmative action on his campus. This figure does not include the continuing costs involved in the maintenance and monitoring of an affirmative action program.

One academic investigator deeply involved in studying the impact of affirmative action programs on a number of campuses conservatively estimates that an ongoing affirmative action program, operated within HEW guidelines, would consume 50 percent of the total administrative budget of a typical school.

At a time when resources for higher education promise to be in increasingly short supply in the years ahead, such administrative costs are likely to have a great impact, probably further increasing dependence upon political funding.

Another problem arising within the academy as the direct result of affirmative action is the application of improper measurement standards, standards unsuitable to higher education. The language and practices developed by the Labor Department for application of affirmative action programs in industry have been imitated by HEW and applied to higher education.

There should be recognizable difference between a plumbers' union and a faculty. There is also the vital difference that the university is a highly decentralized institution which HEW now proposes to administer, not only as though each school was a tightly knit unit but also as though all schools were nothing more than interchangeable units of "the education industry." Such standards cannot be applied without doing lasting harm.

Lowered standards in admissions and faculty hiring, induced by HEW standards and such bizarre notions as the "qualifiable" candidate, will also inevitably have an effect throughout all segments of higher education. It should be obvious that the hiring of a faculty member on any other basis than the particular merit of that individual faculty member must, in the long run, be prejudicial to the quality of the institutional faculty so affected.

The responsibility of each faculty and administration in this country is to find the most qualified person available for a particular post regardless of race, sex, religion, or national origin. Any other basis for selection is not only discriminatory but must necessarily be a downward step in the quality of the institution.

The same situations apply for admissions policies in academic institutions. Those institutions which have experimented with lowering their admissions standards to achieve racial balance have then found that the students admitted under the lower standards can be retained in school only if the institution is willing to lower its classroom standards as well. As in the case of discriminatory hiring, discriminatory admissions practices work directly contrary to the ideal of quality education.

Perhaps one of the most saddening aspects of the entire affairs is the special damage which affirmative action inflicts upon the very people for whose benefit the program presumably operates. The hiring of professors or the admission of students on any other basis than ability works a particular hardship on the "favored" groups.

The qualified, achieving students and teachers can never be sure of where they stand. How can one build an academic standing when neither he nor his colleagues will ever know for sure whether he is there because of ability or because he was part of some racial or sexual quota?

The unqualified student or professor fares even worse. Such a person can be retained only by lowering standards and thus cheating those involved of the education they have been promised.

The U.S. Office of Education has recently announced that it is engaged in developing new standards to apply to those organizations which accredit colleges and universities. Accreditation is a major factor in higher education. Without it, a school cannot hire qualified faculty, cannot guarantee students that scholastic work will be recognized on a transfer basis by other institutions, and indeed probably cannot long survive in the present academic climate.

And now it is proposed by the U.S. Office of Education that this life and death power of accreditation be made subject to a single national pattern. One of the suggested items in this new pattern would be that accrediting agencies have "ethical standards for institutions and programs in such areas as discrimination in admissions and hiring * * *."

Such total Federal control for all schools, whether or not they receive Federal funds, is not far down the road. The National Institute of Education has already received an initial grant of $92 million to facilitate research and central planning for the new national programs.

These principles are coming to faculties now in the affirmative action assumption that racial and sexual faculty proportions should be identical to the racial and sexual proportions of society, as a whole. Attaining such racial and sexual proportions is a practical impossibility.

For example, there simply are not enough academically trained women to staff 50 percent of America's institutions of higher learning, though this fact does not deter the attempt.

Nor does any concern over finding academically qualified persons in such larger numbers seem to dismay the ideologies. Sacramento State College has sent out letters announcing:

> Sacramento State College is currently engaged in an Affirmative Action Program, the goal of which is to recruit, hire and promote ethnic and women candidates until they comprise the same proportion of the faculty as they do of the general population.

The practical reality is: The enforcement of minority quotas on faculties is lowering professional and academic standards. The further affirmative action inflicts its ideology of statistics on the universities, the less they will be able to call themselves institutes of higher education.

As in the case of minority quotas, serious confusions and potential injustices are involved in academic quotas for women. How does a school determine that women are "underutilized"? The current recommended bureaucratic method is to measure the percentage of degrees granted nationally to women in a particular discipline against the percentage of total teaching positions held by women in that same discipline on a particular campus. Never mind whether those women available nationally wish to teach at your school; never mind whether you have positions available to offer those women; above all, never mind whether or not those women candidates interviewed for a job are the best qualified for the particular job in the opinion of faculty and administration. No; the only deciding factor is to be the quota.

And the quota for hiring women is in process of upward revision. Those zealots who think in quantities rather than personalities have decided that an insufficient number of women are entering academic life. Why not have as many women as men completing terminal degrees and assuming teaching positions? Why not indeed, unless women, for whatever reason peculiar to their individual taste and judgment, would prefer to do something else.

In an effort to force upward revision of the academic quotas for women, title IX of the 1972 Higher Education Act contains provisions prohibiting sex discrimination in all federally assisted educational programs. Under special scrutiny are institutions of professional and graduate education. HEW has yet to formulate complete guidelines for the project, but it seems clear that graduate schools will soon be required to establish sex quotas for admissions and for numbers of graduates. One such program already contemplated by a western university has been described in the following terms:

> The university would be charged with the responsibility of conducting an analysis of its students to determine where women are underrepresented, setting reasonable goals and timetables for correcting underrepresentation and designing a program through which it would achieve these goals. Appropriate steps to take under this procedure would include: A review of admission procedures; the selection of admission committee members on the basis of their ability to be impartial with regard to the admission of women; a review of financial aid distribution; the development of affirmative recruiting techniques; and the integration of courses concerning women into the curriculum.

Even after we have decided whom to reward and whom to punish, we are still faced with a problem: How do we gather information to measure quotas for various minorities?

There are a number of State and local laws specifically forbidding the requirement of racial, sexual, religious, or ethnic information as a condition of employment. Presumably, all this is now set aside. Questions and answers for higher education guidelines states:

> Under the principle of Federal supremacy, requirements for information under the executive order supresede any conflicting State or local law. An individual, however, is not legally bound to report such information about himself.

The real problem lies in the fact that the institutions involved are required to provide that information under affirmative action, whether or not the individual employees are willing to cooperate. Columbia University conducted its inquiry into such matters in a way which would give the necessary A.A. information and still not involve individual faculty. "Census reporters" were appointed in each division of the school. These reporters were to make ethnic identifications "based upon the reporter's general knowledge and observation of the employee." Applicants for new positions, HEW requires that all applicants be classified, whether or not subsequently employed, were to be checked out by "visual survey." All of this was to take place without the knowledge of the individuals being "surveyed."

This is ridiculous. It is hard enough, in some cases, to tell an individual's sex at a glance, much less ancestry or oppressed status. A few short years ago, had a novel described such a system of ethnic measurement at some fictitious university, it would have been received as a farce or a fantasy. Today such antics are undertaken as a serious enterprise.

Those institutions more open in their measurement techniques have also had their problems. A sociologist at Syracuse University, attempting to gather information on the status of black professors in predominantly white schools, quickly discovered the reason: Many of those contacted in his national survey simply refused to cooperate. A number of the faculty members labeled black by the sociologist's informants returned their questionnaires with "white" indicated as their racial preference. Other professors wrote, asking for more information:

> I would request you kindly to define more precisely what you mean by the term "black"? Am I right in supposing that you are seeking information regarding American faculty of African descent? Or do you wish West Indian and African faculty members to be included—or dark skinned faculty from other countries?

Michigan State University has also had its problems in computing minorities. Robert Perrin, vice president for university relations, has described what he calls "the numbers game," a game involving collection of vast amounts of statistical data concerning the employees and students of a school. He bemoans the lack of cooperation among those persons being counted. For example, some 150 MSU students categorized themselves as American Indians, 15 times the actual number on campus. Others returned cards with additional categories marked: "Super Jew," "Texan," "50th generation Hun," or "female," as Perrin describes the result, "One determined iconoclast not only mutilated and spindled his computer card, he stapled it as well."

If the President of the United States has the power to command colleges and universities to establish faculty quotas on the basis of race and sex, why not faculty quotas on the basis of ideology or party membership? Unless we answer definitely the questions concerning which portions of society are public and which are private, our inevitable tendency will be toward the totally politicized state.

Today Federal power within the academy has already grown to life and death proportions. Federal funding already provides great leverage. The situation seems well on the way, through a variety of channels, to applying the same pressures to all colleges and universities, whether or not they receive Federal money. This seems to be the assumption of much Federal policy.

Elliot Richardson, former Secretary of HEW, defended affirmation action by claiming it was the Federal Government's vital interest to assure "the largest possible pool of qualified manpower for its projects." As Prof. Paul Seabury immediately asked, "Does HEW now regard universities as Federal projects? If so, how far down the road of government control have we come?" In view of all the pressures discussed in these pages, pressures involving funding, accreditation, admissions, faculty hiring and nearly every other aspect of campus life, to be administered by a variety of Federal agencies, parallel State agencies, and the courts, it seems clear that we have come a long way indeed.

Not only is the power of self-determination passing from the academy, but in many cases the rise of affirmation action is destroying quality and standards as well. Higher education must have no priority ahead of the search for truth and the perfection of learning standards. When "social justice" supplants these goals within the academy, the result is likely to be a misdirection of attention and scarce resources from the primary goal of education.

One effect of that misdirection has been the extremely expensive administrative costs which accompany affirmative action. One small college president announced: "To tell you the truth, my little college simply does not have the personnel to go through all our records and do the necessary homework." The Office of Civil Rights investigator replied: "Too bad. You will just have to dig somebody up to do it."

Another highly disturbing aspect of the present rush toward affirmative action has been the cavalier attitude adopted toward traditional legal guarantees. The OCR tendency has been to dismiss those abuses of legal rights which have arisen in AA programs on many campuses as mere "excesses of zeal" on the part of local officials.

In June 1972, Stanley Pottinger publicly declared:

> I am convinced that the specter of lost autonomy and diminished quality among faculties is one which obscures the real objective of the law against discrimination.

As one commentator has observed, Pottinger seems to be implying that a law's consequences should not be allowed to obscure the intentions of its maker. For the zealot, good intentions are always enough. Presumably we may then overlook the harmful consequences of such laws.

And harmful consequences there are in abundance with affirmative action. For example, one of the root assumptions of Anglo-American jurisprudence has been that the accused is innocent until proven guilty. Not so with affirmative action, which assumes the educational institution guilty of discrimination until the school proves its innocence. Personnel records, previously considered confidential, are now regarded as fair game in affirmative action investigations, with no interests whatsoever displayed by the bureaucracy in securing permission from the persons whose personal files are thus converted into public property.

What we all want, and what some members of society presently lack, is acceptance as an individual by others. It is that acceptance which constitutes genuine equality. Each of us wants to be a person in his own right. Such acceptance can hardly be produced by governmental compulsion. Compulsion smothers any creative response to a problem.

Quotas undercut acceptance for the individual. No matter how many legal guarantees enforce the quota, the primary effect is a stoppage of the acceptance and the opportunities for individual development which we seek. If a person lacks qualification for a position, it is a disservice to that person and to society as a whole to enforce a quota and compel legal acceptance.

Quotas limit rather than enhance opportunity. They degrade rather than dignify. As one pastor of a Harlem church put it, speaking for all quotas-entrapped groups, "If we are going to be judged without discrimination then we will also be judged without pity." The only equality with real meaning is that based upon an absence of prejudgment. The quota is itself a prejudgment, institutionalized with the force of law, standing as a permanent obstacle to true equality.

Perhaps the route toward alleviation of our present discontents lies through a restatement and redefinition of the equality we seek. A vast majority of us want genuine equality of opportunity for all citizens. Discrimination on the grounds of race, sex, religion, or any other group oriented basis is simply unacceptable. But the course we now pursue is calculated to enforce a peculiarly American version of apartheid, and apartheid which not only sets race apart, but adds sex as another category of public regulation.

By every standard of simple equity, by the standards of the American dream at its best, in the interest of all individuals, especially in the interest of the "disadvantaged," and finally in the interest of society as a whole, we must understand that the egalitarian dream now pursued by affirmative action programing on the campuses of America's colleges and universities is undercutting the very structure of the open society. The commendable quest for equality of opportunity must not be confused with the shoddy, politicized quotas of affirmative action.

Despite our problems, one of the central facts of American history has been the achievement of a high degree of individual equality for most citizens. Perhaps the nation somehow sensed that human beings achieve their fulfillment in what they become. Certainly we are most fully ourselves as we aspire to further development, and enjoy the freedom to pursue it.

It is in connection with our aspiration that we seek equality for each person. Surely race or sex is an inadequate basis for such equality. We do not aspire to be black, white, or yellow, male or female. These categories are facts of existence, but the achievement which we seek in life must lie elsewhere, and it is elsewhere that the definition of true equality must also be located.

For this reason affirmative action, it seems to me, is unacceptable. I for one am delighted that Congress is now examining the fact of A.A. programing. Surely, neither Congress, and certainly not the voters will tolerate bureaucratic abuse of higher education and individual dignity now being perpetrated in the name of affirmative action.

Thank you.

Mr. O'HARA. Thank you very much, President Roche.

Thanks to all of you for your statements.

You properly directed your testimony today toward the problems of the institutions of higher education and the peculiar problems they face, but I would like to take some exception to what has become, I think, a fashionable method of analysis among educators; that is, that affirmative action involving goals or quotas or whatever it might be is OK for everybody else but not for institutions of higher education.

I think, if you believe that, you have not been talking to employees of industry much recently. I think you will find that if there are two men in the tool room, and one has been working there longer than the other and has achieved a higher level of competence and it comes time to promote one of them and the other is promoted, you will find a very unhappy fellow, and he would not agree with you that that is OK. He might take some exception to its application in that industrial kind of work.

Dr. Fleming.

Mr. Fleming. May I respond for a minute to that, because I think it is a legitimate criticism. At least, speaking for myself, I don't mean to suggest that it is all right for everybody else, and it is not all right for us. I, for instance, think there is a difference between goals and quotas.

I am not opposed to a goal situation, and we do attempt goals at the University of Michigan. I have spent a lot of time publicly, trying to explain to people I think there is a difference between goals and quotas. The difference is essentially this: I was explaining it in terms, for instance, of our minority enrollment. We agreed some years ago to try to reach a goal of 10 percent of minorities and, particularly, in this case, blacks.

We have not yet achieved it, and the date has passed by which we expected to achieve it. The reason we have not achieved it is that we insisted in our program upon a minimum threshold of admittance standards, that we have turned down, therefore, all applicants who fell below that level.

Now, we could have reached 10 percent, and had there been a goal, we would have reached it, or rather had there been a quota, we would have reached it. Because it is a goal. Because it is a goal, we said:

> No; we will try to do that, but we will not do it if doing it means taking people who basically are unqualified to come to this University.

In any event, I was not referring to that particular aspect of the difference between an industry and a university. One of the biggest differences I find is something President Roche touched upon; that is, universities and colleges tend to be quite decentralized operations. It is very difficult to tell who is management in a university, because a great many decisions are made at departmental levels, at college levels and so forth, and it is not like in industry, where decisions tend to be made, particularly policy decisions, on a much more centralized basis than they do in colleges and universities. That, I find, is a particular difference between industry and universities.

Mr. O'Hara. Well, the temptation is great to wander off into that example you gave, and I don't know if I am going to yield to it or not.

Well, just for a moment—the university has not met its quota or its goal, which is not a quota, because it does set a certain minimum threshold for admission, right? You are talking about students, and that is not really the subject of our discussion.

Mr. Fleming. That is right.

Mr. O'Hara. But, on the other hand, you don't, do you, exact the same requirements of minority students for admission that you do of other students? In your school of literature, arts and sciences for this coming entering class in September, more have applied than will be admitted, isn't that the case?

Mr. Fleming. That is true.

Mr. O'Hara. And in selecting those who will be admitted, you had reliance upon high school performance, for entering freshmen, that is, and you had reliance upon recommendations of school counselors and upon scores achieved by students in SAT tests and ACT tests?

Mr. Fleming. Yes.

Mr. O'Hara. And I think you also require applicants to take the substantive test administered by the College Testing Service? So, you use all of that. Then you say: "All right, we are going to have a cutoff around here somewhere, and it generally gets out to a SAT of around 1,200 and certain other persons, and then, in addition in an effort to meet your goal, you admit certain minority students who do not measure up to that standard, isn't that correct?

Mr. Fleming. No doubt about it, we never denied this. We said this very candidly, publicly any number of times, and we justify it—justify doing it really on this basis; when we are dealing with all students like, say, "all other students," admission standards are based essentially on high school grades and test scores. There was a day when the university was much smaller when we also dealt a good deal in recommendations of their high school people. We have not done it much in recent years, since the University has become so large.

We rely on all other students essentially on the basis of grades and test scores. Where concerned with minority students, we have in addition added the dimension of what their high school counselors say about them—is this a student that can make it at the university? If the answer to that is "yes" and if the test score and high school grades meet what we consider a threshold which does mean that, that student can do the work required, because we don't want two standards at the university, then we have admitted them.

We have done it on the theory that in order to bring in any significant number of minorities, which we believe is good for the rest of the university, we will do it on that basis. Otherwise, we recognize we will not get more than a very small number at this point in time.

We hope that that situation will change over a period of time, but we do do it and we have always said very candidly exactly what we are doing. And we do get criticism of it, but it is interesting that by and large, we get very considerable acceptance that we are doing that.

Mr. O'Hara. I don't know, you know, that is a value judgment. You see, it seems to me, it is only a difference of degree between saying: "Well, we don't admit anyone who is not—who does not possess the minimum qualifications," on the one hand, or saying, "Well, we require everybody to have the minimum qualifications, but we require majority applicants to have greater qualifications than minority applicants." I think that is a difference in degree.

In fact, now, I am reading this back into some of our discussions, in fact, it is very much the same sort of thing, Dr. Fleming, to which you objected when an effort was made to impose that standard on your faculty appointments.

Mr. Fleming. I would argue there, Congressman, it is quite different as a matter of fact. When you bring in students, you are bringing in temporary people, who will be there for a relatively short period of time. You can bring them in, if they do the work, as indeed we judge they are capable of it, then they will come out with a degree and move into society and so forth.

When you hire faculty people, you are hiring people whom you hope will be with you for a long time, therefore, you want the very best people you can find. Those are the people who are going to have an impact on generations of students, not just a single group as they come in. They are going to have an impact over a long period of years. That, I think, is different from the other objective.

Mr. O'Hara. In a situation where you are dealing in terms of the individual injustice involved, where you are dealing with a limited resource in the one case of faculty employment and the other case admission or places in the University of Michigan's School of Literature, Arts and Sciences and you ration those scarce resources on a basis that takes into account a person's race, it seems to me that is discrimination.

Mr. Fleming. There is an inequity, I don't think there is any question but what there is an inequity about it, but the question is, is it a legitimate inequity which you carry on hopefully for a limited period of time in recognition of an even greater inequity which has occurred over a long period of years in making it possible for those students to come into the mainstream of universities. You can argue that.

Mr. O'Hara. I don't recognize any legitimate inequities. I am sort of old fashioned.

Mr. Fleming. I would argue there have been.

Mr. O'Hara. I know my colleagues are anxious to get into this—and before I give up my prerogative of my chairmanship, I think President Hester was trying to get a word in edgewise—did you wish to say something?

Mr. Hester. I wanted to comment on one aspect of the subject you raised with Dr. Fleming. Part of the reason that we have applied a somewhat different standard to the admission of minority students is, that we recognize that the measures that we use are not perfect. The high school averages and SAT scores and all of the other measures are not perfect measures of a person's capability.

In the case of the majority students, we have no choice, we have to use this. We are, as part of our affirmative action philosophy, attempting to increase opportunities for members of minority groups to prove themselves in society, to take advantage of higher education to get into the stream that will lead them to professional positions. So, by taking a few more risks, there, we do enable people who might be excluded by rigid application of our scores from trying out in college and having the chance to do it, and that has proved to be correct—that, sometimes, because of poor previous schooling, high school environment in which there was not enough stimulation or adequate instruction, these difficulties have been overcome in college. And students who would not have been admissible under the general standards have been able to go forward, go to graduate school and become part of the pool of people qualifying for professorships.

Mr. O'Hara. I don't object to your doing it on some nonracial basis—you say you are going to give special incentives to people coming out of poverty, to children of migrant workers of whatever color, if you were going to do that——

Mr. Hester. Excuse me, we do do that. We don't limit it to black or Puerto Rican.

Mr. O'Hara. If that was all you did—searched out people who you felt were qualified for admission because they had overcome handicaps, physical, social, economic, and what-have-you, and they were demonstrating strength of character and determination that you felt weighed heavily in their favor, and did it on a nonracial and nonsex and non-ethnic basis, I would have no complaint about that. That seems to me to be a sensible way of doing it.

Mr. Hester. No; we are doing it on that basis.

Mr. O'Hara. You are also doing it other—for instance, if a black Congressman's son and mine were both to apply, you would consider the application of my colleague's son in a different scale than you would my son, wouldn't you?

Mr. Hester. I doubt that very much.

Mr. O'Hara. Well, I think you would see from the pictures that they submitted that one of them was a minority group member and the other was not.

Mr. Hester. An advantaged minority group member has the same difficulty getting in as an advantaged majority group member.

Mr. O'Hara. Is that true in your system?

Mr. Fleming. Yes.

Mr. Hester. In any case of programs for the advantaged at our institutions and many others, they apply to all disadvantaged groups, not just blacks. It so happens, in a big city like New York, a substantial number of those that come in under the program come from—the black or Puerto Rican communities, but also, white students that come in under the same category.

Mr. O'Hara. You are in the situation that Clarence Mitchell described to us a while back, where some law school admitted a student—they couldn't require pictures—so they admitted some student who was a graduate of a black college, and when he showed up at the door they discovered he was not black, they turned him away.

Now, that, you know, that worries me. Did you want to say something, Dr. Randolph?

Mr. Randolph. Yes; I have just two comments on the latter point. I think it would be well to keep in mind that what we are talking about is nothing unique in higher education. I find it always rather amusing when people begin to take a rather hard line about this. Students have been admitted to colleges on inequitable standards for decades and special admission requirements for athletes, pretty girls, members of particular sororities. So, really, what we are talking about isn't something new, not at all.

Secondly, as a result of the passage of this legislation, and not simply because of the legislation we are talking about in Executive orders, but due to good faith efforts on the part of leaders in higher education, the vast majority of minority students are accepted on the same basis as whites. What we are talking about is not, you know, the majority, the minority, and what we are talking about are practices that have been going on in other places for decades, and we all know it.

Mr. O'Hara. And in which a number of us, in and out of the college community, and the Congress, have been opposing for decades.

Mr. Roche. As to the point—it has been going on for decades in a variety of programs, and deciding who you want to have in school and who you don't, that is fine. The question at issue is, whether or not they should be institutionalized and required by Federal law. That is a different matter as to the decisions being made in that fashion.

As to this matter of black or white, we are a little down on advantaged people and preferring the disadvantaged. I would have to say, it does not speak for us. We take our people even in terms of their income strictly on the basis of their arriving there one at a time, and it goes for blacks as well. I say that without apology.

We have a great deal of scholarship money available, which goes to people on the basis of their ability, again, blacks or whites, and our youngsters, to give the institutional plug and to brag for just a moment—but at Hillsdale, we found that simply because our blacks or whoever comes to us as individuals, the tendency of separation, the tendency to become a class apart, has not been the case there. This, I think, contrasts very favorably to the situation at Cornell a few years ago, when there had been a big push for black admissions and when some of the professors began to adopt an attitude "I give them all A's and B's, and the hell with them."

That, I think, is a significantly unproductive attitude which finally has resulted in some shotguns and total breakdown of the system there.

My belief is, simply to treat people on the basis of one at a time, and then bring them in under any basis you want to so long as it is not institutionalized. But everything has to be in lock step, and this is what society wants. But perhaps it ought to be what the individual professor or admission counselor should be doing—the best he knows in the context of his particular situation, to take people one at a time.

Mr. O'Hara. Mr. Esch, any questions?

Mr. Esch. Thank you, Mr. Chairman.

I must say, this has been a rather refreshing Monday morning after a rather hectic and historic week.

Mr. O'Hara. We can't let events in the sister branch divert us from our business.

Mr. Dellenback. That has been steadily our attitude all the way through, if I may say, Mr. Chairman.

Mr. Esch. Before I take my time, I am reminded, President Randolph, at a recent University of Michigan gathering, one of yours, one of our now fine economists, Bill Haver, introduced Paul McCracken in the audience and described how a personnel officer in a major manufacturing concern came into the chief executive officer, the president of the company, and demanded that he find a one-armed economist. So, he was a rather authoritarian president of a corporation, so the personnel officer went out and hunted high and low for a one-armed economist, and after a 6-month search, he came back in with apologies to the president of the corporation and said he couldn't find the one-armed economist. And he just wondered why, if he didn't mind his asking, why he wanted a one-armed economist, to which the president said:

> I am very sick and tired of all my economic advisers telling me, "No; on the one hand, this can happen and on the other hand, this will happen."

Subsequent to that speech—I might say parenthetically, but it appears—Paul McCracken proceeded in the next 20 minutes to use, "on the one hand and on the other hand." I jotted down 12 times during the course of his statement.

I am reminded, also, however, of some days in the late sixties when the colleges were in a crisis stage on the campus, where we had campus riots and demonstrations. I am reminded, Mr. Chairman, this subcommittee came within a vote or two—because the Congressman for Wisconsin and I were twin votes—of requiring that each college would submit a plan to HEW indicating how they were going to handle the discipline on the campus.

We reached the point, at that time, that decided that would be one step removed from HEW approving the plans of how you handle discipline on the campus.

Finally, that legislation was rejected. Apparently, now we have that instruction through Executive order rather than through either legislation or regulation.

I think, as I think our chairman does, that a major, underlying issue in the attitude of the American people is a strong negative reaction to the continual intrusion of the Federal Government on individuals' lives, and what we are discussing today, perhaps, is that attitude beginning to permeate the faculties at our various institutions.

Before I get into one or two specific details, I sense, and most of you on the panel, have alluded to the difference between the industrial and academic communities. But I sense that the full basis of a university structure is to establish an environment in which the given discipline controls.

After all, the discipline is inherent within that word, but its philosophy, chemistry, or be it pure society or physical sciences or social sciences, that the discipline itself should be the determinant, and so, I understand that, in most college campuses, correct me if I am wrong, that most of the promotions and the hiring and all is not at the administrative level whatsoever. But you develop a structure to allow those given disciplines to be paramount within the university structure. Am I correct that, that really is the way?

Mr. FLEMING. I think, it varies some with the size of universities, and I am not sure at President Roche's institution, for instance, being smaller, they may be able at a more centralized level to play a part. Certainly, at a big university that is the way that it operates.

We recognize, and this goes back also to the point of the difference from industry, we pay a considerable premium in universities for individuality. Those of us in the administrative structure sometimes think that the price of that is sort of organized chaos.

We do permit wide individual decisionmaking and consultation, and that, in many ways, is the essence of what maintains this individuality which we think is a great asset to institutions.

The price you pay for it is a highly decentralized structure, at least in big universities.

Mr. ESCH. Would you want to comment on that?

Mr. ROCHE. I think he is probably correct; that, the smaller the institution, the great likelihood that we can know our people directly and personally, faculty or students or whatever.

Of course, that makes it all the more essential that we treat our applicants for a particular position one at a time rather than according to any outside abstract standard. However, you are still quite right when you suggest in an institution as small as ours there is room, necessity, in fact, to insure that the individual faculty member and the people connected with the same discipline, have a major hand in the selection process, and it is a small enough institution that I also have a major hand. But I don't feel this should be done without a proper consultation and involvement. So, yes, it is a highly personalized and often discipline oriented process, even in a small institution.

Mr. ESCH. I would like to ask one or two specific questions, and one is with reference to Dr. Fleming's comment about the failure to have hearings, which you alluded to within your prepared texts. It is my understanding in the material furnished me by counsel, that there, under provision of the EOA Act, it provided both for full hearing and adjudication under provisions of title V, United States Code, and more specifically, in a supplement for Federal regulation in employment practices in the manual for field officers, prior to the imposition of any requirements, reasonable efforts, within a reasonable time must be made to have compliance, and so forth. And when these efforts fail to produce corrective action adequate to overcome and so forth, appropriate administrative procedures will be required.

The first process will be a letter giving contractors 10 days for requesting a hearing before an impartial hearing officer. I am not sure that time factor is suitable. So, it is my understanding that both the regulations and then the supplemental materials suggesting the funcions under the regulations to explicitly indicate provision for hearing, and it has been your experience there has not been opportunity for hearing?

Mr. FLEMING. If I may respond. That particular section was what I said was specifically furnished to me by the person who is our Affirmative Action Director.

You will notice that it is particularly directed at the opportunity to appeal from the regional offices.

Mr. ESCH. Prior to that time, you wouldn't have had this?

Mr. FLEMING. Yes; a major decision from which apparently she feels at least there is no adequate way of appeal at this point.

Mr. ESCH. What you are suggesting is, we might immediately look at the hearing process beyond the regional level?

Mr. FLEMING. Yes.

Mr. ESCH. I think, Mr. Chairman, that is a point well taken. The other factor you suggest is a good one, I think, and you suggested something constructive, Dr. Fleming, in that you are suggesting we have comparable to what we have in labor negotiations, even though there are not other similarities, we might allow local determinations to prevail unless it is overturned by another process. So, what you are suggesting, or, in effect, what we have in EOA is nothing comparable to what we have in the labor negotiations' field?

Mr. FLEMING. Yes; and I would like to speak to it because it is an important point. I have had a great deal of experience in the labor arbitration field, and in that field if there were an arbitration proceeding binding on a particular company and particular union, even though the grievance covered an area which would be subject to the National Labor Relations Board, or to the courts, and even though both of those agencies would retain jurisdiction over that case, they both take the position that they will not move in and rehear a case which had been heard by a private arbitration machinery, provided the procedure is fair and the law is properly applied.

Therefore, if an individual gets the case heard before a private arbitration tribunal, then goes to an agency or to the courts, they would simply look and say, "Well, our policy is not to rehear the case." There are too many of these things. There is too great a backlog. There ought to be a better way of getting rid of these.

Therefore, our first question is, did this hearing meet those criteria?

If it did, we will, as a matter of discretion, not law, but as a matter of discretion, we will not hear the case. That is the end of it.

The problem at this moment is that if the individual loses the decision before an internal tribunal, the individual can simply say, "Well, I have three or four more chances before other agencies, and I am going to go right on to every one of those."

When an individual does that it requires us to come in with full counsel in every case and spend thousands of dollars defending a case, which was already lost on its merits before the internal tribunal.

Now, that causes our people internally to say, "Why should we do this? Why not throw the whole thing out and just let them go to the agencies." If you let them go to the agencies, they face this tremendous backlog.

We believe we could provide a fair, objective, impartial tribunal internally that would hear those cases. We think, as a practical matter, it would cost us less than these multiplicity of cases that we have to go into before all kinds of agencies, and we think we could work out a procedure that would get the cases decided quickly and fairly. But it cannot be done in the present state of the law.

The Congress would have to take some action which required the administrative agencies and the courts, to respect private tribunals, where established in accordance with certain criteria.

Mr. ESCH. I sense two factors. One is—and this was alluded to earlier in other testimony. One is that, any time we are in a period of change and of great interest and concern and pressure by various interest groups, as at this time, so many are using the process as a forum, and without reference to the validity or lack of validity in a given case, but the process is being used as a forum, you are well aware of that?

Mr. FLEMING. Yes.

Mr. ESCH. I am also concerned about the fact that your institutions, and collectively, your institutions, have some real difficulties with AAUP and other groups in terms of major backlog, and I am not so certain that you, apart from Government action, have shown much initiative to follow through and develop processes and to try to develop in a nongovernmental way.

I think you have been spending time in the last 2 years reacting to Government, which, I guess, is acceptable.

Mr. FLEMING. But, excuse me, we did, in our case, set up what was known as a complaint and appeal procedure and had a tripartite board, and that board probably heard 30 cases or so. It has made decisions in a number of cases. We had, in fact, leaned over backward to accept those. We have, and it worked pretty well. But now we are running into two things.

One is our people who serve on those, who are by and large faculty people, because what happened, a grievant picks one person and the unit picks a second person, and the two of them pick a third, and they hear the case.

What happens, lately, our impartial people don't want to serve anymore because they say, "We hear these cases and make our recommendations and so forth, but then, if a grievant does not like it all they do is go to some other agency.

Mr. Esch. My reference was not to the University of Michigan, but rather to the national situation.

One final question; to what degree is the Association of American Universities developing programs to impact upon this particular problem?

Mr. Fleming. I can't tell for sure, but I know that a number are thinking about it. But they all run into the same problem. That is, "Is it worthwhile doing, when you can't make it binding."

Mr. Esch. Thank you very much.

Mr. O'Hara. Mr. Kemp.

Mr. Kemp. Thank you, Mr. Chairman.

Mr. Fleming, you were talking about that minimum threshold of qualifications for the disadvantaged or minority student applications; what, in practice, in trying to meet your goals of 10-percent minority representation, what has been the actual practice? What has happened in terms of achievement of whatever percent it was being admitted?

Mr. Fleming. It has in fact, worked out quite well. The rate of attrition for minority students is higher than with all students, but not significantly higher.

We normally have a very low rate of attrition for academic reasons. That is because we have high admission standards and, therefore, don't lose many people for academic reasons.

We have studied our attrition records. They are considerably lower for minority students than they are in most public universities for all students. We have found that a third of those we are losing among minority students we are not losing for academic reasons. They are leaving for other reasons of finance, health, desire to transfer somewhere, and so forth.

When I read a story in the New York Times recently about law schools around the country, which indicated so many students were not passing the bar examination, I knew that because our law school had reached a figure of the goal we were after of 10 percent, I suddenly realized I had never asked our law school what the record of success was on the bar. I asked them, and I was told it has been remarkably good. They have only lost, I think, it is two students in a period of 3 years, something like that, from minority groups on the Michigan Bar Examination.

So, in general, our experience has been good.

Mr. Kemp. Doctor, do you have numerical goals for recruitment?

Mr. Fleming. We set about 3 years ago at the request of the Chicago Office of HEW, we set numerical goals. Now, those goals, we hope, were realistic.

In certain departments, those goals were zero. The reason they were zero was because we knew, as President Randolph said, in that particular area, there simply were not any qualified minority people. We knew what the national record was. That did not happen frequently.

I can think of only one place where we said that. But we gave numerical goals, and, incidentally, we have never known, 3 years later, whether our plan has been accepted or rejected. We have never heard.

Mr. Kemp. You still have not heard?

Mr. Fleming. The last I knew, nobody in the Chicago area has ever heard.

Mr. Kemp. President Roche, in view of your very thoughtful and interesting testimony, how do you personally feel the academic community can expand opportunity for more people based less on these artificial criteria and based more on known ability?

Mr. Roche. It strikes me that one of the most unfortunate parts of the whole affirmative action idea of government moving in and enforcing standards in this regard is not only the damage it does to the individuals involved, but the institutional damage it does to the very attempts to correct previous discrimination.

If there has been an area in the past 20 or 25 years in the United States, which has done more than any other in the active recruitment and encouragement of the qualified minority members, whether as a faculty member or as a student, it surely would be in the area of higher education. There has been a terrific push in that direction. That is what I alluded to when I suggested there was an earlier stage in the affirmative action in the sixties, that many people felt, in the academic community, now we are going to do more helping those people, meaning that many people felt it had been extended. And now they found the process is unhelpful to the people they were trying to help.

Now, there seems to be a revulsion on the part of many professors and students against the whole idea. The point is, I don't have a precise formulation as to a nine point program. The great difficulty with the private sector is, it is difficult to summarize it because the way that Hillsdale and Michigan and New York University do it quite properly should be three different ways.

I would like to think there are a couple of thousand other ways in the institutions of higher learning in this country whereby those institutions and the individuals within them in their own way would set about a recognition of the fact that people need opportunity on the basis and judgment of their individual personalities and abilities. I think that had already been proceeding quite well, and my principal complaint against the whole idea as to affirmative action as a program is, it seems to have interfered with that process.

Mr. Randolph. I would like to make a comment on that. I am as much concerned as any of my distinguished colleagues about the administrative problems in dealing with the jurisdictional problems, especially the interpretive problems that we are all having with the guidelines and our own cost problems in terms of collection of data. However, I don't—even though I am part of the picture, as president of a college, and I am concerned about it—privately, I am not all that concerned.

It is the same kind of cost problem I remember in the 1963, 1964, 1965 period, when business began to get the same kind of rules and procedures. They brought up the same concerns. I happen to know about that because I was National Director of Compliance at the EOC at the time and sitting with all of these corporations, and we are in the same thing.

These same things get worked out, and you gradually learn how to get your administrative organization in hand.

I am just not convinced from my own experience—assuming the new legislation or amendment to legislation—we can straighten out some of these administrative problems, that from my experience, higher education, no more than business or government, will carry out its responsibilities to treat fairly people regardless of race, creed or color, and sex.

I would say, it has not previously, which is an awfully blunt statement, and statements were made the Ph. D.'s never had trouble getting a job, but, of course, that is simply incorrect.

I myself have a Ph. D. in economics, and I couldn't even get an interview. So, to say that higher education, on its own, without proper prodding, has some sort of—you know, it is just going to do what is right without someone saying "You must," I just don't agree with. I don't think it has in the past, and I don't think it really had begun to get itself together until the Federal Government, however disorganized it might be in terms of administration, would prod.

Mr. KEMP. You do see my point as to the Government doing this?

Mr. RANDOLPH. Of course.

Mr. KEMP. I represent the suburbs of Buffalo, N.Y. I had a call from the superintendent of schools the other day. He is very thoughtful, constructive, and liberal in making an attempt to provide better opportunities for minority children in the city of Buffalo, and he was anguished over a statement by HEW that he had several months in which to come up with a plan for a hypothetical quota of white students in an all-black school, lest HEW close it down. And the bottom line of it was, "It was closed down against the wishes of the parents, teachers, and the black superintendent and the black principal," and they were vigorously protesting.

It is this sort of heavyhandedness, I think, some of us are concerned about in trying to strike a balance. Mr. Roche was, it seems to me, attempting to point out there is also some good faith effort by the Government to rely on creativity of local institutions in the private sector. It is not all that bad in some instances. Do you agree or disagree, that the impetus has to come from the Federal Government?

Mr. RANDOLPH. That is difficult to answer. It has to come from both, of course. I would say there are many institutions that do not need any prodding, but I would say there are no more than in any other sector of society, be it business, church or what have you.

I am just not convinced that without the Federal Government's saying that, "We are going to have some say," you know, use certain amounts of public money, that institutions are going to follow through. I am not convinced, in fact, that the members are any better than any other group in terms of the race, sex, or what have you.

Mr. KEMP. Is the result, though, of those actions something that you would like to see implemented? I don't know what your experience is in your own college. Is the result of this activity at the Federal Government level something you would like to see implemented wherever you can?

Mr. RANDOLPH. I think it is being implemented, even with all of the problems we are having, because there have been dramatic results. Even with all of these problems, there have been dramatic results in furthering of opportunities to minority groups, disadvantaged youths and in the faculty and in business relations.

Mr. KEMP. And you ascribe all of this to the program?

Mr. RANDOLPH. Not all of it. Much of it.

Mr. Kemp. How much for the faculty? Do you agree with Dr. Fleming about the differences between hiring for faculty and recruiting?

Mr. Randolph. I am in full agreement with Dr. Fleming. I am firmly opposed to lowering of standards when it comes to the faculty. I think that is the highest form of racism.

Mr. Kemp. I am troubled.

Mr. Randolph. Do you understand what I am saying?

Mr. Kemp. Yes; I understand, but I am troubled a little bit about the result of lowering the standards, for students. What happens as they go out of the classroom and into the real world?

Mr. Randolph. I think Dr. Hester's remarks—I would go along with. Of course, we all use various tests, and we all use various methods and we also know vast differences between secondary schools and vast differences between family and environmental matters, and none of us are convinced that any of the measures we use are all that perfect, you see.

Let's face it, we are giving an opportunity. You are not guaranteeing a degree. A young person has the opportunity to pursue an education. When you are hiring a faculty member, the controlled agent in that classroom, you know, the students are totally dependent upon him, and I am firmly opposed to lowering of standards.

I have seen that, and it is terrible.

Mr. Kemp. Let me carry it one step further and say this. If the student is told that there is going to be, an affirmative action program and increasing the opportunities for students, and the student in that heterogeneous atmosphere sees there is a homogeneity among the faculty, wouldn't it be kind of a double standard? Wouldn't there be some type of problem?

Mr. Randolph. I think students are a bit more sophisticated than you are saying. I think they do resent themselves, I know black students do, being given second-class instruction simply because a person is a member of a minority group. That day is past, and there was a cry, I remember, in the sixties, "You have to get so many faculty members among black organized student groups." They want the best instruction you can get.

Mr. Kemp. President Roche.

Mr. Roche. Just a reaction to a couple of things back down the road a moment or two ago. One is, while I agree the result of affirmative action programs have been dramatic, I would question whether or not they have always been beneficial, especially, to the very class that we are trying to help.

Then, as to the question of whether or not the academic community or the business community is capable of putting its own house in order, I must say that the trends of our times have completely reversed the traditional positions to the point, I believe with all of my heart, I have a greater degree of confidence in the American people and their capacity to judge one another as individuals than is expressed in the affirmative action program.

Mr. Kemp. Thank you, Mr. Chairman.

Mr. O'Hara. Mr. Dellenback.

Mr. Dellenback. Thank you, Mr. Chairman.

This has been most helpful testimony and I have had a chance to read your statement, Dr. Hester. Yours is very helpful, I gather from some of the things you said, and I heard Mr. Roche make his statement. May I ask, President Hester—at the end of your testimony you make a clear statement you see the need for affirmative action programs—do you have anything to add to what has been said by several others about the need for affirmative action in the sense that, without it, these things would or would not have taken place, that have taken place?

Do you think that affirmative action as a program has been a principal causal element in bringing about changes? I am not now talking about student practices, but about employment practices.

Mr. Hester. There is no question that the university community is sensitive to an obligation that was recognized by conscience in the past, but has been enforced through this mechanism in a way that is beneficial. The pressure on our departments to consider all sources for potential faculty members when they are recruited, and on our nonacademic employment offices to consider all sources is beneficial.

We are in touch with hundreds of agencies representing minority groups, women, others, when we seek candidates for jobs which we did not deal with in the past. We just were not operating that way. I think that is good.

This effort is opening up opportunities in our society that are very desirable. I do want to emphasize the point which is the crux of my testimony, however, and that is the delicate subject of the philosophy that the Federal Government will adopt with regard to the evaluation of goals. We are setting goals—we have been required to—and we think there is a certain amount of merit in the setting of goals, provided they are really goals. But if we are going to be held in 5 years to having exact numbers of people in position or else be out of compliance and have our contracts canceled, the program will be disastrous.

It is an unworkable system from that point of view. I do concur in what Professor Lester writes in his book in this regard. It is much more practical to prescribe goals for the first appointment to a faculty than it is to try to prescribe goals for the granting of tenure.

Mr. Dellenback. From testimony we had in the subcommittee in recent days, the distinction between current practice and total compliance must be the greatest problem. I think this should be nondiscrimination. I think that, with all of its difficulties, it is achievable in current practice relative to hires, promotions, salaries, and all personnel practices.

But if the affirmative action goals, and I will make the distinction and go along with you between "goals" and "quota," which distinction you made, but the current practice, nondiscriminatory practices, if they are to be followed, I find great difficulty in being sure that some sort of arbitrary period, and as short a period as 5 years, is achievable relative total composition compliance.

Are you all in agreement on that?

Mr. Fleming. Yes.

Mr. Hester. Yes.

Mr. Dellenback. Do you think that will come about or do you think it is irrelevant?

Mr. Roche. Will you repeat what you said?

Mr. **Dellenback.** My question is essentially this: We say, there must be nondiscrimination in regard to race, creed, color, national origin, and sex. Now if you then have a faculty of *x* thousand, take, for simplicity of measurement, 1,000 composition, and let's assume that the average turnover is 20 years, that somebody comes on the faculty and is with you 20 years. If, in the simplistic analysis, that means you take on 50 a year, 50 at one end and 50 at the other end, I can see the 50 that come on in a given year that you can if you immediately put into effect voluntarily or, with some assistance, prodding from the Government, the practice that says there shall be no discrimination and we might within that have a rough goal, simply say if there is in truth nondiscrimination on the average that should end with *x* number of women and *x* number of minorities and so on.

Then you put it into effect for the new class that comes in. The next year you do the same thing with the new class that comes in. You do it for 5 years running. You are really concentrating on each increment that comes along as it comes along.

At the end of 5 years you are not going to have, you are not going to have brought the total mass of 1,000 into anything like the goal relationship that you set as whatever your best basic method of measurement is, the available pool or composition of society or whatever it may be, and it is in the effort of bringing these two into harmony that I have my greatest trouble.

Mr. **Roche.** I have two problems with this, Congressman. The first problem is simply that it depends a lot on the tenure situation on a given campus, but I understand there are departments at Stanford, to pick an example, where they were complaining of this very thing not too long ago in which they have departments on campus so locked in a tenure position with senior professors that they expect a 5-percent turnover between now and the late eighties, which is enough, of course, to give any college administrator, you know, gastritis just thinking about it. It locks him in an impossible situation. It certainly locks him in a noncompliance situation in terms of what you described in hoping to have something done in 5 years, so on that ground, I doubt if it can be done.

No. 2, if I could restate the essence of what I have tried to say today, I doubt very much that with such compliance, by the time we have begun judging people as members of groups rather than as individuals would produce in 5 years or 25 years the goal we are looking for, because of the resentments and misjudgments automatically built into a system when we try to judge people as members of a group rather than as individuals.

Mr. **Dellenback.** Mr. Fleming, I have a question going back to the University of Michigan, because the University of Michigan, where I did my law work, is likened to also my University of Oregon within my district; they are both wrapped up in some of this affirmative action question.

When the officials of the Government spoke with you about the affirmative action program, did they talk in terms of number of years within which something was to have taken place?

Mr. **Roche.** I don't recall that they did; no. Although the goals that we were asked to set, I remember, did have a period of time. I frankly don't remember what it was at the moment, whether it was a 5-year period or what it was and, as I say, we never did hear after we submitted it.

Mr. **Dellenback.** When you say you put a number of years into your goals program, was this done on your own initiative?

Mr. **Roche.** I think, as I reflect on it, I think they must have given us some period. I don't remember exactly what it was.

Mr. **Dellenback.** Do you have a general idea, was it short or long?

Mr. **Roche.** I would say it was not longer than 5 years and it might have been 3, but I think probably it was 5.

Mr. **Dellenback.** We had before us, the chairman will recall when we had the other day's testimony on this, and I was pushing the same general line of questioning, "What are they really pushing for, current practice change or total overall?"

I was left with the feeling that they were forcing to the effect that current practices be without discrimination. But they were also stressing that in pushing for affirmative action programs they were setting 5-year periods by which I am certain things were to take place and yet on my questioning they were not really making those hard and fast, but really talking about current practice.

What I really want to know is this: Are the enforcement officials of the Federal Government, as they move into colleges and universities relative to hiring practices, setting goals within such short periods, and I think a short period is 5 years, by which certain changes are to take place or are they not doing it and you are not able to say at the moment?

Mr. **Fleming.** Maybe I could respond this way. A great many things that the agencies ask us to do we are never really sure whether it is the rule or not, because they are never pursued any further. I am sure that they did, as I think back on it I am sure they did ask us to state goals and they did give us a period of time, although I don't remember exactly what it was, and nothing has ever happened on that since we did that one way or the other.

I can tell you what we have done internally, but frankly we don't know whether we are in compliance or not.

Mr. **Dellenback.** What is your practice?

Mr. **Fleming.** What we do, we named an affirmative action director for the university. Then we sent our instructions to all of the department with regard to their obligations on affirmative action and we said to them:

> You must be able to show you have in a bona fide way advertised this position, you must be able to show that you have made efforts, genuine efforts, to get qualified people for this field, you must be able to show that you have considered them thoroughly without any discrimination with respect to the consideration you have given their applications.

But the capstone of that is:

> Our instructions to you are to pick the best person you can find out of that whole group without respect to age or to race or to sex or to ethnic origin, and we want only that you be able to bear the burden of any inquiry and be able to demonstrate that you did pick the best person.
>
> Now, if you can do that, we will run our risk with HEW or anybody else.

When one of the regional office people once made a public statement that we would be required under such circumstances to hire anybody who was equal to the least qualified person we had, I promptly responded publicly by saying we would never do that unless ordered to by the court or some such authority.

The following day a person in the national office of HEW said, this was not their rules, that that had been an inappropriate statement from the regional office.

But that is where it ended. Now, we have never heard anything more about it. We don't know whether the procedure we are following is acceptable to them or not, but that is the way we do it.

Mr. Dellenback. Would any of the other three indicate—President Randolph, are you having that same kind of lag in dealings with the office?

Mr. Randolph. Yes; we were required to come up with a 3-year plan, which I strongly resisted.

Mr. Dellenback. Your plan dealing with what?

Mr. Randolph. Goals.

Mr. Dellenback. Goals in changing current practices or goals in ultimate composition?

Mr. Randolph. Ultimate composition. We resisted that.

Mr. Dellenback. In 3 years you were to have done it?

Mr. Randolph. Perhaps because they were very upset with us.

I am in a New England college, New England community where there are few minority people, so therefore very few in the composition in the student body as well as the faculty, and here again is a problem of the person representing the agency had a hard time understanding, that simple fact that we were not a large urban community where it would not be difficult to get minority students and faculty.

We turned in our plan with 5 years and we have not heard from them, as Dr. Fleming said.

Mr. Dellenback. How many years since you did that?

Mr. Randolph. 1 year.

Mr. Dellenback. And no word?

Mr. Randolph. No, sir; we are following almost the exact same procedure that Dr. Fleming prescribed.

Mr. Dellenback. Dr. Hester, have you faced this?

Mr. Hester. We submitted the plan I mentioned in 1969. That was not a statement of goals, but it was a statement of a plan. We have never heard from them whether that was acceptable or not until last Monday when they told us they would arrive this morning to examine our plan in the course of this week because an atomic energy contract with our Mathematics Institute has to be approved within the next few weeks.

This is the first time this 1969 plan has been reevaluated.

Mr. Dellenback. You don't know how yet that will come out because you are here and they are there.

Mr. Roche, any comments on that? Have you placed staff in your office at all?

Mr. Roche. We neither solicit nor accept State or Federal funding for any purpose on campus because we do handle this program very nicely.

Mr. Esch. Will you yield for a minute?

Our counsel just saw a bumper sticker on the back of Congressman H. R. Gross' car this morning and it said, "There is always free cheese in a mousetrap."

Mr. **Dellenback**. May I ask this one question? It is my understanding that some of the effort to set goals, where there has been striving on affirmative action, something about the total composition, maybe even current practices, because of stiff competition, have led to higher salaries having been paid if you are going to follow these particular roles, but I understand then also in some instances at least the university or college involved has been involved under the Equal Pay Act and that was the 1972 act, as we all recall, to bring the professional staffs and administrative staffs and staffs of colleges and universities into line and is this a serious administrative problem?

Mr. **Fleming**. It is certainly a problem.

There is no question but what departments, as a classic example of the free market operating, there are a limited number of minority people for these spots, therefore, this is exactly what you would expect to happen. It is the same thing that happened with physicists and mathematicians right after World War II when everybody wanted the most distinguished mathematicians they could find and physicists. So salaries get bid up.

Now it is true that department often, if they want to recruit a first-class minority person, will find themselves bidding against alternative employers and I have had departments consistently ask me over the years what I thought we ought to do about this, and I consistently responded, but with very little confidence, that they did what I told them, that they should not bid those salaries up because it would come back to haunt them, that as soon as they did that, they would find themselves being faced either by inequity charges on the part of peer groups within the structure or of the Pay Act.

Now, as I say, we run a sufficiently decentralized operation that I would not be surprised to discover that we have some examples of cases where they did not follow my advice, but as of this moment I don't know that and I am afraid to look.

Mr. **Dellenback**. But it has been an administrative problem.

Mr. **O'Hara**. You will find out when the equal pay complaints are filed.

Mr. **Fleming**. Yes.

Mr. **Dellenback**. Thank you, Mr. Chairman. I have other things to ask, but I have already used my time, so I yield.

Mr. **O'Hara**. Mr. Huber?

Mr. **Huber**. I am sorry I missed the presentations this morning, but I enjoyed these later comments. In listening to Dr. Randolph, I was a little concerned. When you turn to the Government to inform the motivating force behind the decisions that they ought to be arrived at in a freer atmosphere, I wonder if you don't sometimes run into a busting or destroying of the situation.

Now you have a ruling that is bothering you as being a push on the part of bureaucracy to implement a good concept to the point where now I think, for instance, in the suburbs of Detroit certain disasters, the flight we had in the past will be nothing compared to the flight we will have in the future as a result of these decisions.

I wonder if, when you finally turn to the Government to give impetus to these changes, it isn't self-destructive eventually because it gets into the hands of individuals who write the rules and, depending on that individual, you may have all kinds of rules that are fiscally hurting you.

Mr. FLEMING. That is why I say I have mixed fears. I share your concern. We have all seen excesses and the problems that occur right after a major social change. The same thing occurred in the South.

You know, right after those decisions, the meshing of schools and loss of jobs. There is a loss in the initial throes of major social change and perhaps it is more of a criticism of me and my lack of faith in institutions as I have served them, but I am still of the opinion you need some Federal thrust and guidance in these particular areas.

The nature of it, and how it is administered and reviewed, this kind of thing, you know about the use of affirmative action certainly, but I would hate to see no real guidelines given when one accepts the position of a Federal contractor.

Mr. HUBER. I wonder if we look back at the busing situation, on hindsight, if we really made any accomplishment in the next 5 years? Considering the reaction to what is going to happen, if we had to do it over, what we would do in view of what is now happening?

I don't mean to go into that. I remember we had an investigation of a Michigan campus. We were on 55 campuses of colleges and universities and what we found was that the information officer in the university knew the least about what was going on.

I thought that was rather a startling observation. The presidents were a close second in not knowing. That was also an interesting observation.

The statistics showed students wanted an education and didn't want to be interfered with and didn't want interruption and I was just intrigued to see the results of that study. I certainly enjoyed it.

Did anybody ask Dr. Fleming what was going to happen in Ohio?

Mr. O'HARA. We could have Mr. Schembechler in.

Mr. HUBER. That is all I have.

Mr. O'HARA. He will be here next week.

Mr. HUBER. There was no bias in the selection of Ohio.

Mr. O'HARA. We will have to ask Burt Smith from Michigan State University about that one.

Mr. ESCH. I would just comment from a point of personal privilege I only commented to a group in Ohio recently, "Can you imagine what would have occurred in Southern California in the Rose Bowl had the Big Ten sent its best team?"

Mr. O'HARA. I am not going to ask Dr. Fleming if he applies different standards to the admission of football players. But, you know, the other day a witness said to us, "Well, any time you have to choose, there is discrimination."

Now, I don't agree with that. It seems to me when you choose on the basis of merit and performance or some criteria that has to do with what one's own personal efforts and personal qualities are, that is not discrimination. But if you choose on any other basis it is. Therefore, I think I would have to agree with the president of Westfield State that it is wrong to favor anyone on any basis for admission or employment other than their qualifications and I agree that lots of wrongs have gone on and they continue and there is no question about that, but I find that we are sort of in the place, in my view anyway, of fostering new wrongs.

I know they don't require it and I know the rhetoric of it. I have been through it in the Democratic Party.

I also know the pressures put on you, you know you have to file reports. First, you file your goals and you don't know—well, no, you never hear back as to whether your plan is all right. Then you have to file all of these reports as to what you are doing in meeting your goals and you never hear back on them. You don't know if anyone is examining them or not, but they might be. At least there is that concern in your mind, you know, so there is that spur for you to go ahead.

Then you put in a position yourself of cutting some corners—well, winking at a little preference here or there because it will make your report look better, and you are darned sure not going to have some bureaucrat coming down from Washington if your report shows you are overachieving, you know. So you just have that pressure all the time.

Dr. Fleming, under your system I bet you the department people feel the same pressure. You say to them:

> Look, we want you to hire the best qualified people. If you do that and can assure us you have done that, we are not going to bother you.

But I will bet you nevertheless there is a different reaction over in your office when the department of whatever it might be, civil engineering, finds themselves, someone they represent to be a qualified woman faculty member or qualified black faculty member, I guess you greet that with real beams and you know that they will and so they are on the safe side when they walk in with that kind of application, so I think it is a kind of subtle kind of thing. It is a pressure that I believe we do get some unjust results sometimes.

Mr. FLEMING. I think you underestimate their strength and depth of feeling about this in the department. I don't have much fear myself if we say to a department, "You must be able to demonstrate you have made a fair impartial search," but beyond that if you come up with an individual that you say is the best person you can find and you are willing to defend that and it is not a capricious judgment, then you don't need to worry about us. We will be with you in defending that before any attack.

I believe at our place at least that the depth of feeling in the various departments would be so great on that point that I would not be much afraid that they would alter that.

Mr. O'HARA. Very remarkable people in that case.

I think we are all going to—maybe more than any other and justifiably so within the equal pay area—have complaints in the way we have had a dual standard with men and women in the past.

Mr. FLEMING. But we have been making serious efforts to correct it over a period of 2 or 3 years.

Mr. O'HARA. I think you have real problems and I imagine others will have some or already have some. I thank you very much for your contribution. I hope out of all of these hearings we will be able to end up with something that will promote just results and do it in the way that will help us.

Thank you very much and it is now 12 and we have to get to the other important business of the country, which I hasten to add has been going on—full time—all along.

Thank you.

[Whereupon, at 12 noon the subcommittee recessed, to reconvene at 10 a.m., Wednesday, August 14, 1974.]

CIVIL RIGHTS OBLIGATIONS OF INSTITUTIONS OF POSTSECONDARY EDUCATION

WEDNESDAY, AUGUST 14, 1974

House of Representatives,
Special Subcommittee on Education
of the Committee on Education and Labor,
Washington, D.C.

The subcommittee met at 9:40 a.m., pursuant to recess, in room 2261, Rayburn House Office Building, Hon. James G. O'Hara (chairman of the subcommittee), presiding.

Present: Representatives O'Hara, Gaydos, Biaggi, and Dellenback.

Staff members present: Jim Harrison, staff director; Webster Buell, counsel; Elnora Teets, clerk; and Robert Andringa, minority staff director.

Mr. O'Hara. The special subcommittee will come to order.

Today we are going to look into a particular aspect of antidiscrimination having to do with the Equal Pay Act and related Executive orders and regulations.

Our first witness who will be assisting us in this inquiry will be Dr. Mary Jo Small, who is director of personnel at the University of Iowa. Dr. Small, we will be very pleased to hear from you.

STATEMENT OF MARY JO SMALL, ASSISTANT VICE PRESIDENT FOR ADMINISTRATIVE SERVICES, UNIVERSITY OF IOWA

Ms. Small. I am assistant vice president for administrative services. Personnel is one of my responsibilities at the University of Iowa.

I am here today because an interagency dispute among Labor, EEOC, and HEW has placed a burden upon the Nation's colleges and universities. The dispute deals with what constitutes equality in retirement benefits. We hope that Congress will not only work to resolve this specific dispute but to provide the means for avoiding similar such disputes in the future.

Now, the reason that the problem occurs is that most of the Nation's colleges and universities, as employers charged with—and, I think, in most cases desirous of—providing equal employment benefits to all, are subject to overlapping jurisdiction in the fair employment area from the Departments of Labor, HEW, and EEOC.

If these three Agencies followed similar interpretations of equality in retirement programs, there would be no need for me to be here today.

As you are probably aware, EEOC guidelines are inconsistent with those issued by Labor and HEW; and, with all three charged with overseeing such programs, we face a difficult situation.

In its guidelines, EEOC maintains that it is an unlawful practice, under title VII of the Civil Rights Act of 1964, for an employer to have a retirement program "which differentiates in benefits on the basis of sex" and that it is no defense "that the cost of such benefits is greater with respect to one sex than the other."

Both Labor and HEW take the position that an employer is not discriminating "if his contributions are the same for men and women or if the resulting benefits are equal."

Thus, educational institutions are confronted with the problem of complying with inconsistent requirements emanating from the three Federal Agencies charged with assuring equality in retirement programs.

Recently, EEOC comenced proceedings against a few colleges and universities whose faculty and staff are TIAA-CREF participants. Parenthetically, I would say we are one of these institutions and I am here not to complain about that fact. That very fact, however, stimulated our thinking about how and what would be an appropriate solution to the general problem.

The reason that EEOC has commenced proceedings is in an attempt to get a judicial determination of the appropriate standard of fairness. So we have become, in a sense, a pawn in this dispute. We feel that in such cases, where three Federal agencies with overlapping jurisdictions cannot agree and private parties bear the burden of their disagreement, the time has arrived for Congress to resolve the dispute.

Now, there are reasons why colleges and universities are particularly caught in what we think is a kind of Catch-22 situation.

In my written testimony, I go through for several paragraphs describing the insurance-related problems which I will just touch on now.

Many colleges and universities belong to or have their faculty and staff members participate in TIAA-CREF and similar individual annuity programs which are known as defined contribution retirement plans, under which the institution and often the individual faculty member contributes money over the employee's career. At the end of that time, depending on which of the various options for retirement benefits are chosen, the employee receives the benefit of the contributions and accumulated interest.

These plans are typically, and certainly this is true in the case of TIAA-CREF, individually owned. They are fully vested and they are completely portable. TIAA-CREF was indeed set up to provide such a program for higher education because there was a great deal of mobility in past years and this mobility generated a need for such an insurance program.

Now, typically in Government and in industry there is a kind of retirement program known as a formula-benefit plan. There is a description of that kind of plan in the middle of page 3. Under such plans, the employer normally retains ownership. Vesting occurs, if ever, only after several years of service, and the funds are not transferrable when the employee takes a new job.

Benefits under such plans are calculated according to a formula based on such factors as years of service, the average annual salary for a set period of years prior to retirement, and cash accumulations.

Now, the TIAA program that we participate in—in which 2,600 other institutions of higher education participate—are judged to be nondiscriminatory under the standards and guidelines which labor uses to enforce the Equal Pay Act and under which the Office of Federal Contract Compliance operates.

HEW has provisionally accepted the labor standards in drafting its title IX guidelines. The EEOC, on the other hand, because the benefits under some of the options are not equal for men and women, judges the TIAA-CREF and similar programs to be discriminatory.

TIAA-CREF provides, if an employee dies before retirement, equal death benefits for men and women. If either a man or a woman chooses an option where a survivor is also provided for, all things being equal the man and woman will get the same benefit. But if a woman chooses an option which provides only for her lifetime, the TIAA-CREF and other similar individual annuities programs base benefits on actuarial tables which differentiate between sexes. TIAA-CREF female annuitants are judged to have 4 years of longer life than the males, and therefore their monthly benefits under single life options are lower.

It is that which has caused EEOC to judge the program to be discriminatory. That is the point at issue.

The reason that we are here is that we feel caught in the middle of this conflict. EEOC's disagreement is, at least at the first stage, with the TIAA-CREF program but they have no jurisdiction over the insurance industry and they do have over employers.

They have been unable, as we understand it, to resolve the dispute at the national level among themselves, labor, and HEW. They have been unable to reach an agreement with TIAA-CREF or other carriers to change their programs.

So it is their feeling, as it has been expressed to us by the district EEOC office, that in order to get a resolution of the dispute, they will proceed against individual employers—in this case institutions of higher education—and seek a judicial determination.

Now, this places us, we feel, in an intolerable situation. We have two choices. We can acquiesce in EEOC's judgment in what is proper or we can go to court and litigate the merits of the issue.

If we acquiesce, there are two things we can do. In view of existing practices—and now I am roughly at the top of page 4—in the insurance industry, one option would be to abandon TIAA-CREF and similar programs and convert to some kind of formula benefit type of retirement system which in our individual case would probably mean coming under the State public employment retirement system, which is much less advantageous for our employees. If we did not do that and we wanted to choose to remain with the present carrier, we would have to, in some way, increase contributions so that we could provide equal periodic retirement benefits for those women employees who elect a single life option. Not all women employees will, in other words, require this additional money but some women employees would.

If we were to withdraw from TIAA-CREF and go into the State system, our present employees, would suffer serious harm and our ability to recruit and retain outstanding faculty would be dealt a heavy blow. This is particularly difficult for us because, though there are 2,600 institutions who participate in TIAA-CREF, only a few of them by chance have been chosen to be proceeded against.

In other words, at least initially, individual institutions would bear the burden of the EEOC ruling, although it is clear that the ultimate result aimed at is to change the TIAA-CREF policy.

If we chose, on the other hand, to acquiesce in EEOC's decision, we would have to find some way of increasing contributions for those women who elect single life option. We feel that this we would create at least a perception of inequity on our campus, since it is clear, under an attorney general's opinion in our State, that that money contributed to annuity is compensation.

Also, this procedure might raise serious questions with regard to the Equal Pay Act because it would be clear that we are compensating women in greater amounts than men. We are most desirous of not being placed in the position of litigating EEOC's position. I think any other individual institution would feel the same way.

The real issue seems to be the propriety of using mortality tables which differentiate between the sexes. In essence, EEOC's position implies that unisex mortality tables are the only lawful tables, and Labor and HEW seem to have concluded it is lawful to use dual tables.

Individual colleges and universities—and I am now at the top of page 5—are powerless to control the insurance industry's use of dual mortality tables. It seems improper, therefore, that we be required to litigate an issue about which Federal agencies disagree and over which we have no control.

Furthermore, we find it difficult to take a position as to which is a fairer position for actuarial projections—unisex or dual tables. We hear various and convincing arguments in support of both positions.

If one favors the use of unisex tables, one can argue that it costs as much for a retired woman to live as it does for a retired man and hence retirement benefits for women should be equal on a periodic basis to those of men.

It has also been argued you can make other distinctions, such as race or living habits, which one might expect to have an impact on actuarial projections. Why, then, is sex the only one used?

One also can look at the formula benefit retirement program and note that many if not most of them do not distinguish in benefits on the basis of sex. Why should TIAA-CREF and other similar programs make such a distinction?

It can also be argued that, in simple fairness, if a woman earns the same, she ought to benefit the same. Then there is the general argument that sex is impermissible as a characteristic to make such distinction.

You can go through these arguments for unisex tables and then find people who will argue equally convincingly and plausibly on the other side. They will argue that need is not a factor which ought to in any way impinge on benefits because if one chooses a joint option, providing for both husband and wife regardless of who is the primary annuitant the benefits provided are even less on a periodic basis, and in such cases you have two people to provide for instead of one.

The insurance carriers such as TIAA argue that, at least for their annuitants, race and living habits have not proved to be significant and other distinctions should not be used in addition to or rather than sex.

In response to the argument involving formula benefit retirement plans, it is noted that, while they often have this virtue of equal benefits regardless of sex, they have other disadvantages, such as lack of vesting rights, portability, and so forth.

In response to the question of whose premiums result in greater benefits—a man's or a woman's—it is argued that it is a matter of perspective. If you look at it month by month, the man may receive the greater benefit. Viewed from the perspective of the total life span of the female, she is likely to receive more.

Finally, while it can be argued that sex is an impermissible characteristic, there has been a recent Supreme Court decision—*Kahn* v. *Shevin*—in which it was decided that it is permissible to provide some benefits—in this case a real estate tax exemption for widows—on the basis of sex.

The factors I have set forth above and the variety of arguments cited point up the need for congressional action in this area. Congress has the authority to reconcile the conflicting positions of the Federal agencies involved. Congress can provide a national forum in which the views of all interested parties—individuals of both sexes, employers, the insurance industry, public interest groups, and governmental agencies—can be expressed effectively. Congress, and only Congress, can create the administrative mechanism for settling the dispute one way or another.

Finally, I urge Congress to address itself to and take decisive steps to resolve an issue which transcends this particular dispute. Open disagreement among the Federal agencies charged with enforcing laws requiring equality significantly dilutes the moral force of those laws. Employees whose economic interests are vitally affected understandably are disturbed by a perceived unfairness in a process whose fundamental goal is fairness.

Carrying out the spirit as well as the letter of equal opportunity laws is impeded by the inability of Federal agencies to agree as to what the laws require. Attempts to resolve interagency conflict by litigation which threatens interests as vital as retirement benefits serve only to exacerbate the detrimental effect created by the existence of such conflict.

Apparently with these considerations in mind, Congress provided, in the Equal Employment Opportunity Act of 1972 for an Equal Employment Opportunity Coordinating Council composed of representatives of agencies involved in the equal employment area—with the significant omission of HEW—the statutory purpose of which is to:

> Maximum effort, promote efficiency, and eliminate conflict, competition, duplication, and inconsistency among the operations, functions, and jurisdictions of the various departments, agencies, and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies.

As the present interagency dispute so forcefully demonstrates, however, the Coordinating Council has been unable to substantially eliminate duplication and conflict among agencies. But if citizens and institutions as employers and employees are to continue to be subjected to the overlapping jurisdiction of multiple Federal agencies in this area, some kind of effective coordination is imperative. If it is to be the EEOCC, then HEW's absence must be eliminated forthwith.

Something must be done in addition to require the agencies involved to take the EEOCC and the need for coordination seriously, by perhaps requiring all regulations, guidelines, and other official agency interpretations to undergo review and approval by the Coordinating Council prior to becoming effective.

Other means of achieving effective coordination may occur to this committee. Whatever means are chosen, however, the elimination of interagency conflict, with its attendant adverse consequences upon individual citizens and institutions, must be eliminated if the goals of equal employment legislation are not to be irreparably crippled by the very process of enforcement.

[Ms. Small's prepared statement, with appendixes A and B attached, follows:]

Statement of Mary Jo Small, Assistant Vice President for Administrative Services, University of Iowa

Mr. Chairman and members of the committee, I am Mary Jo Small, Assistant Vice President for Administrative Services and Personnel at the University of Iowa. I am here today to bring to your attention the burden imposed upon the nation's colleges and universities by a dispute between three federal agencies regarding what constitutes equality in retirement benefits and to seek the assistance of Congress, not only to resolve this specific dispute but to provide the means for avoiding similar occurances in the future.

Most of the nation's colleges and universities, as employers charged with and desirous of providing equal employment benefits to all, are subject to the overlapping jurisdiction in the fair employment area of the Departments of Labor and HEW, and the EEOC, under various statutes and executive orders. If these three agencies followed similar interpretations of equality in retirement programs, I would not be appearing today. As you are aware, however, EEOC guidelines[1] regarding retirement programs are inconsistent with those issued by Labor and HEW; and with all three charged with overseeing such programs, the situation we face is exceedingly difficult.

In its guidelines, EEOC maintains that it is an unlawful practice under Title VII of the Civil Rights Act of 1964 for an employer to have a retirement program "which differentiates in benefits on the basis of sex,"[1] and that it is no defense "that the cost of such benefits is greater with respect to one sex than the other." Both Labor and HEW take the position tha an employer is not discriminating "if his contributions are the same for men and women or if the resulting benefits are equal." Thus, educational institutions are confronted with the problem of complying with inconsistent requirements emanating from the three federal agencies charged with assuring equality in retirement programs.

Recently, EEOC commenced proceedings against a few colleges and universities whose faculty and staff are TIAA-CREF participants, in an attempt to get a judicial determination of the appropriate standard of fairness in dealing with retirement programs. In essence, these institutions have become pawns in a dispute among the three agencies. In such a case, when three federal agencies with overlapping jurisdiction cannot agree and private parties bear the burden of their disagreement, it seems to us that the time has arrived for Congress to resolve the dispute.

The interagency dispute has a particularly harsh impact on colleges and universities because many of these institutions participate in "money purchase" or "defined contribution" retirement plans under which the employer contributes a percentage of the employee's salary toward the purchase of an annuity policy. In most such plans, the individual employee also contributes. These plans are employee-owned, fully vested and completely portable, attributes or the lack thereof which Congress is presently concerned with in other retirement programs. At retirement, the employee possesses an annuity, the value of which is determined solely by the accumulated contributions and interest. The employee then may choose among several options as to how he or she wishes to receive the benefits. The bulk of these plans for colleges and universities are provided by TIAA-CREF, Teachers Insurance and Annuity Association-College Retirement Equities Fund.

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[1] The texts of the relevant guidelines are set forth in appendix A, infra.

The TIAA-CREF annuity plans in force at many colleges and universities provide for equal preretirement death benefits for men and women. They also provide equal monthly retirement benefits where annuitants, male or female, select an option providing for benefits for survivors, usually a spouse. Only under the single-life options—providing payments only during the life time of the annuitant—do women annuitants receive lower monthly benefits than men. The lower monthly payments are made because TIAA-CREF, in common with other insurance carriers, uses separate actuarial tables for men and women; and such tables project the life-expectancy of a female TIAFF-CREF annuitant to be approximately four years longer than that of a male annuitant. In fact, if each lives her or his actuarially projected life span, the woman receives a larger total amount than the man, even with lower monthly benefits, because of the effect of compound interest for an additional four years. A great many other options are available to faculty and staff members upon their retirement; and whenever a form of a joint-life option is selected, monthly payments to men and women retirees are the same to the extent that all other factors affecting payments are the same.

The plans in force in most colleges and universities contrast with the "formula benefit" programs common in industry and government. Under these plans, the employer normally retains ownership, vesting occurs, if ever, only after several years of service, and the programs are not transferable when the employee takes a new job. Benefits under such plans are calculated according to formulae based on such factors as years of service, the average annual salary for a set period of years prior to retirement, and cash accumulation. In general, it may be said that most of the retirement plans whose deficiencies have inspired Congress to undertake pension reform legislation were formula benefit plans.

The TIAA-CREF program described earlier complies with the retirement benefits guidelines developed by Labor and provisionally adopted by HEW, since equal contributions are made for men and women. In contrast, EEOC has taken the position that the TIAA-CREF programs discriminate against women employees because they provide unequal monthly benefits under the single-life option. Since EEOC"s jurisdiction is limited to employers, it has been unable to proceed directly against TIAA-CREF and other insurance companies. It has chosen, therefore, to proceed directly against educational institutions. EEOC's actions against individual institutions places such an institution in an intolerable position. It is perforce required either to acquiesce in EEO's position or to litigate the merits of that agency's interpretation. In view of existing practices in the insurance industry, acquiescence requires the institution either to abandon its "money-purchase" plan and convert to a "formula benefit" type of retirement system or to increase its contributions in some manner to provide equal periodic retirement benefits for those women employees who elect a single-life annuity at retirement. Neither of these is viable. Withdrawal by any single institution from participation in the TIAA-CREF type of program not only would affect adversely the interests of the institution's employees, but would hamper its effectiveness in recruiting and retaining outstanding staff. This is particularly unfair to both the employees and the institutions involved since out of the more than 2,600 institutions participating in TIAA-CREF retirement programs, only a small handful have been chosen, apparently more or less randomly, as respondents in these EEOC proceedings. On the other hand, increasing the contribution to the retirement funds of a single group of employees—those women who elect single-life options—would create at least a perception of inequity as well as raising serious questions regarding compliance with the Equal Pay Act.

Nor should any individual college or university be forced to litigate the merits of EEOC's position. Notwithstanding the provision in the EEOC guidelines which would seemingly allow an employer to offset the differential effects of separate mortality tables for men and women by contributing different amounts to their retirement policies, it is apparent that the real source of the disagreement among the three federal agencies (and between EEOC and the insurance industry) turns ultimately on the propriety of using such tables. In essence, EEOC's position implies that "unisex" mortality tables are the only lawful tables; while Labor and HEW have concluded that it is lawful to use dual tables. Individual colleges and universities are powerless to control the insurance industrys' use of dual mortality tables. They should, therefore, not be required to litigate an issue amount which federal agencies disagree and over which institutions have no control.

Furthermore, individual educational institutions find it difficult to take a position as to which is a fairer basis for actuarial projections: Unisex or dual tables. Various and convincing arguments have been advanced in support of both positions. If one favors the use of unisex tables, one can argue that:

> It costs as much for a retired woman to live as it does for a retired man, and hence retirement benefits for women should be equal on a periodic basis to those of men.
>
> Other distinctions which one might expect to have an impact on actuarial projections—race, living habits, etc.—are not used and hence sex should not be. (It has also been argued that one of the other distinctions should be used rather than sex.)
>
> As a rule, neither formula benefit retirement programs nor group life and disability programs provided by employers distinguish with regard to benefits on the basis of sex. Why then should individually owned annuity policies?
>
> It is unfair for a woman whose earnings produce the same premiums as a man's to receive less in monthly benefits.
>
> It is impermissible to use sex as the basis of any distinction in employment related matters.[2]

All of the above arguments can be countered with others, equally plausible, to the contrary. Those who favor retaining dual tables will, for instance, tell you that:

> In a "money-purchase" retirement program, the level of benefits results from a combination of factors, principal of which is the amount contributed and the life expectancy of the annuitant upon retirement. Need is not one of those factors. If it were, those choosing a joint survivorship option, which must provide support for two people rather than one, would receive greater and not lesser monthly benefits.
>
> Other factors such as race and living habits have not proved to be actuarially significant for annuity programs such as TIAA-CREF's.
>
> While it is true that many formula benefit retirement plans and group life and disability insurance policies do not distinguish with regard to sex in providing benefits, it is also true that characteristically such plans and policies have other drawbacks. Generally speaking, coverage is lost when employers are changed and there is limited, if any, vesting rights for employees under such retirement plans.
>
> The question of whose premiums result in greater benefits—a man's or a woman's—is a matter of perspective. Viewed in terms of monthly benefits under a single-life option, the man receives the greater benefit; viewed from the perspective of the total amount received in benefits, the female annuitant is likely to receive more.
>
> In *Kahn* v. *Shevin*, the U.S. Supreme Court ruled on April 24, 1974 that it is permissible to provide some benefits (in this case a real estate tax exemption for widows) on the basis of sex.

The factors I have set forth above and the variety of arguments cited point up the need for Congressional action in this area. Congress has the authority to reconcile the conflicting positions of the federal agencies involved. Congress can provide a national forum in which the views of all interested parties—individuals of both sexes, employers, the insurance industry, public interest groups, and governmental agencies—can be expressed effectively. Congress, and only Congress, can create the administrative mechanism for settling the dispute one way or another.

Finally, I urge Congress to address itself and take decisive steps to resolve an issue which transcends this particular dispute. Open disagreement among the federal agencies charged with enforcing laws requiring equality significantly dilutes the moral force of those laws. Employees whose economic interests are vitally affected understandably are disbursed by a perceived unfairness in a process whose fundamental goal is fairness in a process whose fundamental goal is fairness. Carrying out the spirit as well as the letter of equal opportunity laws is impeded by the inability of federal agencies to agree as to what the laws require. Attempts to resolve interagency conflict by litigation which threatens interests as vital as retirement benefits serve only to exacerbate the detrimental effect created by the existence of such conflict.

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[2] See appendix B for a recent EEOC decision (74-118) which would appear to call into question any insurance program—not simply retirement programs—under which different benefits are paid by or different premiums are charged to men and women based on average characteristics of each of the groups. Thus, the premium differential favoring women policy holders in many life insurance plans—premised upon dual mortality tables—and the lower auto insurance premiums commonly available to women drivers in certain age groups based upon average accident records are rendered suspect by the EEOC approach.

Apparently with these considerations in mind, Congress provided in the Equal Employment Opportunity Act of 1972 for an Equal Employment Opportunity Coordinating Council composed of representatives of agencies involved in the equal employment area (with the significant omission of HEW) the statutory purpose of which is to "maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies." As the present interagency dispute so forcefully demonstrates, however, the Coordinating Council has been unable to substantially eliminate duplication and conflict between agencies. But if citizens and institutions as employers and employees are to continue to be subjected to the overlapping jurisdiction of multiple federal agencies in this area, some kind of effective coordination is imperative. If it is to be the EEOCC, then HEW's absence must be eliminated forthwith. Something must be done in addition to require the agencies involved to take the EEOCC and the need for coordination seriously, by perhaps requiring all regulations, guidelines and other official agency interpretations to undergo review and approval by the Coordinating Council prior to becoming effective. Other means of achieving effective coordination may occur to this Committee. Whatever means are chosen, however, the elimination of interagency conflict with its attendant adverse consequences upon individual citizens and institutions must be eliminated if the goals of equal employment legislation are not to be irreparably crippled by the very process of enforcement.

APPENDIX A

EEOC Guidelines on Discrimination because of Sex, 29 C.F.R. Section 1604.9 (a), (e), (f) (1974):

"(a) 'Fringe benefits,' as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

* * * * * * *

"(e) It shall not be a defense under title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.

"(f) It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex. A statement of the General Counsel of September 13, 1968, providing for a phasing out of differentials with regard to optional retirement age for certain incumbent employees is hereby withdrawn."

U.S. Department of Labor, Sex Discrimination Guidelines, 41 C.F.R. Section 60-20.3(c) (1974):

* * * "In the area of employer contributions for insurance, pensions, welfare programs and other similar "fringe benefits" the employer will not be considered to have violated these guidelines if his contributions are the same for men and women or if the resulting benefits are equal."

U.S. Department of Labor, Sex Discrimination, Proposed Revision of Guidelines, 38 Fed. Reg. 35337, 35338 (Dec. 27, 1973):

"(c) The employer shall not make any distinction based upon sex in employment opportunities, wages, hours or other conditions of employment. Nor shall the employer make any distinction based upon sex in the granting of fringe benefits, including medical, hospital, accident, life insurance, pension and retirement benefits, profit sharing and bonus plans, credit union benefits, leave and other terms and conditions of employment. *Proposed Alternative* (A). It shall not be an excuse that the cost to the employer of such benefits is greater with respect to one sex than the other. *Proposed Alternative* (B). In the area of employer contributions for insurance, pensions, welfare programs and other similar "fringe benefits" the employer will not be considered to have violated these guidelines if his contributions are the same for men and women or if the resulting benefits are equal."

U.S. Department of Health, Education, and Welfare, Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance: Nondiscrimination on the Basis of Sex, 39 Fed. Reg. 22227, 22230, 22237 (June 20, 1974):

"Section 86.46(b)(2) of Subpart E follows the Executive Order regulations in requiring that fringe benefit plans provide for either equal periodic benefits to members of each sex, or equal contributions by the employer for members of each sex. (Sec. 86.36 imposes identical requirements for student benefit plans).

"The Title VII regulation differs in that it prohibits payment of unequal periodic benefits on the basis of sex, and precludes employers from justifying unequal periodic benefits on the basis of differences in cost for males and for assuming equal contributions by all employees, Title VII implicitly requires payment of higher employer contributions for, and the possibility of higher total benefits received by, women. (The Department of Labor is currently considering changes in the Executive Order regulations. One of the proposed changes would result in conforming the fringe benefit requirements with those in effect under Title VII. (See 38 FR 35336-28, December 27, 1973.)

"The Secretary has considered a third alternative for possible adoption by the Department. That proposal would mandate the use of premium or rate tables which do not differentiate on the basis of sex, and would thus require both equal contributions and equal periodic benefits. The Secretary invites comment specifically on whether Sec. 86.46(b)(2) should adopt the Executive Order approach, as it does presently, that of Title VII, or the third alternative as set forth above."

* * * * * * *

"Sec. 86.46 Fringe benefits.

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"(b) *Prohibitions.* A recipient shall not:

* * * * * * *

"(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; and"

APPENDIX B

[¶ 6431] Unequal Benefits Resulting From Sex-Segregated Actuarial Tables Are Sex Biased

Decision of Equal Employment Opportunity Commission, Decision No. 74-118, April 26, 1974.

TITLE VIII—CIVIL RIGHTS ACT OF 1964

Sex Discrimination—Municipal Government Agency—Retirement and Benefits Program—Basis of Payments—Sex-Segregated Actual Tables— Reasonable cause exists to believe that a municipality and municipal agency employer unlawfully discriminate on the basis of sex where they pay lower monthly pension payments to females than to males on the basis of sex-segregated actuarial tables indicating a longer life expectancy for females. Average statistical characteristics of females as a group cannot properly be used to deny equal monthly pension payments to females. Possible higher cost to the employer of equalized payments is not a proper defense to a sex biased pension payment system. 42 U.S.C. Sec. 2000e.

Back reference.—¶ 1208.

Full Text of EEOC Decision

SUMMARY OF CHARGES

Charging Party, a female, alleges that Respondent City is violating Title VII of the Civil Rights Act of 1964, as amended, in that it is a member of a retirement system that pays lesser benefits to females than males, because of sex.

Charging Party further alleges that Respondent A is violating Title VII of the Civil Rights Act of 1964, as amended (hereinafter Title VII), by paying lesser benefits to females than males, because of sex.

JURISDICTION

Respondent City, Charging Party's employer, is a government or political subdivision employing 25 or more employees, is engaged in an industry affecting commerce, and is therefore an employer within the meaning of section 701(b) of the Act.

Respondent A is a governmental agency employing 25 or more employees and is engaged in an industry affecting commerce. Respondent A is also, therefore, an employer within the meaning of section 701(b) of the Act. On the facts of the instant case, see p. 3, *infra*. Respondent A has such a direct involvement in, and control over, the retirement system to which Respondent City belongs and which affects Charing Party, that it falls within the proscriptions of section 703(a)(1) of the Act notwithstanding that Respondent A is not Charging Party's employer. *Wilson v. Sibley Memorial Hospital*,—F. 2d—, 6 EPD ¶ 8964 (D.C, Cir., 1974).

All jurisdictional prerequisites have been satisfied.

SUMMARY OF INVESTIGATION

Charging Party is an employee of the City and will soon be eligible for retirement. The City voluntarily participates in a retirement system run by A.[3] The Municipal Retirement System Act created A and vested it with authority to operate a retirement and benefit system "* * * to provide for the payment of annuities and other benefits to employees and to beneficiaries of employees of participating municipalities * * *." A has many duties and responsibilities in connection with operating the system. Thus, among other duties and responsibilities A determines the employee rate of contribution; it adopts those actuarial tables it believes are appropriate to spread the risk involved; it considers and passes on all applications for annuities and benefits; it may suspend any payment or payments. It is clear that the City exercises no control over the operational aspects of the system. Nor is the City offered options other than whether to participate in the system and how much it will contribute towards its employees' annuities.

It is undisputed that Charging Party has been making contributions, fixed at a percentage of her earnings, into an account with A. When she retires the City will make a contribution which, added to Charging Party's contributions, will be used to purchase Charging Party an annuity. It is undisputed that the amount that this annuity will pay Charging Party each month is calculated on separate actuarial tables for each sex and that "The life-expectancy tables which are used by the System reveal that female annuitants have a life expectancy more than five years greater than that of males of equivalent age." (March 14, 1973 letter from A.) Thus a female of a given salary and length of service retiring from Respondent will receive substantially smaller payments each month than will a male of the same salary and length of service. It is this disparity that Charging Party alleges amounts to unlawful sex discrimination.

A argues that equal monthly payments to female retirees would in fact discriminate in their favor because females, statistically, live longer than men. The logic of this argument is that usually used to support discrimination: an appeal to the average characteristics of a particular sex, race, or other group protected under Title VII. But no person knows when he or she will die. This quote from the Note, *Sex Discrimination and Sex-Based Mortality Tables*, 53 B.U.L. Rev. 624 (1973) makes the point:

"Indeed, the insurance company is *not* concerned with when and if an individual insured will die. Its concern is with the group experience as a whole, with the number who will die per year * * *. The insurance company can no better predict when an individual insured will die than the individual insured can. Because insurance companies can deal with a large number of insureds, however, it can predict accurately with regard to a large group of similar risks. Thus, predictive acumen with regard to any particular individual is no longer relevant or necessary. This, indeed, is a chief value of insurance. * * * [T]he key to life insurance is that it 'deals not with individuals but with groups.' * * *" At n. 10.

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[3] The A "*Handbook of Information*" states that once a city has joined A it may not terminate membership in the system. The City appears to raise this as a defense. The important factor however, which is undisputed, is that the City joined A voluntarily.

Thus we think that A's argument misses the point. All that A's sex-segregated actuarial tables purport to predict is risk spread over a large number of people; the tables do not predict the length of any particular individual's life.

In our view, any use of sex-segregated actuarial tables that results in payment of different periodic pension benefits to males and females is highly suspect. Because actuarial tables do not predict the length of any individual's life, any claim that such tables may be used to assure equal pension payments over a lifetime between males and females must fail. In order to achieve compliance with Section 703(a) of Title VII [5] and with the Commission's *Guidelines on Discrimination Because of Sex* [6] the periodic pension benefits paid to males and females in equivalent circumstances must be equal. Moreover, it would not be a defense to Charging Party's charge that equalizing males' and females' periodic pension benefits would result in higher costs to Respondents, if indeed this were shown to be a fact. *Guidelines on Discrimination Because of Sex*, 29 CFR Sec. 1604.9(3). See also, *Taylor v. Goodyear Tire and Rubber Co.*, — F. Supp. —, 5 EPD 8545 (N. D. Ala. 1973).

A further contends, however, that if unisex actuarial tables were used [7] * * * that the effect of it would be to charge a male more for the annuity than he could obtain for his money from a private insurance company." (March 14, 1973 letter from A.) Thus, the argument goes, such a method of calculating risk would result in males subsidizing females' annuities. This argument, we think, contains a fatal flaw: The advantages males now enjoy rest on an unlawful system. In short, were uni-sex actuarial tables used, males would fare no worse than they would have had the retirement system been operated in a fair lawful manner all along. *Watkins v. Steel Workers (USA), Local 2369*, — F. Supp. —, 7 EPD 9130, n. 8 (E. D. La. 1974); *United States v. Bethlehem Steel Corporation*, [3 EPD 8257] 446 F. 2d 652, 663 (2d Cir., 1971); *United States v. St. Louis-San Francisco Railway Co.*, [4 EPD 7862] 464 F. 2d 301, 312 (8th Cir. 1972).[8]

DECISION

Reasonable cause exists to believe that Respondents are each violating Title VII of the Civil Rights Act of 1964, as amended, as alleged.

Mr. O'HARA. Dr. Small, I thank you for a very lucid statement. I notice that our next witness is a representative of TIAA-CREF. The subsequent witness, Dr. Woolf, will testify on much the same sort of problem.

If you have no objection, I would like to ask the other witnesses to join you at the witness table and each of them to deliver his statement and then to permit committee members to question the several of you as a panel.

Ms. SMALL. Fine.

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[5] Section 703 provides:

"(a) It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[6] Sec. 1604.9(f) of the Commission's *Guidelines on Discrimination Because of Sex* provides:

"(f) It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex." 29 CFR Sec. 1604.9.

[7] A itself raises the issue of uni-sex actuarial tables. The use of such tables, however, is only one of several possible ways to remedy the situation Respondents find themselves in.

[8] The City queries how it can ". . . resolve a violation of equal employment without there being a violation of State law." (January 29, 1973 letter from City.) The answer is that if State law is found to conflict with federal law, the State law must be held to have been preempted by the federal law through operation of the Supremacy Clause of the United States Constitution. *LeBlanc v. Southern Bell Telephone & Telegraph Co.*, [4 EPD ¶ 7674] 333 F. Supp. 602 (E. D. La., 1971), *aff'd per curiam*, [4 EPD ¶ 7832] 460 F. 2d 1223 (5th Cir. 1972), *cert. denied*, [5 EPD ¶ 8021] 409 U.S. 990 (1972).

Mr. O'Hara. I would like to, then, ask Mr. Donald S. Willard and Dr. William Woolf if they will join Dr. Small at the witness table. We would like to hear first from Mr. Willard.

STATEMENT OF DONALD S. WILLARD, EXECUTIVE VICE PRESIDENT, TEACHERS INSURANCE & ANNUITY ASSOCIATION AND COLLEGE RETIREMENT EQUITIES FUND, ACCOMPANIED BY JoANN SHER, ASSISTANT COUNSEL

Mr. Willard. I am Mr. Willard. I am executive vice president of Teachers Insurance and Annuity Association, or TIAA, and its companion organization, CREF, College Retirement Equities Fund.

My responsibility is that of manager of what we call our college service division, which has primary responsibility of working with eligible institutions and their staff members in the development of sound staff benefit plans. I have with me this morning Mrs. JoAnn Sher, assistant counsel to TIAA-CREF.

If I may, I would like to give a little bit of background information to the committee about TIAA-CREF.

The Carnegie Foundation for the Advancement of Teaching, working with higher education, established TIAA in 1918 as a special purpose nonprofit life insurance company under New York laws. CREF was established in 1952 by special New York Act as a companion nonprofit corporation.

Participation in the TIAA-CREF benefit system is strictly limited to colleges, universities, independent schools, and certain other nonprofit institutions that are tax exempt under the education or scientific exemptions of section 501(c)(3) of the Internal Revenue Code.

TIAA provides fixed-dollar benefits to help educators and their families withstand the financial impact of old age and death. CREF adds variable annuity benefits to help educators sustain their purchasing power in retirement. I might add: It is not doing too well these days.

The major service is the fully and immediately vested, fully funded, portable retirement program in effect, as Mary Jo has indicated, at 2,600 institutions and covering 400,000 staff members, a program which permits mobility of academic and scientific talent among public and private educational institutions throughout the country without loss of benefits.

The TIAA-CREF program was referred to, on several occasions during congressional deliberations on private pension reform legislation, as the model plan after which all private pensions should be patterned.

Types of pension plans: There are two basic types of pension plans—the defined contribution or the defined benefit. Mary Jo has told you a little bit about defined benefit plans and defined contribution plans. The TIAA-CREF retirement plans are of the defined contribution type, under which the pension commitment is made in the form of monthly annuity contributions that are a stated percentage of current salary. They are based on the concept that men and women should receive equal employer contributions toward the purchase of annuities as a part of equal pay for equal work.

For similarly situated men and women, these equal contributions provide equal death benefits prior to retirement and equal accumulations at retirement with which to buy annuity incomes that are actuarially equal.

Under the joint options for husband and wife, for example, two-thirds or full benefits to the survivor for life options which are frequently elected at TIAA-CREF, the equal accumulations pay the same monthly income to a female employee and her spouse as to a male employee and his spouse, given identical ages. The ages of the spouses affect the amount of income; the elder the spouse, the larger the monthly income, and vice versa. But where both husband and wife are the same age, the income paid to a couple for a given accumulation is the same whether the husband or the wife is the plan participant.

However, when benefits are paid out under a single life option, the periodic incomes are larger for men than for women since women's benefits must be spread over a longer period of time because women, on average, live longer than men.

The defined benefit plan is normally found in State retirement systems and throughout industry. This type of plan normally provides that an employee with vested benefits will receive at retirement a monthly single life income determined by a formula representing a specified percentage of the average salary paid by the employer in the years just prior to retirement or termination of service—for example, 1 percent of the final 5-year average salary multiplied by the years of service.

While this standard formula benefit produces a monthly retirement income that is the same for a man and a woman who retire at, say, age 65 with identical salary and service histories, the accumulation—the cost—needed to pay the income is determined by the age, sex, salary, and service of each individual and is larger for the woman than for the man because the formula benefit must be paid to the woman about 3 or 4 years longer, on average, than to the man.

If, however, they elect any of the other income options, such as one of the joint options for husband and wife as discussed above, the female employee receives a larger monthly income than the male employee if again we assume the ages of both to be the same.

Thus, both these pension plan approaches—indeed all types of pension plans—rely on mortality tables that reflect the differences in life expectancies of men and women. In the case of defined contribution plans, or the typical TIAA-CREF plan, they are a significant factor in determining the annuity payout rate, while, in defined benefit plans, they are a major element in determining the cost of annuity benefits.

Federal agencies' guidelines: Again this is somewhat repetitive of what Mary Jo has been talking to you about, but I think it is worth repeating if you will bear with me.

In recent years several Federal agencies charged with the administration of bans against sex discrimination in employment have adopted guidelines with respect to pensions. The first set of guidelines was developed by the Department of Labor to interpret the Equal Pay Act of 1963 and embodies the "either/or" approach to equality in pension plans—either the contributions or the periodic benefits must be equal for similarly situated men and women under this approach.

The EEOC apparently has rejected this approach when interpreting its 1972 guidelines which states:

> It shall be an unlawful employment practice for an employer to have a pension or retirement plan * * * which differentiates in benefits on the basis of sex.

While the EEOC guideline itself does not define equal benefits in this area—that is, it does not state whether they mean equal monthly benefits or actuarially equal benefits—the EEOC decisions applying this guideline have interpreted it to mean equal periodic—monthly—benefits.

It is important for this subcommittee to note that the change of approach in the EEOC's guidelines was made despite the earlier congressional mandate instructing the EEOC to follow the Wage and Hour Administrator's policy in matters over which the Equal Pay Act and title VII have concurrent jurisdiction.

Another Federal agency, HEW's Office for Civil Rights, responsible for administering title IX, the Education Amendments Act of 1972, published its proposed guidelines in June 1974. While their proposed guidelines require that penson plans provide either equal contributions by the employer or equal periodic benefits for the similarly situated male and female, in his introductory remarks in the Federal Register the Secretary of HEW indicated that he has considered a third possible alternative approach and has requested comments on its possible adoption.

That alternative approach would mandate the use of premium or rate tables which do not differentiate on the basis of sex and would thus require both equal contributions and equal periodic benefits. Under this alternative, neither the monthly costs nor the rate of paying out accumulated retirement funds could reflect the differences in life expectancy between men and women. This would mandate the so-called unisex approach.

The unisex rate for any pension program or other group of annuitants, such as an insurance company, would be determined by the proportions of men and women in the group and would change from time to time as the proportions of men and women change. The present rate of payout for men would be reduced in order to increase the women's.

When a pension program contained 50 percent men and 50 percent women, the monthly rate of payout per person retiring at that time would be about halfway between the true actuarial rate for men and the true actuarial rate for women. When the group was two-thirds women and one-third men, the unisex rate would be about two-thirds of the way toward the true rate for women, and so forth.

In reality, because accumulated retirement funds would be distributed at a monthly rate lower than the true male rate, men would not live long enough on average to receive the true actuarial rate of their accumulated funds. The shortfall in their benefits caused by their shorter duration of life would be used to pay the women more than the true actuarial value of women's accumulated funds.

Insurance companies that concentrated their sales efforts on male annuity business would have the fewest women and the most attractive rates, which would tend to draw the funding of men's retirement benefits away from pension programs and insurance companies having a normal mix of men and women.

A unisex rate for paying out accumulated funds would be no better in its handling of individual equity than "uni-age" rate for paying out accumulated funds to all persons of the same sex retiring between say, ages 60 and 65. A reduced "uni-age" monthly rate for persons retiring at age 65 would mean they could not live long enough on average to receive the true value of their accumulated funds, with the shortfall in their benefits being used to increase benefits for the younger retirees.

In short, semantic changes won't change the facts of life and death. Women do live longer than men, and younger people do live longer than older people. Age and sex, then, are the two statistically reliable and objective factors that significantly influence the expected duration of annuity payments and therefore the rate of payout per $1,000 of accumulated funds in all types of retirement plans.

The problem to be considered by this subcommittee is: Which of these three conflicting definitions of equality in pensions—equal monthly contributions, equal monthly benefits, or unisex approach—as a practical matter, best accommodates the needs of higher education while also accommodating the letter and spirit of equal employment opportunity legislation?

Involved in this problem is the question of whether an educational institution should continue to have the right to choose the type of pension arrangement best suited to its needs or whether this desirable flexibility is to be precluded by mandating a standard arrangement.

Also to be thoroughly examined is the issue of whether educational institutions should be able to provide pension plans which recognize the difference between male and female longevity in the payment of benefits.

TIAA-CREF suggests that it has not been established that there is only one fair and equitable way to structure pension plans. We believe, therefore, than an educational institution and its staff members should have the right to choose the type of pension plan most suited to their needs from among those already approved by Federal and State laws and regulations.

And we do not believe that actuarial tables, based on statistically valid longevity factors and the laws of probability are discriminatory. Rather, such tables use a two-component system which separates annuitants by expected duration of life and therefore expected duration of payments.

The fact that age and sex are the two objective and statistically reliable factors used in determining expected rates of mortality is not unlawful discrimination between men and women any more than it is unlawful discrimination between young people and old people.

TIAA-CREF thanks the subcommittee for the opportunity to express our views on this important subject. We will be happy to furnish the subcommittee with any additional information it may find helpful.

[Mr. Willard's prepared statement follows:]

STATEMENT OF DONALD S. WILLARD, EXECUTIVE VICE PRESIDENT, TEACHERS INSURANCE AND ANNUITY ASSOCIATION, COLLEGE RETIREMENT EQUITIES FUND

Thank you, Mr. Chairman and Members of the Committee. I am Donald S. Willard, Executive Vice President of the Teachers Insurance and Annuity Association, hereinafter referred to as TIAA, and its companion organization, the College Retirement Equities Fund, hereinafter referred to as CREF. I am responsible for the management of Our College Services Division, which has primary responsibility of working with eligible institutions and their staff members in the development of sound staff benefit plans. With me this morning is JoAnn Sher, Assistant Counsel to TIAA-CREF.

TIAA-CREF

The Carnegie Foundation for the Advancement of Teaching, working with higher education, established TIAA in 1918 as a special purpose nonprofit life insurance company under New York laws. CREF was established in 1952 by Special New York Act as a companion nonprofit corporation.

Participation in the TIAA-CREF benefit system is strictly limited to colleges, universities, independent schools, and certain other nonprofit institutions that are tax-exempt under the educational or scientific exemptions of Section 501(c)(3) of the Internal Revenue Code. TIAA provides fixed-dollar benefits to help educators and their families withstand the financial impact of old age and death. CREF adds variable annuity benefits to help educators sustain their purchasing power in retirement. The major service is the fully and immediately vested, fully funded, portable retirement program in effect at 2,600 institutions and covering 400,000 staff members, a program which permits mobility of academic and scientific talent among public and private educational institutions throughout the country without loss of benefits. The TIAA-CREF program was referred to on several occasions during Congressional deliberations on private pension reform legislation as the model plan after which all private pensions should be patterned.

TYPES OF PENSION PLANS

There are two basic types of pension plans—the Defined Contribution or the Defined Benefit. The TIAA-CREF retirement plans are of the "Defined Contribution" type, under which the pension commitment is made in the form of monthly annuity contributions that are a stated percentage of current salary. They are based on the concept that men and women should receive equal employer contributions toward the purchase of annuities as a part of equal pay for equal work. For similarly situated men and women these equal contributions provide equal death benefits prior to retirement and equal accumulations at retirement with which to buy annuity incomes that are actuarially equal. Under the joint options for husband and wife, e.g., two-thirds or full benefits to the survivor for life options which are frequently elected at TIAA-CREF, the equal accumulations pay the same monthly income to a female employee and her spouse as to a male employee and his spouse, given identical ages (the ages of the spouses affect the amount of income: The older the spouse, the larger the monthly income and vice versa). But where both husband and wife are the same age, the income paid to a couple for a given accumulation is the same whether the husband or the wife is the plan participant. However, when benefits are paid out under a single life option, the periodic incomes are larger for men than for women since women's benefits must be spread over a longer period of time because women, on average, live longer than men.

The Defined Benefit plan is normally found in state retirement systems and throughout industry. This type of plan normally provides that an employee with vested benefits will receive at retirement a monthly single life income determined by a formula representing a specified percentage of the average salary paid by the employer in the years just prior to retirement or termination of service, e.g., 1 percent of the final five-year average salary multiplied by the years of service. While this standard formula benefit produces a monthly retirement income that is the same for a man and woman who retire at, say, age 65 with identical salary and service histories, the accumulation (the cost) needed to pay the income is determine by the age, sex, salary and service of each individual and is larger for the woman than for the man because the formula benefit must be paid to the woman about three or four years longer, on average, than to the man. If, however, they elect any of the other income options, such as one of the joint options for husband and wife as discussed above, the female employee receives a larger monthly income than the male employee, if again we assume the ages of both couples to be the same.

Thus, both these pension plan approaches, indeed all tyeps of pension plans, rely on mortality tables that reflect the differences in life expectancies of men and women. In the case of defined contribution plans, they are a significant factor in determining the annuity payout rate; while in defined benefit plans, they are a major element in determining the cost of annuity benefits.

FEDERAL AGENCIES GUIDELINES

In recent years several federal agencies charged with the administration of bans against sex discrimination in employment have adopted guidelines with respect to pensions. The first set of guidelines was developed by the Department of Labor to interpret the Equal Pay Act of 1963 and embodies the "either/or approach" to equality in pension plans: Either the contribution or the periodic benefits must be equal for similarly situated men and women under this approach.

The EEOC apparently has rejected this approach when interpreting its 1972 guideline which states: "It shall be an unlawful employment practice for an employer to have a pension or retirement plan * * * which differentiates in benefits on the basis of sex." While the EEOC guideline itself does not define equal benefits in this area, the EEOC decisions apply this guideline have interpreted it to mean equal periodic benefits. It is important for this Subcommittee to note that the change in the EEOC's guidelines was made despite the earlier Congressional mandate instructing the EEOC to follow the Wage and Hour Administrator's policy in matters over which the Equal Pay Act and Title VII have concurrent jurisdiction.

Another federal agency, HEW's Office for Civil Rights, responsible for administering Title IX, the Education Amendments Act of 1972, published its proposed guidelines in June, 1974. While their proposed guidelines require that pension plans provide either equal contributions by the employer or equal periodic benefits for the similarly situated male and female, in his introductory remarks, the Secretary of HEW indicated that he has considered a third possible alternative approach and has requested comments on its possible adoption. That alternative approach would mandate the use of premium or rate tables which do not differentiate on the basis of sex and would thus require both equal contributions and equal periodic benefits. Under this alternative, neither the monhly costs nor the rate of paying out accumulated retirement funds could reflect the differences in life expectancy between men and women. This would mandate the so-called "unisex" approach.

The unisex rate for any pension program or other group of annuitants, such as an insurance company, would be determined by the proportions of men and women in the group and would change from time to time as the proportions of men and women changed. The present rate of payout for men would be reduced in order to increase the women's. When a pension program contained 50 percent men and 50 percent women, the mothly rate of payout per person retiring at that time would be about halfway between the true actuarial rate for men and the true actuarial rate for women. When the group was two-thirds women and one-third men, the unisex rate would be about two-thirds of the way towards the true rate for woman, and so forth.

In reality, because accumulated retirement funds would be distributed at a monthly rate lower than the true male rate, men would not live long enough on average to receive the true actuarial rate of their accumulated funds. The short fall in their benefits caused by their shorter duration of life would be used to pay the women more than the true actuarial value of women's accumulated funds. Insurance companies that concentrated their sales efforts on male annuity business would have the fewest women and the most attractive rates, which would tend to draw the funding of men's retirement benefits away from pension programs and insurance companies having a normal mix of men and women.

A unisex rate for paying out accumulated funds would be no better in its handling of individual equity than a "uni-age" rate for paying out accumulated funds to all persons of the same sex retiring between say ages 60 and 65. A reduced "uni-age" monthly rate for persons retiring at age 65 would mean they could not live long enough on average to receive the true value of their accumulated funds, with the short fall in their benefits being used to increase benefits for the younger retirees.

In short, semantic changes won't change the facts of life and death. Women do live longer than men, and younger people do live longer than older people. Age and sex then are the two statistically reliable and objective factors that significantly influence the expected duration of annuity payments and therefore the rate of payout per $1,000 of accumulated funds in all types of retirement plans.

The problem to be considered by this Subcommittee is which of these three conflicting definitions of equality in pensions, as a practical matter, best accommodates the needs of higher education while also accommodating the letter and spirit of equal employment opportunity legislation. Involved in this problem is the question of whether an educational institution should continue to have the right to choose the type of pension arrangement best suited to its needs or whether this desirable flexibility is to be precluded by mandating a standard arrangement. Also to be thoroughly examined is the issue of whether educational institutions should be able to provide pension plans which recognize the difference between male and female longevity in the payment of benefits.

TIAA-CREF suggests that it has not been established that there is only one fair and equitable way to structure pension plans. We believe, therefore, that an educational institution and its staff members should have the right to choose the type of pension plan most suited to their needs from among those already approved by federal and state laws and regulations. And we do not believe that actuarial tables, based on statistically valid longevity factors and the laws probability are discriminatory. Rather, such tabels use a two-component system which separates annuitants by expected duration of life, and therefore expected duration of payments. The fact that age and sex are the two objective and statistically reliable factors used in determining expected rates of mortality is not unlawful discrimination between men and women any more than it is unlawful discrimination between young people and old people.

TIAA-CREF thanks the Subcommittee for the opportunity to express our views on this important subject. We will be happy to furnish the Subcommittee with any additional information it may find helpful.

Mr. O'HARA. Thank you very much. We would appreciate it, Mr. Willard, if you and your counsel would remain with us so that we will have an opportunity to hear Dr. Woolf's statement and then direct some questions to the group.

STATEMENT OF WILLIAM B. WOOLF, DIRECTOR OF ADMINISTRATION AND ASSOCIATE SECRETARY OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

Mr. WOOLF. Thank you, Mr. Chairman.

To be technical, I had best read the first sentence of my statement.

While I appear before you as an individual rather than as a representative of any organization, you should know that I am director of administration and associate secretary of the American Association of University Professors, and that, it is in that capacity that I have become acquainted with the issues we will discuss today. Indeed, the very complexity of these issues, and the strong and conflicting positions held by members of the academic profession, have made it impossible for my association yet to reach a firm and carefully reasoned policy position on the subject of sex-determined variations in fringe benefits.

We do not have a firm position. We have had a great deal of activity within the association discussing this. The annual meeting in April, which is a meeting of delegates from across the country, but not the ultimate policymaking body, voted in favor of equal monthly benefit payout for retirement systems. So, there is that policy position.

The Committee of the Association on the Status of Women in the

Profession strongly holds the position that payout formulas for retirement systems should provide equal monthly benefits to otherwise identically situated males and females. So, while there is not an official position of the association, there is a great deal of activity and a formal position taken by the meeting and by the Committee on the Status of Women in the Profession.

Another committee, the Committee on Fringe Benefits, tentatively took a year ago the position that equal pay for equal work, by which they meant equal contributions on behalf of the individual by the employer, did constitute equity and was a proper position. That would be the position that the TIAA contracts reflect.

The annual meeting to which that committee reported was unhappy with that position. The one this year voted to take the opposite position.

I will not bore you by reading much of my statement, since it repeats much which has been said by Dr. Small and Mr. Willard. I recount, as both Mary Jo and Don have, the status of the several administrative agencies and the conflict between their regulations. I assert that in my opinion the subject is sufficiently controversial and sufficiently a public policy question rather than a technical question; that, it is inappropriate, in my view, for the rulemaking procedures of Federal agencies to resolve it. Rather, it should be resolved in the policymaking arena.

I also opine that, I think the courts are not appropriately a vehicle for resolution of the issue. I think you can give good equity arguments for any one of three positions here, and I should imagine that a court would have considerable difficulty adjudicating that on the basis of the various and sundry pieces of legislation, including the Constitution, which bear on the issue.

So, I should think that a happier resolution would result from careful examination of the issue by this committee or some other committee of Congress. I am not expert enough to know which committee in Congress properly would look at the question as to what is equity in the handling of insurance in general and retirement systems in particular.

We are talking here about a retirement system so far, but the same question applies, for example, in the provision of life insurance. The cost to insure otherwise identically situated males and females is higher for males than it is for females. For exactly the same reason—they are liable to die sooner—premium dollars will flow for a shorter length of time, so you have to charge a higher premium.

In the case of life insurance provided by employers, it is common to suppress that difference in cost when you charge the employee his piece of the premium. You pool, as we say, across the sex variable.

Now, life insurance is true group life insurance as distinguished from individually owned annuities, as in the case of TIAA retirement program; that causes a difference which may be illuminated as we go into the question and answer period. Don and I have discussed this on several occasions.

Returning, however, to what I think is the hard issue, not the life insurance, but the retirement, I have been staring at this problem off and on for 2 years. I started out absolutely convinced that the way that TIAA-CREF operates is a proper way, if not the proper way.

I have started at the problem for 2 years and talked to lots of people about it, over coffee and in conferences. I am less confident of that position now and more inclined to believe that equity requires us to share the risk of longevity equally between men and women.

In other words, yes, it requires the pool of men to be merged with the pool of women and equally to share the average cost of living out to the average length of life. This does mean unisex. That is what I am talking about.

There have been, in the last couple of years, other suggestions around such as "topping up." These attempts to resolve the issue seem to me to be inadequate and to fall apart upon examination.

The unisex theory—and this is where we will some back to Mr. Willard's very excellent discussion of the issue—in theory seems to win the equity argument. It makes the conscious public policy decision that you will spread the risk across men and women and not separate them. You cannot wave away the fact that the women, on the average, do live four years longer than the men. You do not wave it away.

You agree explicitly to spread that charge among the entire population. Mr. Willard's statement properly points out the problem that I have not yet been able to resolve in my own mind; if retirement systems were one monopoly, rather than being provided by a competitive industry, that monopoly could establish unisex rates—one unisex table for the entire population it was insuring—and that would be it. The problem would be solved.

However, you have many companies in the business. Each of them, in order to be actuarially sound, must establish its own unisex mortality tables based on the mix of its annuitants. If some company has a largely male pool of annuitants and some other company has a largely female pool of annuitants, they must charge different rates.

The male pool will be charged less for their retirement system than the female pool. Otherwise, one of the companies is going to go broke, and the other will make a roaring profit. That does create a competitive situation, I think, of such economic importance that it can't be waved away. I do not pretend, at this point, to have a resolution of that difficulty in the unisex proposal.

[The statement referred to follows:]

TESTIMONY OF WILLIAM B. WOOLF, DIRECTOR OF ADMINISTRATION, AND SECRETARY OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

My name is William B. Woolf. While I appear before you as an individual, rather than as a representative of any organization, you should know that I am Director of Administration and Associate Secretary of the American Association of University Professors, and that it is in that capacity that I have become acquainted with the issues we will discuss today. Indeed, the very complexity of these issues, and the strong and conflicting positions held by members of the academic profession, have made it impossible for my Association yet to reach a firm and carefully reasoned policy position on the subject of sex-determined variations in fringe benefits.

Let me take a moment to describe this issue as I see it. It is a statistical fact, almost universally recognized and accepted, that women as a group live longer than men. That fact has several correlaries: It will cost more to provide a given retirement income to a group of one thousand females than to an otherwise identically situated group of one thousand males; it will cost less to provide that same group of one thousand women with a certain level of life insurance than to provide the same level for the one thousand otherwise identically situated men. The issue is whether or not it is proper public policy to permit insurers to reflect these actuarial facts by paying smaller monthly retirement benefits to individual women than to similarly situated men, or by charging higher life insurance premiums to individual men than to similarly situated women. Or should we mandate a sharing of risk in both pension and life insurance plans which would make costs *and* benefits equal for men and women?

There are several laws and executive orders which speak to this general area, and several agencies charged with the administration of these laws and orders. The Office of Federal Contract Compliance in the Department of Labor is charged with enforcing Executive Order 11246, as amended by Executive Order 11375. It is currently the policy of that office that an employer is in compliance with the Order if either of the following tests is met: The costs of benefits for otherwise equally situated males and females are the same; *or* the benefits provided to otherwise equally situated males and females are the same. It should be noted that there are hearings scheduled in September to examine this specific point, based on the Department's publication of proposed changes in regulation.

The Office for Civil Rights in the Department of Health, Education and Welfare, which acts for the Office of Federal Contract Compliance in the area of Education, also enforces Title IX of the Education Amendments of 1972. Pursuant to that responsibility, the Office of Civil Rights has issued proposed regulations for comment by October 15th of this year. OCR's proposed regulations suggest three possible alternatives, and solicit comment on the appropriateness of each. The alternatives are: (1) that benefit plants must provide equal periodic payments to annuitants, whether or not this results in higher cost (larger contribution) for women; (2) that employer contributions must be the same for male and female employees; or (3) that a shift be made to use of plans with premium and rate tables which do not differentiate on the basis of sex, thus requiring equal contributions and equal benefits.

The Equal Employment Opportunity Commission administers Title VII of the Civil Rights Act of 1964. Its regulations hold it unlawful to have a retirement plan "which differentiates in benefits on the basis of sex." This language has been interpreted to require that otherwise similarly situated males and females should receive equal periodic benefits from a retirement system (as contrasted with actuarially equal cumulative benefits). The Wage and Hour Division of the Department of Labor administers the Equal Pay Act of 1963, Section 6D of the Fair Labor Standards Act of 1938, as amended. That agency has held that an employer "will not be considered to have violated . . . [the] guidelines if his contributions are the same for men and women or if the resulting benefits are equal."

It is clearly untenable to have disagreement among agencies on federal equal employment policy. Congressional intent is thwarted by a lack of uniform standards as to what constitutes discrimination. Even if employers attempt to act in good faith in following federal fair employment practice laws, they must ask which law to follow. Moreover, insurers have not offered employers alternative plans. The hesitancy of the insurance industry to formulate policies which would reflect the employer's legal obligations may well be related to the lack of uniform federal policy on the issue.

Even assuming that the responsible agencies could reach a consensus and promulgate a single set of regulations, we must ask whether the basic problem involved is not one of sufficient substance that agency rule-making is not enough. If the intent of the legislation and Executive Orders were clear on this issue, would we have been so long in arriving at its resolution? On the contrary, I would submit that the intent of the existing laws is *not* clear, and that the issue involved is one of fundamental public policy that cries out for prompt legislative resolution, rather than administrative or even judicial consideration.

I do not suggest that the process of writing legislation in this area will be easy: The conflicting equity considerations and the possible difficulties of implementation will require considerable study and analysis by the staff and the Committee, and will probably require extensive hearings to allow interested parties to present their viewpoints. As a layman who has spent the last two years, off and on, looking at this issue, I have come to a tentative conclusion as to what I think ought to issue from such deliberations. I will attempt to outline this conclusion briefly, mentioning one or two unresolved difficulties inherent in it. I am confident that my good friend Don Willard from TIAA will elaborate further on the problems his organization sees in what we have come to call the "unisex" solution.

At the present time persons retiring under the TIAA-CREF retirement plan (and many other retirement plans commence receipt of a monthly retirement benefit which is calculated from mortality tables drawn up separately for males and females. Under the "unisex" plan, retirement plans would be required to draw up a single mortality table for their pool of participants and annuitants. Such a table would, because of the actuarial fact that women live longer—on the average—than men, reflect the composition of that pool of participant annuitants. An insurer whose pool of annuitants was all female would have a "unisex" mortality table identical to the current female mortality table, while an insurer whose pool was composed entirely of males would have a "unisex" mortality table identical with the current male mortality table. But an insurer with a mix of males and females in the covered pool would have a mortality table reflecting that mix. Under this system, similarly situated participants would pay in equal amounts during their working years, and would receive equal monthly benefits upon retirement.

The whole principle of insurance and retirement plans is the principle of pool-sharing risk: Persons who die earlier than predicted in the mortality tables receive less than they have contributed to the system, while those who outlive the mortality predictions receive more. The "unisex" plan would mandate that men and women share equally the costs of providing retirement income to the entire pool.

As I understand it, the major difficulty facing such a unisex system derives from the fact that there are competitive retirement benefit plans. If there were one single retirement monopoly which could utilize one single mortality table for the entire population, there would appear to be no theoretical barrier to the utilization of a unisex table. This, however, is not the case; insurance companies compete with one another in providing retirement systems. The requirements of actuarial soundness make it essential that each company utilize a unisex table constructed to reflect the male-female mix of its pool of participant annuitants. If, by chance or design, one company were to have a largely male pool, and another a largely female pool, the first company would be able to charge rates significantly lower than the second. Equivalently, any retirement plan might have pressures on it to minimize the number of women participants. I do not pretend to have devised a solution to this problem, but neither am I convinced that no solution can be devised.

A second problem hanging over the heads of all of us concerned with this issue is in some sense independent of the unisex plan. If any court or executive agency holds that retirement systems based on the principle of equal contribution or cost, but providing unequal periodic benefits to similarly situated males and females, are in violation of either the law or administrative regulations, the question of restitution or "back pay" will immediately arise. I know of no one who has articulated an equitable resolution of this "retroactivity" question. Whether this Committee can devise legislation to provide a solution, or whether it can only be formulated through judicial decisions, I do not know, but it seems inevitable that the problem will plague us for quite awhile.

I thank you, Mr. Chairman, and the members of the Committee for the opportunity to contribute to this discussion.

Mr. O'HARA. Thank you, Dr. Woolf, and I thank all of you.

Mr. Willard, in your statement, you point out, "In short, semantic changes won't change the facts of life and death. Women do live longer than men, and younger people do live longer than older people. Age and sex, then, are the two statistically reliable and objective factors that significantly influence the expected duration of annuity payments. . . ." Is that last sentence really correct? Aren't there differences in annuity tables based on occupation, based on race, and based on other factors?

Mr. WILLARD. Not that I am aware of. The question of race is one that always comes up in a discussion of this sort. I think what is important to focus on, in fact, is that we are talking about annuitant population, not general population.

You cannot set an annuity rate on the mortality or longevity experience of the general population, because it is quite different from the mortality rate of annuitants as a group of individuals. General population statistics do show, granted, that blacks do not live as long as whites. To my knowledge, there are no statistics on annuitants distingushing between blacks and whites.

We have made every attempt that we know of, and we will be delighted to have any suggestions that any of you may have, to try to determine whether indeed there is any differential in life expectancy between black and white annuitants. I even talked with the senior vice president and actuary of the North Carolina Mutual Life Insurance Co., which is the largest black-managed insurance company in the country. They have no annuitant population whatsoever. They sell only life insurance and health and accident insurance. They assured me this was true of other black-managed companies, too. From studies that have been done in this area, as best as that can be determined, the differences in longevity between blacks and whites is because of economic and environmental factors, not some innate biological factor. And that, where blacks and whites are living in much the same economic and environmental conditions, there is no evidence of any differential in the longevity of blacks versus whites.

Population statistics, I might also add, show, too, that there is a crossover in the differential in life expectancy between blacks and whites at about age 70, and that, indeed, blacks that live to age 70 have a longer life expectancy than whites that live to age 70. It is the older ages, 65 basically and older, which are the only ages that life expectancy comes into play in setting annuity rates. The rate of mortality prior to retirement age is not a factor at all.

Mr. O'Hara. It seems to me that I have seen some indications that marital status has something to do with longevity. Maybe it does not have anything to do with it, but that married males, for instance, tend to live longer than unmarried males.

Mr. Biaggi. It only seems longer, Mr. Chairman.

Mr. Willard. I have not seen such statistics, and I doubt their reliability.

Mr. O'Hara. My point is, that I would not be surprised if there were other differences.

Mr. Willard. I am sure there are other differences. I think the question is, No. 1, are they significant differences? Are they things that can be measured statistically? Are they objective factors?

When you start trying to put those factors together and determine what other differences there are, then you have the question I suppose of just how far does a company go in breaking down the differences in life expectancies among different groups of people.

You have heard Bill say that one extreme is unisex, where you have no breakdown at all. Another extreme would be to have all sorts of breakdowns and all kinds of things, if, indeed, there were reliable, valid, objective statistics that would be used.

Mr. O'Hara. I think that is the problem—you see—that I think many women would see. If you don't break it down on the basis of race, if you don't break it down on the basis of marital status, if you don't break it down on the basis of occupation—and I am convinced that Members of Congress—I don't know what effect the seniority system has on it—live longer than any other group in our society——

Mr. Dellenback. Only those of you from safe districts.

Mr. O'Hara [continuing]. Those who are very sensitive to the rights of women might well object and say, if you are not going to break it out for these other purposes, then what justification is there for breaking it out to the detriment of women, who are beneficiaries of these plans? If you are not going to break it out as between the school janitor and the professor of horticulture, then why are you going to break it out between men and women?

I think one could make a very good argument; I am sure those arguments have been made much more effectively than I could at Mr. Woolf's annual meetings, which led them to vote in favor of equal payment plans.

Does anyone have any comment on that?

Ms. Small. The only thing I was going to add, Mr. Willard, is that I think that since your annuitants are still predominantly faculty and professional, TIAA-CREF would tend to have an annuitant pool which is quite similar in occupational background, more so maybe than a general insurance company which dealt with a wider variety of annuitants.

Mr. O'Hara. I guess they would at that.

Ms. Small. That might condition the kind of statistics they get as opposed to those of another kind of company.

Mr. Woolf. Don, did you nod when Mary Jo asked whether they are largely faculty?

Mr. Willard. I did neither. They are largely faculty, but there are a number of nonfaculty people as well.

Mr. Woolf. Over the years TIAA-CREF has moved from a company insuring or providing retirement benefits for faculty only, to a company providing benefits at many institutions for the entire staff and, certainly, many institutions for a staff much larger than just the academic staff.

One illumination of the problem that Don cites to you about unisex can derive from that fact. Suppose it is correct that faculties are largely male, as I think it is, unfortunately, and suppose it is correct that support staff at institutions is heavily female, as I think is roughly correct, if you had a unisex system and TIAA were back 20 years ago insuring mainly faculty, they would have largely a male pool. They would have natural reasons, economic reasons, to resist extending their coverage to that largely female support staff, because the extension would raise the rates of the policies they were providing.

So, there would be an economic pressure against what I would presume to be otherwise sound social policy; namely, that they extend that coverage to the entire staff of the institution. There is this real economic difficulty with the unisex system.

In context, I am persuaded by the studies that I have been witness to—I can't say that I have done—that the 4-year differential between the average male and the average female at age 65 in longevity is a much more significant difference than you are going to find in those other variables, even if you do find some difference.

I am easily persuaded that sex is a very powerful determinant as to average longevity among the annuitants. You can't ignore it. You have to confront it face on and say how you want to deal with it.

Mr. Biaggi. Does anyone concede that sex is a most powerful component in these pension systems and other areas? I think we have seen—and what we will see to a greater extent, with the passage of time—a large infusion of females into the pension system. At least 25 years ago, the actuarials in the large pension plans didn't take into consideration the almost insignificant presence, numerically, that is, of the females. They spoke in terms of contribution, equal contribution, based on the fact of longevity. Some of those females would benefit to a greater extent because they came in on an equal basis.

But, with the infusion of females into the system in great numbers, in an actuarially determined plan, I think it is inescapable that the rates must go up, or the males will suffer by being required to pay a greater share of the cost of the system.

I agree with you. I think it is simply a question of policy, really. That could be said of each one of these proposals.

Mrs. **Sher**. Mr. Chairman, it is not my role to speak today, but I did want to comment on two of the questions that you had raised earlier, if I may.

You suggest that the problem that we are grappling with here is, essentially, a lack of data. I will agree with you that, in the question you raised concerning black annuitant mortality versus white annuitant mortality, there is indeed a lack of data. However, on the other issue that you raise, the marital status, which is not unlike some of the other issues that are raised, for example, smokers versus nonsmokers and so on, you have a question as to the reliability and validity of the statistics. Personal habits, such as smoking, obesity, alcohol, or even, if you will, marital status, is subject to change and consequently doesn't become the kind of reliable, valid statistics that one would use in establishing annuity tables.

Mr. **O'Hara**. That is a point well made.

Mr. Dellenback, do you have any questions?

Mr. **Dellenback**. I don't know whether I have too many or none.

Mr. **O'Hara**. I think, very clearly, that it is an intolerable situation as it now stands with the three agencies, each of them imposing different requirements.

The problem I have is deciding how to come to grips with it.

Mr. **Dellenback**. I would take it one step further than that, Mr. Chairman. That is, I would agree with Dr. Woolf's idea that this really is not a decision that ought to be left to the courts, nor certainly to the administrative agencies. This is a policymaking decision, and that is what we are talking about. Therefore, it becomes a congressional responsibility.

Would you mind, Dr. Woolf, going a little bit further into the "whys" of your change of attitude? You said that when you first began to look at this 2 years ago, you were instinctively of the feeling that what was being done—and still is being done—at the present time—was right. You have apparently moved very considerably away from your original position, according to my reading of your statement today. I don't know if I misstate the situation.

Mr. **Woolf**. I think that is correct, except, I cannot resolve what I think is a serious economic problem in implementing unisex. Until I can persuade myself that that problem has a resolution, I am not in a comfortable position.

Mr. **Dellenback**. From the standpoint of equity, why did you move to that position?

Mr. Woolf. Two reasons—a member of our Committee on the Status of Men and Women in the profession has done a short paper which contains a little graph which I find very persuasive. It is a graph of the years of death of 1,000 men and 1,000 women who start out at age 65.

The graph is very simple. The graph for the men starts at age 65—let me say right here—goes up and down. The graph for the women starts lower at age 65, humps later and goes down. You see that women die later on the average.

Then, she goes on to point out that if you take these 1,000 people and pair them by age of death, you can pair 68 percent of the men with 68 percent of the women, so that each pair dies at exactly the same time. You have left over 32 percent—I am sorry, you paired 68 percent of the total group. You have left over 16 percent of the group, which are men, who died earlier than women. You don't have any women to pair them with left. You have 16 percent of the group who are women who died later than any man because you have used up the men who died at that time in pairing.

So, 68 percent of these 2,000 people are indistinguishable. It is the fact that there are 16 percent on this end that are unmatchable and 16 percent on this end unmatchable, that requires you to use sex in determining how to price the system.

It is not clear to me that all 2,000 people have to be differentiated because 32 percent of the 2,000 behaved differently. That is reason No. 1.

Reason No. 2 is in a sense another way of saying that. Insurance business is the business of sharing risks. We pool all kinds of risks.

As I mentioned in my initial remarks, it is common to ignore the sex variable in distributing the cost of life insurance to an employee group. I am not saying that the premium is not dependent on the sex mix of the pool, but the price charged is the same to men and women assuming the employees are paying part of the premium on the group insurance, that is, their cost independent of the sex variable.

The employer knows how the premium is determined, and it is determined with an eye to the sex mix as well as age mix of the group, but the charge is then passed on, on an equal basis.

Now, I don't see any equity argument against similarly pooling across the sex variable in the case of retirement. Since we have made the public policy determination that we may not classify by sex as to employment, I draw the conclusion that that very properly can be said to mandate that the employees shall share the differential cost of longevity.

Mr. Willard. I want to make a comment, if I may, on Bill's second point, because there seems to be a different understanding of what is unisex and what is not unisex.

As I see it, unisex is a pooling, as Bill points out, of male and female, and you come up with a "people table," if you will—not differentiating in any way in terms of cost or benefit.

Bill's point on group life insurance—this is not a unisexing, if you will, under a group life insurance plan, but rather it is the very same thing that is done under defined benefit plans. Mortality factors, the differences in longevity between male and female, are taken into account, but there in group life, as under defined benefit plans, the differences are reflected in the cost, not in the benefit.

Indeed, under group life plans, the employer puts in more money for men than for women to recognize this difference in longevity.

Mr. Biaggi. I would like to make a point. We are taking two points of view. If you talk in terms of an insurance company, of course, that becomes a problem that you have to grapple with, and the competitive situation.

Let us go back to the individual male. This strikes me as analogous to some of the abuses that we found in other areas in affirmative action. In order to provide for the female, we work a hardship on the current status of the male. It is an accepted fact, and I think an established fact, that there is a longevity difference. We must deal with that equitably.

What you are requiring is the male to pay for that difference. I don't think it is fair. We don't quarrel with the notion of buying equality for the female, but at what price, and who is to pay? That is a question I pose. The answer, of course, is not that easy.

Mr. O'Hara. Will the gentleman from Oregon yield to me?

Mr. Dellenback. I will be glad to.

Mr. O'Hara. It seems to me that excellent arguments can be made on either side of this issue. I thoroughly agree it is not the sort of thing that a Federal agency ought to be deciding on its own, saying we have weighed these relatively equal arguments and we have decided in favor of the one—perhaps by a narrow margin, but we have decided. Therefore, everyone must fit our mold.

It is clearly more the responsibility of the Congress to make those kinds of decisions as Mr. Dellenback has pointed out. I even hesitate to do that. My own inclination is to say, well, there are good arguments that can be made either way. Maybe we ought to leave these issues to be determined by the individual groups involved.

In other words, if you have a collective bargaining agreement at an institution, a collective bargaining agreement could define the sort of plan they ought to have.

Mr. Dellenback. The trouble I would see with that, Jim, is that we have in existence certain statutes dealing with lack of discrimination.

Mr. O'Hara. If we define equality as being either equally defined contribution or defined benefit, which HEW does now, for instance——

Mr. Dellenback. HEW is reaching for a third road at the present time.

Mr. O'Hara. No.

Mr. Dellenback. Labor has gone one way, HEW has gone another way, but there is a third possibility, and EEOC has gone another way.

Ms. Small. Right.

Mr. O'Hara. Are there any defined benefit plans in force to your knowledge at institutions, possibly secondary institutions?

Mr. Willard. Most of your State retirement systems are defined benefit plans; yes.

Mr. O'Hara. If we came down, for instance, on the side of an equal contribution definition, a lot of the State schools would be out of step?

Mr. Biaggi. When dealing with equal contributions in defined contribution pension plans, don't they make allowance for the different ages of the annuitant?

Mr. **Willard.** No. Do you mean participants in the plan: do they contribute different amounts because of different ages?

Mr. **Biaggi.** Yes.

Mr. **Willard.** No. The contributions are a percentage of an individual's salary. A person age 30 may be earning $20,000 and someone age 60 may be earning $20,000, but they contribute the same percentage of their salary.

Mr. **Biaggi.** Is it a standard percentage?

Mr. **Willard.** Yes.

Mr. **Biaggi.** Are there some plans that have varying percentages depending on your age?

Mr. **Willard.** Yes. There are some plans that grade their contributions by age, usually not more than two gradations. For example, they may require contributions totaling 10 percent up until age 45, then 15 percent from 45 to 65.

Mr. **Biaggi.** I am familiar with certain plans in the City of New York that deal directly with the age of the annuitant, and the gradations vary at great length.

Mr. **Willard.** Yes; under your New York City retirement system.

Mr. **Biaggi.** They contribute on a percentage basis, but their age is a major factor. You can understand it in an actuarial determination. If a man enters the service at 21 years of age, and he is eligible to retire after 20 years, he has the ability to live, statistically, beyond that to a very substantial period.

Mr. **Dellenback.** I was trying to get a feel for the last part of your testimony, Ms. Small. You have, in your paper, argued cogently a series of reasons why one stand is right and then you counter that with a series of equally cogent reasons why you come out the other way.

Mr. Woolf has indicated his conclusions, with some caveats, after an attempted investigation. What are yours?

Ms. **Small.** As I study this issue, I find that I am swayed first one way and then the other. It is not really a decision I can make. That is one reason why I argued so strongly that Congress ought to make it. For instance, I personally, as a potential TIAA annuitant who at the moment would choose a surviving spouse option, am not affected by this. I also see economic arguments in terms of women on both sides. I don't see how you can change the retirement insurance programs and not change life insurance, and hence lose the advantage that women now have in buying individual life insurance policy and the advantage that, at least under some policies, women have in automobile insurance, because their accident rates are better. So, I can't even decide where my own economic self-interest lies, let alone where the proper social policy lies.

What has come home to me more, as someone sitting at an institution, is that this is an issue which generates a good deal of emotion on the part of individual potential annuitants, particularly male annuitants.

Mr. **Woolf.** Both.

Ms. **Small.** In our own institution, the most vocal discussion has been on the part of women who see themselves as being unfairly treated. What worries us, at least as much, however, is that when you discuss the issue with individual male staff members who are very strongly committed to the general notion of affirmative action, you find a great deal of anxiety generated.

There is almost nothing that I can think threatens people as much as what is going to happen to them in their old age. For them to perceive the institution being caught and through what seems like by chance, treated differently, at least for a period of time, from other schools who are doing the same thing, because one agency has decided one thing and one another, we feel may generate the very worse kind of reaction.

Rather than trying to decide which side of a very difficult and complex issue I come down on, I have worried more than anything else about the damage to the good social policy intended by legislation which could be undermined between agencies.

It is like the novel "Catch 22." Whichever way we turn we get caught. That is what worries me. That follows on your point that even to say the either/or standard is permissible, would need some action, because EEOC has chosen the other.

Mr. DELLENBACK. Any way we go, it seems to me, we must legislate because we have created the "Catch 22" situation, ourselves. We have created a different set of laws, and we have created different agencies to administer them, and the difficulty is compounded in that they are just not administering them the same.

Mr. Woolf, let me ask you a couple more questions. First, what is the principal composition, male and female, of your group?

Mr. WOOLF. Our group is, I think, the last time we checked, about 21 percent female.

Mr. DELLENBACK. In spite of your group being only about a quarter female, it came to a decision which, on the surface at least, might be disadvantageous to the male?

Mr. WOOLF. One committee, which is the Committee on the Status of Women, which is much more than 21 percent female, came out strongly for the equal monthly benefits. Another committee, which was a committee of economists and had one woman on it out of five, came out the other way.

Mr. DELLENBACK. But that was tentative, you said, and that was a year ago.

Mr. WOOLF. A year ago.

Mr. DELLENBACK. And then it was repudiated by the full body.

Mr. WOOLF. At the full annual meeting—it is hard for me to tell you what the composition of that meeting was, but I have no reason to assert that it wasn't 21 percent or less female. It was not biased in favor of lots of women there.

Mr. DELLENBACK. It says something to me. I would have understood the decision of overturning of the first committee more readily had it been 21 percent male and 79 percent female in attendance at the annual meeting.

Mr. WOOLF. I think it is fair to say that the people who compose that vote had not been exposed by us to any reasonably extensive debate on the issue.

Mr. DELLENBACK. So, the principal debate was carried in the second instance, at least, by the committee which had already concluded that that is the way it would go, and the body went with the committee?

Mr. WOOLF. I am not sure that is true because the committee did not present an extensive report. The body was not acting on the report of the committee. The body was acting on a motion from the floor. The discussion of the issue was from the floor. So, it was on the peculiarities of the issue, not after extensive debate of its details.

Mr. DELLENBACK. It seems to me we accept as fundamental the fact that we should move. It seems to me that we have an obligation, Mr. Chairman, to move fairly rapidly on this issue. Whatever we are going to do—even if the decision is a decision of inaction—it is a decision we should move on fairly soon.

I don't think we should delay and wait to see a series of decisions from the courts, which may just compound the problem. If we decide to move on this, I believe you have suggested, Mr. Woolf, that we would probably require extensive hearings.

Mr. WOOLF. Somewhat extensive, I think; is the phrase.

Mr. DELLENBACK. Actually, it is on page 4 of your testimony; and it says "* * * will probably require extensive hearings * * *" and "* * * will require considerable study and analysis * * *" May I ask for a simplistic answer to this one. As we dig deeply into this issue, are we going to find a host of different factors that we have to take into consideration—as some problems require extensive hearings to get the full panoply of reasons—or are we going to find that the arguments are summed up in this small paper on both sides?

There are good arguments on both sides, and in hearings, we will find them vehemently pushed on one side or the other. Is this problem that kind of complex question, or is it just a difficult policy decision?

Mr. WOOLF. I think the arguments that you have adduced do a very fair job of laying the structure of the debate. I suppose the reason that I made that comment in the testimony was precisely the point I have made here orally; that, I have not yet been able to figure out how to come to grips with the economic impact, the economic issue that Don has laid before us and that I have tried to articulate as well.

Therefore, I have not been able to figure out how to implement what seems to me tentatively to be the equity choice. So, I assumed you would have some trouble coming to grips with it and resolving it. I think that is all I meant to say there.

Now, if you go another route and decide to leave the ball game wide open, any one of the three is legal and equitable, then maybe you don't have to work very hard. If you try that out to get public reaction, I am not sure that public reaction will be very favorable. At least, I know segments of the population who will react unfavorably who feel very strongly that equal pay-in and unequal pay-out is inequitable.

I know there is a segment of the population that holds that view.

Mr. O'HARA. You had better wait until after election in spite of the need for haste.

Mr. DELLENBACK. What is the phrase—"due and deliberate speed?"

Mrs. Sher, in spite of the fact you said we shouldn't participate, is there anything else you would add?

Mrs. SHER. I would like to say that not only as a member of TIAA corporate legal staff, but in the past 8 months, I have been chairing a task force that has been looking into the very issue of what we call the fair annuity benefit. I can tell you that, with each aspect that we examine, we understand that there are more aspects that have to be examined.

So that, you will find, probably, that you will be examining the question from two vantage points. One is a very serious public policy question, and then, the other will be whether, from a public policy instinct, can the facts be implemented technically. So that, once the actuaries become involved, you have that kind of complication as well.

We can do very funny things with numbers; all of us can. I would like to say for the record, not critically, but only descriptively, that we (TIAA) have had funny things done to some of our figures by well-meaning people. Some of the figures that were quoted before this committee today were not prepared by actuaries. I would only say that, before accepting them, the committee would want to, I am certain, have an actuary examine them.

Mr. DELLENBACK. You are adding to what Mr. Woolf said, in effect, that if we really started to dig into this, we would find that the argument is a fairly simple one and can be laid out quite intrinsically.

Mrs. SHER. I find very much that the contrary is true.

Mr. DELLENBACK. Mr. Willard, would you add anything else?

Mr. WILLARD. I would agree wholeheartedly with what both Bill and Jo Ann have said. It is an exceedingly complex issue. There are good arguments on both sides of the issue. This is one reason, frankly, that I think we have taken the public posture and the position that the either or guidelines are the ones that should be the ones that apply to all employers.

I agree with what Mr. O'Hara said earlier that this is an issue that I think employers should have the flexibility of making the choice, whether it is at the collective bargaining table or through other means to determine what plan they feel best can meet the needs of their staff members.

I have been at TIAA for 20 years. By far, it is the most slippery problem that I have ever had to deal with and try to get a handle on. What is fair and what is equitable really seems to me the basic question.

Mr. DELLENBACK. Does it place in jeopardy the basic work that you are doing? Does it place in jeopardy any of the basic programs that you are administering?

Mr. WILLARD. I would answer that question in this way: I hope that we are sufficiently talented so that we can write pension plans anyway that it is so mandated they should be written. As I indicated in my comments, our plans almost without exception are all defined contribution plans, but we have the capability of writing defined benefit plans just as many insured plans in industry are underwritten by insurance companies on a defined benefit basis.

We don't happen to believe that that is the best approach for higher education because of the mobile type of community that we are dealing with. We believe that the defined contribution approach better meets their needs. But we can write a defined benefit plan, and it would affect our operations, yes, to the extent that if defined benefit plans were mandated, obviously, we would have to go through rather extensive and expensive change in order to accommodate to this type of approach.

Mr. DELLENBACK. I suppose I was really asking counsel a legal question. Does it place in jeopardy plans now in existence as opposed to capacity to modify future plans? If this issue were suddenly decided in the courts and they were to rule along the EEOC route, would that give you concern about any of those plans which are now being followed? Will you find yourselves suddenly having to change that which exists?

Mrs. Sher. There are several parts to the response, if I may. We believe that, since our system provides an individual contract between TIAA and each employee, we do believe that should there be either a legislative or court mandate today which takes a contrary view to the procedure we have been following, that such a mandate could only be prospective because it could not impair the contractual rights which have existed heretofore. So, in that regard, the existing plans, we believe, would not be disturbed, could not, in fact, be disturbed.

In terms of prospective changes, depending on what the mandate was, for example, if the EEOC guidelines were to prevail in the sense that equal periodic benefits under all options were required, then it would require adjustments to our procedures. The adjustments, however, could be in a funding and under certain options. If you are asking whether it places in jeopardy our system, I would have to say no.

Mr. Dellenback. You answered the other phase of the question when you made the distinction between prospective or restrospective. I didn't know if it was in contention.

Mrs. Sher. Of course, precedents have not been followed by some court, in order to provide change. There is no precedent for this particular set of facts. Nevertheless, we do feel confident in saying that we think a change would have to be prospective only, given our individual contract situation.

Mr. Dellenback. Thank you very much.

Thank you, Mr. Chairman.

Mr. O'Hara. My thanks to all of you for your contribution to our understanding of this problem. I am afraid, now that we understand it, we will be unable to solve it.

Thank you.

The committee will now stand in adjournment until tomorrow morning at 10 o'clock in this room.

[Information to be included in the record:]

Testimony of Dr. Norma K. Raffel, Head, Higher Education Committee, Women's Equity Action League

I am Dr. Norma Raffel, member of the Pennsylvania Commission on the Status of Women, past National President and currently Head of the Higher Education Committee of the Women's Equity Action League (WEAL). WEAL is a national voluntary organization which promotes equality in education and employment through legislation, litigation, and by pressing for full enforcement of existing anti-discrimination laws on behalf of women.

I am pleased to be here today representing WEAL. Congress has acted repeatedly and decisively to end unequal treatment of women in employment and education. Recently anti-discrimination laws have been extended and new laws enacted. Title VII of the Civil Rights Act of 1964 was amended in 1972 to include all educational institutions. The Education Amendments Act of 1972 extended the coverage of the Equal Pay Act of 1963 to executive, administrative, and professional employees, including college and university faculties. The Comprehensive Manpower Act of October, 1971, which amended the Public Health Service Act forbids sex discrimination against students in health-related programs. Title IX of the Education Amendments was passed in 1972, and forbids sex discrimination in any educational program or activity receiving Federal financial assistance.

In the employment practices affected by this anti-discrimination legislation individual women can no longer be evaluated by the standards relegated to the "average woman." Women may not be grouped separately from men in hiring, promotion, or salary. The Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex issued in 1972 state in Section 1604.2a,1, (ii), "The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group." Whether it is in the assembling of intricate equipment, lifting weights, or aggressive salesmanship, decision must be made on individual capabilities and not on capabilities attributed to the "average" male or female. It has been shown that while "average" performance of men and women may differ, there is usually a considerable overlap in the performance of the sexes. For example, the "average" man may be able to lift a heavier weight than the "average" woman, but some women may be able to lift more weight than some men. Therefore, weight-lifting laws which restrict women have been repealed and persons are now considered according to their individual capabilities and not on the basis of their sex. If grouping people by sex is not allowed in employment decisions such as hiring, promotion, and pay, such grouping should not be allowed in employee benefits.

It is not reasonable to group by sex in pension plans because distributions of the death ages of men and women are very similar and using the "average" death age is very misleading. Dr. Barbara Bergmann, an economist at the University of Maryland, has shown this clearly in a draft statement for the American Association of University Professors. She states, "While the 'average' woman dies later than the 'average' man, there is considerable overlap in the distributions of death ages. If at a single point in time we were to pick at random 1000 men age 65 and 1000 women age 65, and follow them through and observe their death ages, we would find an overlap of 68.1 percent (See Figure 1). This means that we could match up 68 percent of the men with 68 percent of the women as having an identical year of death. This leaves 32 percent of the population, of whom 16 percent are men who die relatively early, unmatched by women's deaths, and of whom 16 percent are women who die realtively late, whose deaths are unmatched by male deaths."

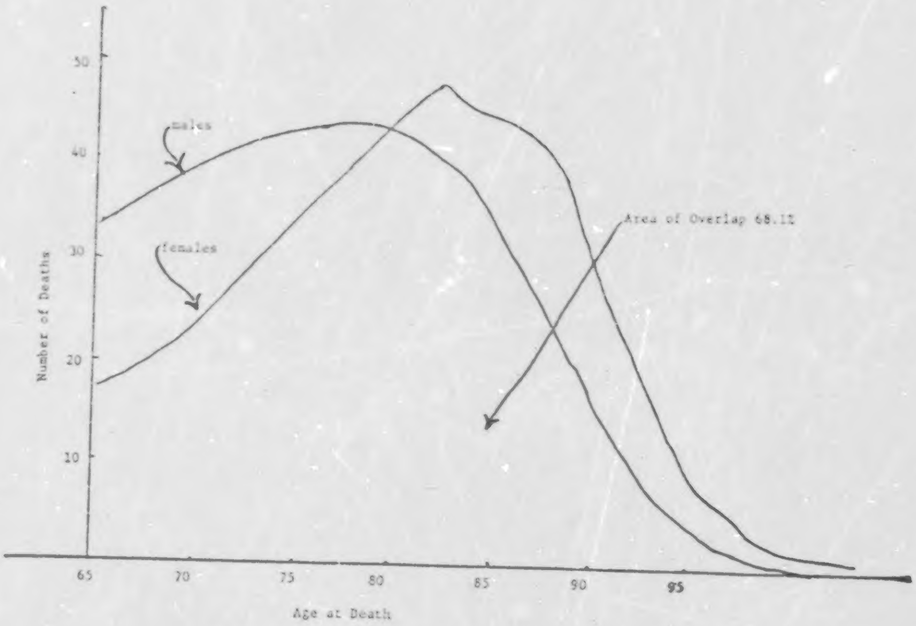
If an employer subscribes to a pension plan which provides higher monthly benefits for men than for women on the rationale that all men are like the "average man," and all women are like the "average woman" in terms of age at death, then the 68 percent of the men in the overlap group, who have an identical year of death with 68 percent of the women, benefit from the early death of 16 percent of the population which are men and who die early. Similarly, women in the overlap group bear all of the costs of the 16 percent of the population who die late because they happen to be women. The benefits and penalties of those in the overlap group are based entirely on their being the same sex as the person in the groups outside of the overlap. Therefore, women in the overlap group, with the same work histories as men, receive lower monthly benefits. Their standard of living may be adversely affected because everyone knows that the cost of a bag of groceries and the apartment rent for men and women is absolutely the same. A far more equitable and just solution would be that the extra burden of supporting that 16 percent of the population who live longer be shared by all of the persons receiving pensions, and likewise the savings in annuity cost of that 16 percent of the population who die early could be spread among the entire group of persons in the pension system. Sharing the risk among the pool of participants is done with other factors which affect longevity such as heavy smoking, heavy drinking, obseity, and hereditary predisposition to disease. Why then was sex singled out? True, it's easy to identify and remarkably constant, but also, a splitting of the pool by sex originated at a time when men made the decisions and women seldom questioned them. Times have changed.

WEAL urges that all insurance companies and pension plans be required to adopt mortality tables that do not distinguish between men and women in pricing or paying monthly benefits. In other words—a unisex table—anything less would, of course, be sex biased.

It is just as feasible to keep men and women in one group and charge each person in that group the average cost needed to provide an equitable retirement income as it is to split the group on the basis of sex. Then persons with the same salary and years of service would receive the same retirement benefits, and this would reflect the concept of equal pay for equal work. I believe that using sex in computing retirement benefits originated at a time when the prevailing social attitudes limited women in all areas of employment, and women were not as dependent on paid employment as they are today. Such a classification by sex is unacceptable in today's world. Congress has acted to end discrimination in other areas of employment and it is now time to end discrimination in retirement benefits.

FIGURE 1

Distribution of Death Ages of 1000 White Males and 1000 White Females who reach Age 65



Source: U.S. Life Tables, 1959-61

[Whereupon, at 11:05 a.m., the subcommittee recessed, to reconvene at 10 a.m., Thursday, August 15, 1974.]

CIVIL RIGHTS OBLIGATIONS OF INSTITUTIONS OF POSTSECONDARY EDUCATION

THURSDAY, AUGUST 15, 1974

House of Representatives,
Special Subcommittee on Education
of the Committee on Education and Labor,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to recess, in room 2261, Rayburn House Office Building, Hon. William Lehman presiding.

Present: Representatives O'Hara, Lehman, Benitez, and Dellenback.

Staff members present: Jim Harrison, staff director; Webster Buell, counsel; Elnora Teets, clerk; and Robert Andringa, minority staff director.

Mr. Lehman. I call the Special Subcommittee on Education and Labor to order. I apologize for being a few minutes late and for the temporary absence of our good chairman, who has been appointed to the new Budget Committee and is meeting with them.

Today we continue with our hearings on the requirements which existing civil rights statutes, Executive orders, and related rules and regulations impose upon postsecondary education institutions.

In today's hearing we will be taking testimony on operational aspects of this question. The availability of data needed to meet the requirements of affirmative action programs will be discussed by Dr. Betty Vetter, executive director of the Scientific Manpower Commission.

The dollar costs of affirmative action programs will be explored by Mr. Robert Johnson, vice president of the University of California; and Mr. Robert Stitt, counsel for Columbia University, will discuss some procedural questions relating to the administration of these statutes and regulations.

Today's hearing will be our last until after Labor Day recess. After that recess, the subcommittee will take further testimony on affirmative action and other equal opportunity programs. The exact dates and sequence of those hearings will be announced as soon as they are firmed up.

Dr. Vetter, will you begin today's proceedings?

STATEMENT OF BETTY M. VETTER, EXECUTIVE DIRECTOR, SCIENTIFIC MANPOWER COMMISSION

Mrs. Vetter. Thank you, Mr. Lehman and gentlemen.

Good data are essential to meet the requirements of equal opportunity in training, employing, and promoting women and minorities and, where necessary, carrying out programs of affirmative action to overcome the results of past discrimination.

Planners must have a knowledge of the number and proportion of women and minorities who have been and are being trained and/or who are presently in the work force. Without such data, realistic affirmative action programs cannot be structured. Further, unless the numbers and proportions of women and minorities already trained or in training is known, no base line measure for progress is available.

Educational data in the United States have included sex breakdowns for many years. Thus, we know how many women have graduated at each degree level over the past several decades, and we have these data broken down by field of major. Summary data for doctorates is shown in table I.

[Table I follows:]

TABLE I.—DOCTORAL DEGREES AWARDED BY U.S. UNIVERSITIES, 1920–73, BY FIELD AND SEX

Field	Total number	Number women	Percent women
Life sciences	73,870	9,029	12.22
Agricultural sciences	9,372	258	2.75
Biological sciences	51,501	8,070	15.67
Medical sciences	7,521	825	10.97
Physical Sciences	93,309	4,758	5.10
Mathematics/computer sciences	15,972	1,129	7.07
Physics and astronomy	24,777	666	2.69
Chemistry	44,039	2,729	6.20
Earth sciences	8,918	243	2.72
Engineering	41,047	209	.51
Social sciences	43,018	4,997	11.62
Psychology	28,827	6,246	21.67
Political science	8,924	776	8.70
Economics	14,541	795	5.47
Sociology	7,644	1,381	18.07
Anthropology	2,827	659	23.31
Arts and humanities	65,376	13,030	19.93
Professional fields	17,509	1,977	11.29
Education	76,625	15,662	20.44
Total—All fields	438,368	56,577	12.91

Source: Doctorate Records File, National Research Council.

Mrs. Vetter. Data breakdowns for minorities are much more recent, less accurate, and less readily available. We do know the number and proportion of the major minority graduates at the Ph. D. level in 1973, for example, through the work of the Commission on Human Resources in the National Research Council, which maintains the docorate records file. These are shown in table II.

[Table II follows:]

TABLE II.—1973 DOCTORATE RECIPIENTS BY FIELD OF DOCTORATE, RACIAL/ETHNIC GROUP

Racial/ethnic group	Physical sciences	Engineering	Life sciences	Social sciences	Arts and Humanities	Professional fields	Education	Total
White Caucasian:								
Number	3,396	1,902	3,185	4,069	3,894	994	4,811	22,251
H (percent)	15.3	8.5	14.3	18.3	17.5	4.4	21.6	
V (percent)	78.3	69.5	78.2	84.8	87.3	86.6	84.9	81.7
Black/Negro/Afro-American:[1]								
Number	45	27	96	87	74	24	382	735
H (percent)	6.1	3.7	13.1	11.8	10.1	3.1	52.0	
V (percent)	1.0	1.0	2.4	1.8	1.7	2.1	6.7	2.7
American Indian:[2]								
Number	10	7	17	21	18	1	34	108
H (percent)	9.3	6.5	15.7	19.4	16.7	.9	31.5	
V (percent)	.2	.3	.4	.4	.4	.1	6	.4
Spanish-American/Mexican-American/Chicano:[3]								
Number	35	14	49	26	49	4	38	215
H (percent)	16.3	6.5	22.8	12.1	22.8	1.9	17.7	
V (percent)	.8	.5	1.2	.5	1.1	.4	.7	.8
Puerto Rican-American:[4]								
Number	3	3	7	8	6		10	
H (percent)	8.1	8.1	18.9	21.6	16.2		27.0	
V (percent)	.1	.1	.2	.2	.1		.2	.1
Oriental:[5]								
Number	480	476	372	190	84	36	93	1,731
H (percent)	27.7	27.5	21.5	11.0	4.9	2.0	5.4	
V (percent)	11.1	17.4	9.1	4.0	1.9	3.0	1.6	6.4
Other:								
Number	10	17	7	8	11	1	4	58
H (percent)	17.2	29.3	12.1	13.8	19.0	1.7	6.9	
V (percent)	.2	.6	.2	.2	.2	.1	.1	.2
No useable response:								
Number	359	292	340	387	325	91	298	2,092
H (percent)	17.2	14.0	16.3	18.5	15.5	4.2	14.2	
V (percent)	8.3	10.7	8.3	8.1	7.3	7.8	5.3	7.7
Total:								
Number	4,338	2,738	4,073	4,796	4,461	1,151	5,670	27,227
(H percent)	15.9	10.1	15.0	17.6	16.4	4.1	20.8	
V (percent	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

[1] Includes 7 persons who checked this category and one other.
[2] Twenty persons checked only this category; 88 checked American Indian and white.
[3] Includes 45 persons who checked this category and white.
[4] Eight persons in this category also checked white.
[5] Twelve persons checked this category and white.

Note: H percent indicates the horizontal percentages which sum to 100 percent across the doctoral fields for each racial/ethnic group. The vertical percentages (V percent) sum to 100 percent for each doctoral field.

Source: "Summary Report 1973 Doctorate Recipients from United States Universities," National Research Council, 1974.

Mrs. VETTER. We do not have this information for earlier years but we have some data supplied by the National Research Council on both women and minorities within the working population of science Ph. D.'s in the United States derived from questionnaires to a sample of that population in 1973. Table III shows these breakdowns by scientific field. We have no similar information on minority and women doctorates in the nonscience fields.

[Table III follows:]

TABLE III.—TOTAL NUMBER AND PERCENT DISTRIBUTION OF U.S. DOCTORAL SCIENTISTS AND ENGINEERS BY FIELD OF IDENTIFICATION, SEX AND RACIAL GROUP

Field of identification	Total population	Percent— Females	White/caucasian	Minority group [1]	No report
All fields	244,921	8.7	86.8	5.4	7.7
Mathematics	15,952	6.3	85.4	5.9	8.7
Physics	18,350	2.7	85.2	5.8	8.9
Chemistry	31,041	5.6	87.7	5.9	6.5
Earth sciences	10,701	2.7	89.2	3.1	7.6
Engineering	35,912	.4	85.2	8.9	5.9
Biosciences	61,807	11.8	87.4	5.4	7.2
Psychology	26,664	20.5	88.5	2.9	9.5
Social sciences	29,042	10.9	86.2	5.0	8.8
Nonsocial sciences	11,956	11.6	88.7	3.4	7.9
Unknown	3,496	8.0	80.3	7.1	12.5

[1] Includes Black, American Indian and Asian.

Source: "Doctoral Scientists and Engineers in the United States, 1973 Profile," National Academy of Sciences, March 1974.

Mrs. Vetter. The data on women are accurate. Data on minorities is underreported in some instances and overreported in others. This comes about because of the different systems used in assembling data from a sample population.

Where questions of minority status are asked directly of individuals in a particular population and reported as received, the numbers will be underreported to some degree since answering such questions is always optional. This is the case in the data in tables II and III.

On the other hand, some reporters of data, such as the Census Bureau, allocate those persons who do not indicate racial or ethnic origin according to their general proportion within the population. This inevitably results in an overcount of both minorities and women in fields and at educational levels where these groups are grossly underrepresented.

In engineering, for example, the census data for 1972 show about 20,775 women engineers in the working population, while we know from other sources that fewer than 5,000 women have graduated in engineering at all degree levels combined over the past 24 years, and some of them are no longer practicing engineering.

The Engineering Manpower Commission estimates that 19,600 women are working in engineering, of whom 3,500 have engineering degrees. Among approximately 14,800 blacks in engineering occupations in 1973, about 8,100 have engineering degrees.

A major problem for administrators seeking to plan and carry out programs of affirmative action is that the existing data are scattered, some available information is unpublished, and much of the existing data that has been collected by professional organizations from their own memberships is not widely known outside the particular group which collected it. In some instances, these organizations are the only reliable source of data on the professional working population, particularly when it comes to minorities.

The Scientific Manpower Commission is in the process of bringing together in one place all the available data that exists from the many sources where it has been collected. We believe this will be a valuable resource for higher education as well as for other employers. It will include sufficient annotation to explain the discrepancies that exist in the data. Unfortunately, the work has not yet been completed.

Accurate data are essential for setting realistic goals for affirmative action. For example, a plan that sought to achieve a faculty made up of 51 percent women and 12 percent minorities—about the proportion in the general population—would be completely unrealistic since the number of qualified women and minorities is proportionately less for those groups than for white men.

Further, within particular fields, the proportion of trained women and minorities is substantially different. In the sciences, for example, about 16 percent of the Ph. D.'s granted in the biological sciences over the past 40 years have been granted to women, compared to only 6 percent in chemistry, 7 percent in mathematics, 3 percent in physics, and 0.5 percent in engineering. On the other hand, about 20 percent of Ph. D.'s in the arts and humanities, 22 percent in psychology, and 12 percent in the social sciences have been earned by women. Those proportions are now increasing.

Despite the relatively small proportions of women in the doctorate population, most universities and colleges have even smaller proportions on their faculties. At assistant professor rank and above, 17.7 percent of faculties nationwide in 1972–73 were women, compared to 18.1 percent of all Ph. D.'s that were granted to women in that year.

At universities, women made up only 13.2 percent of this faculty, compared to 28.3 percent at 2-year institutions. Among full professors, only 9.8 percent are women, while 39.9 percent of all instructors in 1972–73 were women. Table IV contains some of these breakdowns.

[Table IV follows:]

TABLE IV.—WOMEN'S SHARE OF FULL-TIME FACULTY JOBS, 1972-73

[In percent]

	All ranks	Professor	Associate professor	Assistant professor	Instructors
All institutions	22.3	9.8	16.3	22.8	39.9
Public institutions	22.7	10.0	15.8	23.7	39.2
Universities	17.1	6.7	12.3	20.0	44.4
Other 4-year	23.2	12.7	17.4	24.7	44.0
2-year	32.3	21.2	24.3	31.3	35.1
Private institutions	21.2	9.5	17.2	24.1	42.5
Universities	14.5	5.4	12.9	19.0	41.0
Other 4-year	23.6	12.3	19.1	25.7	41.5
2-year	45.4	31.5	34.3	41.3	53.8

Source: National Center for Educational Statistics.

Mrs. Vetter. It is discouraging to note that these proportions are not improving. In 1959–60, 9.9 percent of the full professors were women, compared to 9.8 last year. At the associate professor level, the percentage of women was 17.5 percent in 1959–60, 14.6 percent in 1971–72, and 16.3 percent in 1973. If we look even further back, we find that the highest proportion of women faculty was in 1879, when about 36 percent of all college faculty were women, compared to 22 percent in 1973.

The racial background of college and university teaching faculty in 1972–73, together with other characteristics by field, degree, rank, and position, is shown in table V.

[Table V follows:]

TABLE V.—SELECTED CHARACTERISTICS OF COLLEGE AND UNIVERSITY TEACHING FACULTY, 1972-73, BY SEX

Characteristic	All institutions (percent)		
	Men	Women	Total
Racial background:			
White Caucasian	95.1	93.6	94.8
Black/Negro/Afro-American	2.4	4.8	2.9
American Indian	.8	.9	.8
Oriental	1.4	1.7	1.5
Mexican-American Chicano	.3	.2	.3
Puerto Rican-American	.3	.3	.3
Other	1.5	1.1	1.4
Major field of highest degree:			
Business	4.7	1.9	4.1
Education	12.6	23.4	14.8
Biological sciences (including agriculture)	7.4	4.3	6.8
Physical sciences (including mathematics/statistics and computer sciences)	13.3	4.3	11.5
Engineering (including architecture/design)	7.8	.4	6.3
Social sciences (including psychology and geography)	13.3	8.6	12.4
Fine arts	8.3	9.2	8.4
Humanities	16.8	20.6	17.6
Health sciences	3.2	10.2	4.6
Other professions (including social work, law, journalism, library science)	3.7	4.9	4.0
All other fields (including home economics, industrial arts, vocational-technical)	2.1	5.4	2.7
None, no higher degree, no answer	6.7	6.6	6.7
Highest degree currently held:			
None, less than B.A.	1.3	1.0	1.3
Bachelor's	4.5	6.5	4.9
Master's	40.8	61.6	44.9
LL. B, J.D., other professional (except medical)	5.4	3.7	5.0
Doctorate (except Medical, Ed. D., or Ph. D.	1.6	1.2	1.5
Ed. D.	3.1	2.6	3.0
Medical (M.D. or D.D.S.)	1.2	.5	1.1
Ph. D.	33.8	15.6	30.2
No answer	8.3	7.4	8.1
Present rank:			
Professor	30.3	11.0	26.4
Associate professor	25.1	21.0	24.3
Assistant professor	23.8	31.2	25.3
Instructor	10.4	24.3	13.2
Lecturer	2.2	4.0	2.5
Do no hold rank designation	6.8	6.4	6.7
Other rank	1.4	2.1	1.6
Principal activity of current position:			
Administration	12.2	8.5	21.4
Teaching	81.2	86.5	82.2
Research	4.8	1.6	4.2
Other	1.9	3.4	2.2

Source: Teaching Faculty in Academe: 1972-73, by Alan E. Bayer, American Council on Education.

Mrs. VETTER. Necessary availability data also includes knowledge of the relative unemployment rates of highly qualified persons. The National Research Council, in its 1973 survey of science Ph. D.'s in the United States, found that 0.9 percent of the men were unemployed and seeking employment, compared to 3.9 percent of the women. In every field of science, the unemployment rate for women Ph. D.'s was higher than for men. These data are corroborated by other studies as well.

In a 1974 study by the American Chemical Society of employment among chemists and chemical engineers, at all degree levels combined 1.2 percent of the men and 3.5 percent of the women were reported as unemployed and seeking employment. This relative unemployment ratio for men and women has persisted for each year since 1971, when the American Chemical Society began this annual survey. Minority unemployment was measured for the first time in 1974, at 2.7 percent, higher than for white men but lower than for women.

The 1973 survey of professionals in physics conducted by the American Institute of Physics found 1.1 percent of the male Ph. D.'s and 5.2 percent of the women Ph. D.'s unemployed and seeking employment.

The data make it apparent that well-qualified women are available for faculty positions, although in some instances they are less mobile than men. There is less certainty about the relatively few members of minority groups whose educational background, when considered alone, makes them eligible for faculty slots.

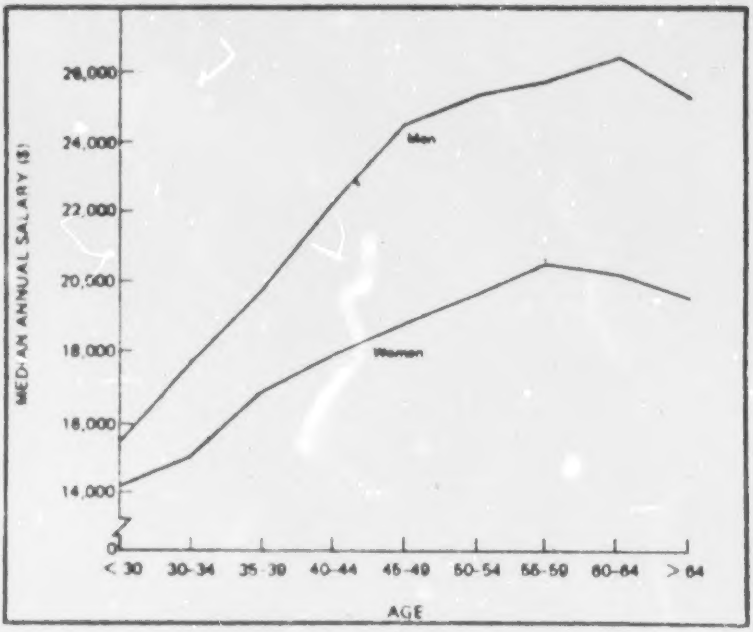
The proportion of American Indians, blacks, Chicanos and other Spanish-heritage groups, and those from Oriental stock who have reached the top of the educational ladder is much lower than for white men and well below that for white women.

There are no data that I am familiar with that indicate any substantial incidence of unemployment among well-educated minorities. There is, however, a serious disproportion of these groups entering and completing higher education. The situation is improving slowly.

The civil rights statutes also require equal pay for equal work. There is a substantial amount of data available to show that women at the same level of education, experience, age, and type of employer earn considerably less than men. The median annual salary for doctoral scientists and engineers in 1973 was \$20,890. For men, the median was \$21,170; for women doctorates, \$17,620—17 percent less. The differential persists from the year of the Ph. D. onward but increases with age, as shown in figure 1.

[Fig. 1 follows:]

FIGURE 1.—*1973 median annual salaries of doctoral scientists and engineers, by age and sex*



Source: *Doctoral Scientists and Engineer in the United States, 1973*, National Academy of Sciences.

Mrs. VETTER. Men in the 60–64 age bracket reported median salaries of $26,470, while women in that age bracket reached only $20,760—a 22-percent difference.

Median salaries of women faculty are well below those of men in every kind of higher education institution. In 1972 differences ranged from 19.7 percent less in large public universities to 17.5 percent less in all 4-year institutions combined, to 9.3 percent less in large public 2-year institutions.

One final requirement for effective affirmation action is the ability to locate qualified women and minorities for placement on higher education faculties. A great many resources for locating such persons have been and are being established. Many of the professional associations in specific disciplines have established womens' committees or caucuses and/or minority groups concerned with their status in the profression. Some of these groups have prepared directories, rosters, or registries of their women or minority members. These are available under varying conditions for use as recruitment resources.

The placement offices of America's large universities are also good sources for new Ph. D.'s who are women or minorities. Some of the largest institutions in terms of Ph. D.'s granted to women employ the smallest proportion of women faculty. As is now well known, women make up 50.4 percent of all high school graduates, 43 percent of all baccalaureate graduates, and 37 percent of advanced degree graduates but only 24 percent of all college faculty and 9.8 percent of all full professors.

Black Ph. D.'s are employed in a significant proportion in predominantly black institutions. Other minority faculty are scattered throughout the higher education system but employed in larger numbers in those areas where the minority group of which they are a member is substantially represented in the regional population. For example, Chicano faculty are more predominant in the Southwest and West than in the Northeast.

A list of rosters and registries of women professionals has been compiled by and is available from the Federation of Organizations for Professional Women. A list of the several minority rosters is being compiled by the Office of Opportunities in Science of the American Association for the Advancement of Science.

Additionally, the Equal Employment Opportunity Commission is compiling a list of rosters of both women and minorities which should be available sometime in September.

The Scientific Manpower Commission will include these lists along with the existing availability data in the reference work now in preparation. Although this is not yet available, I have brought with me a copy of most of the data thus far compiled, some 280 tables, and I will be happy to answer any specific questions you have on data as well as any other questions you may have. Thank you.

Mr. LEHMAN. Thank you, Mrs. Vetter. I have enjoyed your testimony. If you think it is bad for women in education, you ought to take another look at industry. I was on the Dade County School Board several years ago; I was chairman of that group. We were involved out by Eastern Airlines with a group to try to get the top executives of the 8 or 10 largest employers in the Dade County—Miami area and they had people there from Eastern Airlines, the First National Bank group, from National, from Florida Power & Light, Southern Bell, Dade County School System, University of Miami.

Of all the people there, we were the only group—we had one woman among the top executives; that was an area superintendent. There was not a single woman among the other industries. As bad as education is, it is good compared to some of the other categories.

Mrs. VETTER. That is correct.

Mr. LEHMAN. I have been an automobile dealer; I am a General Motors dealer. I have had opportunity to go into the district office in Jacksonville; not a woman, even in front line management.

You go to the regional office in Atlanta. It is "Can you type?" In fact, if you came up here on the Hill looking for a job, the first question they ask you is——

Mrs. VETTER. Can you type?

Mr. LEHMAN. But if a man came in, they would not ask if he could type.

Mrs. VETTER. That is right.

Mr. LEHMAN. So we are all guilty. In fact, coming from a State that just for the second year in a row has voted down the ERA, I am a little guilty myself.

But I think the women furnish the greatest untapped resource that we have in this country. I think the real fault that I have found out is the fear of male middle management, that women can't get by that frontline middle management. Once they get past that, they can go up, but they can't get past middle management.

In my own business, I can get management to accept blacks and Puerto Ricans. I can't get them to accept a woman salesman. In the city of Miami there must be, I guess, 1,500—at least 1,000—new-car salespeople and not 1 woman. They can sell real estate but the automobile industry——

Mrs. VETTER. Since women buy so many cars, one would assume that a saleswoman would be able to sell a car.

Mr. LEHMAN. Every dealership has Spanish-speaking salesmen, black salesmen, but they don't have a woman salesperson. The main problem is basically your white middle frontline management. That is one of the problems in the automobile business today; they don't get enough input from women at the management level.

Mrs. VETTER. It is quite possible that, since higher education is being forced by regulation to make some steps in this direction, when they succeed—and they will—in providing appropriate numbers of well-qualified women on staffs and it becomes apparent to industry that this has worked successfully, perhaps that will be the greatest bridge across those barriers, because there are few laws requiring that kind of thing from industry.

Mr. LEHMAN. In another committee, we are going to be dealing with some legislation called the Child and Family Service Act of 1974. I think it would be well to write into this act some kind of child care centers at the universities, not just for young female family people they can bring on their staff but for young students on the staff and as a laboratory facility to train people to take care of children.

Mrs. VETTER. That is right.

Mr. LEHMAN. I think all the opportunity in the world is not going to do you any good if you have a 2-year-old child who is going to need your care at that time when you are competing for promotion and you are competing with a male who doesn't have to assume those duties. I am going to try to work something out along those lines.

Would any of the staff like to ask questions?

Mr. HARRISON. I would, Mr. Chairman.

Mr. LEHMAN. Go ahead.

Mr. HARRISON. At the absolute end of page 4 of your statement, you say—

> On the other hand, some reporters of data, such as the Census Bureau, allocate those persons who do not indicate racial or ethnic origin according to their general proportion within the population. This inevitably results in an overcount of both minorities and women in fields and at educational levels where these groups are grossly underrepresented.

I am sorry; statistical analysis is not my thing; I do not understand what you are saying in that paragraph.

Mrs. VETTER. In the census data, everyone is asked to report his minority status or racial background but it is not a required question. It is against the law to require it. So for those people who refuse to answer it—and this includes both minority groups and nonminority people who refuse to answer it on principle—in other kinds of reporting but not in Census Bureau they simply report the number of people who announce themselves as belonging to a particular minority.

The Census Bureau decided instead to allocate all unreported people as being female or black or brown or whatever on the basis of their proportion within the population. Therefore, 51 percent of all the persons who did not designate sex are assumed to be women. This works all right when you are working with a total population.

On the blacks, they did it with a regional allocation. If you did not report your ethnic origin and you were from Alabama, for example the allocation to black was proportional to the sectional population of blacks. This works all right when you are working with big numbers. But when you are working with populations in which very small numbers of blacks or other minorities or women are represented in a discipline, if you get 17 engineers who do not designate sex and you decide that 51 percent of them are women and 12 percent of them are black, you come out with very greatly overreported numbers.

Mr. HARRISON. Thank you.

Mrs. VETTER. It took us a long time to find out why the census data were so completely off from everybody else's data.

Mr. HARRISON. What you have said would tend to confirm another impression I have about your data. When you are making comparisons in these areas, 17.7 percent of faculties nationwide were women, 18.1 percent Ph. D.'s—at any rate, the percentages that appear on page 6, for the most part you are talking about a small enough population so that the small differences among these percentages——

Mrs. VETTER. They are not accurate necessarily when you are reporting for minorities. Minorities are reported in one of two ways: By visual observation—somebody looks and decides what minority group he or she thinks someone may belong to—or by asking the individual himself to state the minority group.

In either case, if you get no answer from the respondent, you have to either ignore him—in which case you are under-reporting—or judge by observation. I am certain that the people who do these counts—I have known some of them—are not trained to distinguish accurately; they may not be able to tell what the ethnic background is.

So the numbers on minorities are very inaccurate. We do have a great deal of data on minorities and it does not agree very well. That is the major reason why. It depends on the way in which you use what you have collected and the way you collect it.

Mr. Harrison. You also have very small total figures here. Going to page 8, 1.1 percent of the male Ph. D.'s and 5.2 percent of the women Ph. D.'s in physics are unemployed and seeking employment; 1.1 percent of male Ph. D.'s in physics is how many?

Mrs. Vetter. It is about 283.

Mr. Harrison. And 5.2 percent of the women Ph. D.'s?

Mrs. Vetter. It is about 31.

Mr. Lehman. Mrs. Vetter, how do our data compare to Western industrial, European nations, Scandinavian, Britain, West Germany?

Mrs. Vetter. We are way below in women. They don't have the same minority proportions generally that we do.

Mr. Lehman. Dentists, doctors, and things like that?

Mrs. Vetter. We are way below in women. We graduate fewer women in the professions. We put fewer women in the graduate school. For example, in the medical profession, women make up a much higher proportion of the medical profession in almost all of the—I started to say "civilized"—the advanced countries than in the United States. Women earn 27% of the medical degrees in France, 30% in Germany, 12% in Italy, 26% in Sweden and 8.5% in the United States. In Russia, women physicians are in the minority.

Mr. Lehman. I welcome Congressman John Dellenback, whose wife is a well-known writer.

Mr. Dellenback. She will be very pleased to hear you say so.

Mr. Lehman. A TV personality. If you would like to get into the act, Mr. Dellenback, welcome aboard.

Mr. Dellenback. Mr. Chairman, I must be apologetic. We are in the process of doing one of the things that happens in the Congress. We are supposed to be at two places at the same time. We have been dealing with the Public Lands Organic Act in the Interior Committee. I have been at it and I apologize for not having been here earlier.

I wonder, Mr. Chairman, whether, in view of the fact that I haven't yet had a chance to read the testimony of Mrs. Vetter, it would be in order for counsel to ask a couple of questions.

Mr. Lehman. We were doing that anyway.

Mr. Dellenback. If that would be in order, I would appreciate Mr. Andringa's asking some questions.

Mr. Andringa. Are you or others in the Commission as involved in the collection of data on women and minorities for nonacademic employment as well as academic employment?

Mrs. Vetter. Yes.

Mr. Andringa. Could you give us some idea, then, as to how these kinds of statistics which you have shared with us about academic employment for women and minorities are comparing with progress made in other sectors of the economy? The statistics you mention on the bottom of page 6 are very discouraging, to say the least.

Mrs. Vetter. Yes, they are.

Mr. Andringa. Are the statistics as discouraging in other sectors or, because women were traditionally less involved early on in other sectors, might their progress show greater advancement?

Mrs. Vetter. No, I don't think there is any area in which they have made much progress since 1920, not really. We had proportionately more women trained in 1920. The proportion of women doctorates was higher in 1920 than it has ever been since. It dropped steadily through the fifties, starting back up in 1960, and is now climbing quite rapidly; but, even though we are training more women, they are having greater difficulty finding jobs, even the fully trained ones.

For academic areas generally, we can assume that the Ph. D. is probably as good a measure as we can find—how many women have Ph. D.'s in a field—because it is the best single measure you can use statistically to find out whether there are qualified women available for faculty positions.

Mr. Andringa. Could you look at the chart on page 6? In almost every case the proportion of women is higher as you move down in faculty rank.

Mrs. Vetter. That is right, as you move down in faculty rank and down in prestige of institution, as you move from university to junior college.

Mr. Andringa. Would that kind of profile in 1972–73 compare favorably with a similar profile, say, 20 years ago, or is it encouraging that at least at the lower levels this is a much higher proportion of women? If the normal tenure process and promotion process takes place, would we expect to find the percentages in the associate professor and professor level moving up in 10 years?

Mrs. Vetter. I think we will find them moving up, but present proportions are less than in 1920. We had very few 2-year institutions in 1920. What we had, instead, was 4-year colleges and universities. The proportion of women faculty in 4-year institutions was 27 percent, compared to 19 percent in 1972.

Mr. Andringa. Could you comment on the general question of timing in meeting affirmative action plans, given the current enrollment projections, collective bargaining trends, tenure rule, and so forth?

Mrs. Vetter. There has been an estimate made by the Carnegie Commission on Higher Education that if 50 percent of all new hires at universities 1970 to 1990, were women, faculty composition would reach 30 percent women by 1990. Obviously, 50 percent of all new hires are not women. So it is going very slowly.

But we are increasing women graduate students faster than that. We are increasing the proportion of women Ph. D.'s faster than that. The opportunities for training women are improving faster than the opportunities for employing women in higher education.

Mr. Andringa. So it is not so much a matter of the supply side?

Mrs. Vetter. It has not been the supply side for a long time. There are a great many unemployed women Ph. D.'s seeking academic positions. There are a great many academic institutions who say they can't find any qualified women. In come cases they genuinely can't because they don't know where to look and don't know how to go about it. And in some cases they obviously didn't try.

Sometimes they have queried groups like mine, for example, asking: Do I know any qualified women biochemists? Generally speaking, I know more about the women in science than I do in other groups because of the nature of my commission.

But yes, I do, and I will send them back the information they need. I will later find that they have never contacted a single one of the women who were recommended to them; but, on their statement of affirmative action of what they did to fill this job before they hired a pale male to fill it, "they checked with me and found out there wasn't anybody available." I have had that happen more than once.

Mr. Andringa. When will you be completing the compilation of data that you have in preparation?

Mrs. Vetter. I wish I had a perfect answer to that. Hopefully we will have it done in the fall. There turns out to be much more available than we thought there was when we started.

Our problem is the same as almost everybody elses. We can't get the support to finish it, we can't increase the staff to get it moving, so we are doing it in between everything else.

Mr. Andringa. If, as you suggest, this will be the most complete compilation available, although changing regularly, how far along will we be toward the ideal goal in terms of availability of information?

Mrs. Vetter. I would say, on women, we will have almost everything that is needed. As a matter of fact, we are up to that stage now. On women, there will be all the data anybody needs to know what a realistic affirmation action goal should be for hiring in any department in any university.

Mr. Andringa. This is to include master's degree?

Mrs. Vetter. Yes; we have all the information on master's. We will also include information on: Where do you go to look for the people? Where can you find lists? And sometimes these lists are in the form of simple directories that will give you a name and address and degree level. Sometimes they are rosters that will give you a little more information. Sometimes there are registries that will give you back history.

Mr. Andringa. One final question. Does your commission keep on file any résumés or personal information about specific individuals and make that avalable?

Mrs. Vetter. Not on purpose we don't. A lot of people think we must be a placement agency, so they send us résumés. At the same time, a lot of people who are looking for somebody think we must be a placement agency, and they send us job descriptions. Once in a while these two match up and I make copies and send each one copies of the other person's request.

But by and large, no, we don't. But we do know where all such résumés are maintained. There are a number of groups in higher education that work in academic placement. The most outstanding one is the Cooperative College Registry, which operates in Washington and is a placement service for college and university hiring, a nonprofit service. It is a very good place to locate women and minorities.

Mr. Andringa. Thank you.

Mr. Dellenback. Mr. Chairman, may I ask one question. It is not really covered by your testimony, Mrs. Vetter. It is a matter of searching within this committee for a road that I find difficult to locate. I believe in affirmative action. I think we ought to be doing something and not leaving it to chance.

But, in listening to the testimony these last weeks in this area, I see a difficulty, the resolution of which I don't quite see. If we, say, when it comes to employment as opposed to salary and raises and so on, in a given year, whatever the increment to be added must be nondiscriminatory, maybe you don't set quotas but you set some goals and the goals are in rough proportion to the available pool or the constituency being served or whatever it may be.

But you take the increment and apply a true measure of nondiscrimination to the increment added to. If you do this for 2, 3, 4, 5 years in a row, you will have had an impact on the normal pale male mass?

Mrs. VETTER. A little, not much.

Mr. DELLENBACK. But you will have had some impact on it but it will not have brought the mass of the given area into anything like a balance?

Mrs. VETTER. That is right.

Mr. DELLENBACK. On the other hand, if you change the incremental input so that within *x* years, whether it be 5 years or 7 years or 10 years, you have a substantial impact on the mass so that it comes closer to what we might consider balance, you do it in a way that means the incremental input discriminates?

Mrs. VETTER. That is right.

Mr. DELLENBACK. How do we resolve this issue? What is the right way for us to draw legislation which insists on nondiscrimination?

Mrs. VETTER. I think there is no fair way that this sort of thing can be decided. We have the same problem in reference to trying to make up to the Indian populations for that which our forebearers did to the Indians that they should not have done. We have the same kind of problem with any kind of discrimination which has existed in the past.

I think the only kind of answer that makes sense is: In hiring, when there are proportionately more qualified women or blacks or any other minority group available than there are men, then positive steps toward affirmative action seem to be indicated.

When the unemployment rates for highly qualified women are considerably higher—they now are from two times to seven times higher than for men—then, it seems to me, some affirmative action probably is completely justified.

Mr. DELLENBACK. Let us assume it were the other way and the women were in the predominant numbers and in a given year you and I were applying for a single faculty position and your qualifications were better than mine and they said, "Dr. Vetter, we have to bring this into balance; we are going to take Dr. Dellenback instead of Dr. Vetter for this particular position." It would not be fair to you.

Mrs. VETTER. I would not question for a moment taking the best person you can find. I do question, because I have seen it happen so often, whether anybody really looked to see who was the best person.

It is true—not because women are smarter or brighter or faster or anything else than men are—but it is true that highly qualified women, women who have reached the Ph. D., by any measure of testing or anything else we have, come out above the men, not because they are brighter but because they are so highly selected. Any woman who has the stamina and ability to go that far was selected way above her male compatriots, who did not need quite as much push.

We have large numbers of women who reach that level, and certainly every person who has reached a Ph. D. does not necessarily stand for something, but it is a measure we can use.

When we have fairly high unemployment among women who have gotten that high in the circuit and when those women, as a statistical group, have much better qualifications than the men do, they came out higher on the test scores, their graduate record exam scores were higher, their grades as graduate students were higher, then I think some affirmative action is necessary.

But that does not mean—when you come down on an individual basis, if you will truly look at some available women and some available men, I think always you should take the person who is best for the position if you will just be honest with who is best.

Mr. Dellenback. I will agree with you that the affirmative action of insisting on a true search instead of just saying, "We already have three applicants; they are all male; so we will go this way and we won't really try to open the information to the field and really look at the broad selection"——

Mrs. Vetter. We have to eliminate the old boy system of hiring or we have to get the women into the old boy system. I don't think there is anything wrong with the old boy system except that it is pretty exclusively male.

Mr. Dellenback. I understand, Mr. Chairman, with apologies, that we have another witness.

Mr. Lehman. Thank you, Mrs. Vetter.

Mr. Johnson, because we are going into session a little early, would you kindly summarize your statement? You may be assured your entire statement will be inserted in the record.

STATEMENT OF ROBERT L. JOHNSON, VICE PRESIDENT, UNIVERSITY RELATIONS, UNIVERSITY OF CALIFORNIA, BERKELEY, CALIF.

Mr. Johnson. Mr. Lehman and Mr. Dellenback, you have a long statement in front of you, a part of which I had intended to read and part of which I simply added as supplementary information. I think perhaps if we leaf through this very quickly without reading it at all, I will point out to you on page 1, I really would ask you to pay attention to the first paragraph because I do want to stress that, quite apart from whatever the monetary cost is, the commitment to affirmative action does indeed change an institution. I think this is very important.

Then you will notice that it is very difficult to aggregate dollar expenses but we have given you, on page 1 here, a motion of some $3 million for the current fiscal year at the University of California. You will remember we are talking now about nine campuses. We have given you a notion of the fact that most of this is a redirection of our own resources, only $250,000 coming from public moneys from the State of California, $500,000 from the university's governing board's own resources.

Then I would particularly point out, and I think this relates specifically to the previous speaker's comments that, if we are going to break up some of the old boy patterns of recruitment that, if you will look at the bottom of page 2, we give an illustration here of the fact that probably in the past, not probably but certainly in the past, that financial restrictions along with preconceived notions have meant only candidates which fitted the image of best bet have been invited by academicians for faculty appointment.

Since women and minority scholars are not usually part of personal knowledge of available scholars, they are less likely to be invited for interviews.

To correct this will take a lot of money in our judgment, probably as much as $620,000 in a year.

We have given you some indication here of what the cost has been recently for nonacademic positions, citing two instances here of over $3,000 each spent in appointments of just two positions where over 500 applications have come in.

I think I would particularly at this moment also like to point out some of the difficulties that occur with respect to the regulating agencies.

You will note on page 4 that we make reference to the fact on the Berkeley campus a painstaking effort to put together numerical goals for OCR and then learned that contract employment offices were told to emphasize percentage goals, one group we were working with from HEW telling one thing and another group telling us we need to do it another way.

No objection to what we are trying to do, but a real cost involved in changing the approach.

I will point this out from the EEO report. I would like to take a second, if I may, because I think this will give you some notion where I think there is no question about our all having the same purpose but the kind of difficulty we can get into.

Unless my memory fails me, the current EEO—one report places Philippinos with all other minorities. The EEO-situation report, if it is promulgated in a way we are told it will be, Philippinos will become part of an Asian group with others who were previously listed as Orientals. In California, Philippinos are not an insignificant number. For us, I think you can readily understand what this does to a computer program system and particularly it will probably mean we are going to have to maintain the old records and the new records in order to do any kind of continuity and the kind of sharp availability analysis and employment analysis that we would want.

Just to complicate this a little more, in the compliance report for OCR on students there is no mention of Philippinos at all. So, I have to infer that they would go back into the all other category again.

So any notion of our trying to match student enrollment, student opportunity, and student census with the occupational census as required under the EEO situation report and what they mean really to our keeping track of what we have been doing and where we are going becomes complicated, to say the least.

The rest of this is an elaboration of what the internal staff direction of energies is.

I have some comments here about the sort of pervasive nature, requirements, the commitment of staff time, and energy. I point out here that in the university we have 61 employees alone currently filling positions specifically earmarked for affirmative action, in no way counting all the others who are involved in whole or part time.

Then I think the one other thing that I would just highlight here is the kind of indepth analyses of personnel actions which we have taken. These are, indeed, expensive, time-consuming and necessary.

As chairman of the university's management program, for example, I can tell you we are reviewing all 550 so-called management programs of the university to look for any disparate effect in either classification or payment for women and ethnic minorities. This is going on at the academic level and management level at the university.

Lastly, I call your attention to some of the things that have happened at the university in a positive way, particularly noting some of the things that we have moved into that are not specifically required of us by law.

I would really close with that last sentence that I can say with conviction that we are a better institution for all this and, although the cost has been heavy, the benefits are certain. But the costs are, indeed, very real.

[The statement referred to follows:]

STATEMENT OF ROBERT L. JOHNSON, VICE PRESIDENT, UNIVERSITY RELATIONS, UNIVERSITY OF CALIFORNIA, BERKELEY

I will be frank. It is extremely difficult to isolate the cost of affirmative action efforts. Genuine commitment to affirmative action permeates an institution, influencing all activities at all levels. It *changes* an institution. The nature of this change is in some ways obvious, but often subtle. If the change is difficult to quantify and analyze, the cost of this change is even more so. I would not argue that the change stems solely from Federal requirements. The University is changing with the times; Federal legislation simply speeds the process and confirms our own sense of what is right and what must be done. Indeed, we hope it is true that the University of California has been a leader in this process.

Having indicated that much of the cost of our affirmative action efforts—probably a majority of the cost—can never be calculated, though real dollars are involved, let me give you some gross dollar figures. So far as we *can* calculate cost, we estimate this to be more than $2 million in 1973–74 and approximately $3 million during the current fiscal year. In 1973–74, only $350,000 of the total was new money. The State of California appropriated $250,000 and The Regents of the University appropriated $100,000. For 1974–75, the State has continued the $250,000. The Regents' appropriation is $500,000. The remaining costs of over $2 million for 1974–75 will, as was true last year, be met by a redirection of existing resources, including staff energies.

To sum, for 1974–75, we will spend over $2 million by absorbing costs within regular institutional resources; another $500,000 from internal funds is specifically earmarked for affirmative action, and $250,000 from State funds is earmarked for affirmative action, for a total of approximately $3 million.

Funds specifically allocated for affirmative action in 1974–75 and costs absorbed internally relate to five broad categories of expense: program coordination and administration ($385,000 earmarked), employment recruiting ($237,000 earmarked), training (no specific appropriation), data production and analysis (no specific appropriation), and related programs ($128,000 earmarked, including $40,000 for student affirmative action).

Let me use employment recruitment, because it is easier to quantify, as illustration of the expense associated with vigorous affirmative action. Every career job vacancy in the University is required to be openly listed in some manner. The University has been engaged in a vigorous effort to search out, identify, and encourage applicants from groups underrepresented in our workforce—with special emphasis on those occupational categories where women and minorities are underrepresented. This includes contact with national and local organizations, community groups, and a variety of recruiting sources. On some campuses, recruiters are assigned full-time to this outreach recruiting effort. Extensive advertising costs are incurred in conformity with the requirement for a full-scale search and recruitment of a diversified pool of candidates. Additional costs are incurred in paying travel expenses of candidates brought for interview.

On the academic side, for instance, departments have normally reimbursed travel expenses of only one or two candidates. Financial restrictions have meant that only candidates who fit a previously conceived image of "best bet" have been invited. Since women and minority scholars often may not fit this stereotypic image, they may have been less likely to be invited for interviews. Faculty members are aware of this problem and are most anxious to correct it by seeking to ensure that an honest and vigorous search be made for all competitive candidates. We estimate an additional expense of $1,000 per new ladder rank appointment to permit a much-needed expansion of the interview process, totaling perhaps as much as $620,000 in a year.

On the staff side, costs of advertising, long distance calls, and travel expenses recently exceeded $3,000 for each of two high-level management positions. Over 500 applications were received for one of these openings, Executive Director of Computing, and each application received close attention. The $3,000+ price tag for recruiting does not, of course, include the time of members of the search committees to scrutinize resumes and interview candidates.

Having indicated the sorts of costs which can be identified in rough approximation for purposes of budget requests and allocation of funds, let me turn to other costs, especially focusing on program coordination and administration and on generation and analysis of data.

Program coordination and administration takes place at two levels: University-wide and on the campus or at the laboratory. We have 14 affirmative action programs relating to employment, one for each of the nine campuses and three laboratories, one for the Office of the President, and one for Cooperative Extension. University wide guidelines for written affirmative action programs are formulated in the Office of the President, which then reviews each of the 14 programs to ensure conformity with the guidelines. Guidelines concern designation of responsibility, personnel policies and practices, recordkeeping, monitoring functions, and statistical analyses—including utilization analyses, analyses for substantial disparity, and establishment of goals and timetables.

In formulating these guidelines, University-wide staff maintain regular liaison with Federal compliance agencies to keep abreast of requirements, to seek assistance in interpreting requirements, and to comment on proposed requirements. This task involves untold manhours under the best of circumstances. Unfortunately, inconsistency sometimes arises among agencies or between central and regional offices, resulting in extraordinary cost to an institution.

These situations indicate the complexity of the entire process of adapting to institutions of higher education laws and regulations designed for application to industry. This process can be as confusing and difficult for Federal agencies as it is for the University.

As an example, during discussions with the Berkeley campus in the spring of this year, the Office for Civil Rights, DHEW, placed emphasis on the need for numerical goals—[illegible] opposed to percentage goals. As a result, the Berkeley campus workforce analysis just submitted to OCR contains numerical goals established through painstaking calculations. Now we learn that as long ago as January of this year the Office for Federal Contract Compliance sent Technical Guidance Memorandum No. 1 on Revised Order 4 to contract compliance officers emphasizing the need for percentage goals. It appears certain that we will have to recalculate utilization analyses and establish new goals on a percentage basis, expending manhours for calculations and typing as well as costs for reproducing and distributing the new workforce analysis. There's a morale factor in such instances, as well. Staff who take pride in their work, who are accurate and who meet deadlines, visibly lose motivation when they discover their careful job must be done all over again through no fault of their own. And, of course, University-wide guidelines must be revised in light of new information.

To take this subject just a bit further, let me point out that too frequent changes in Federal guidelines are a significant source of institutional cost. Each change can create enormous retooling costs—changed data bases and reporting systems—and, importantly, may force loss of comparability with the past. For example, the now proposed Higher Education Staff Information Report EEO-6 would necessitate immediate, major modification of computer programs in order to completely recode the ethnic identity of employees to conform to proposed new definitions of ethnic groups. Additionally, the proposed EEO–6 report, by combining University academic and nonacademic positions in occupational categories, would require institutions to keep dual sets of data—one based on current EEO–1 occupational categories in order to maintain continuity with historical information; another based on proposed EEO–6 categories for the purpose of providing EEO–6 reports.

To return to program coordination at the University-wide level: personnel policies are developed and review to ensure equal opportunity and non-discrimination in all employment areas, including recruitment, selection, employee development, promotion, salaries, benefits and separation. Standardized job descriptions and minimum qualification for each staff title are developed and reviewed to eliminate arbitrary or unnecessary requirements and to provide equal pay for equal work. These processes include extensive coordination with the campuses and employee groups.

Guidelines are developed for analysis of workforce composition and establishment of goals and timetables and for the analysis of all employment actions, as required under implementing regulations of Executive Order 11246. To assist the campuses in conducting utilization analyses and establishing goals and timetables, data on the availability of women and minorities are developed and tailored to fit the occupational mix and recruitment area for each campus. (Incidentally, the inadequacy of existing "availability data," particularly in the academic area, is a source of current frustration to all institutions of higher education.) For staff personnel, occupational subcategories of the Federal Occupation Codes are established to provide more detailed and accurate comparisons of University workforce data with availability data.

At the University-wide level, the monitoring function includes development of mechanisms to identify any problem areas in campus programs. Careful consideration is given to campus needs in order that limited resources can be optimally utilized. Funds provided by the The Regents and the Legislature are distributed to campuses for support of specific efforts designed to further affirmative action.

Multitudinous reports are prepared in the Office of the President, for external and internal audiences, describing the results and effectiveness of affirmative action programs and including statistical information on the University's workforce.

At the campus level, program management includes the interpretation and application of University-wide guidelines; preparation of written affirmative action programs, reports and statistical analyses; the conduct of in-depth analyses of personnel actions when the data indicate a problem may exist; the evaluation and monitoring process; and responsibility for wide dissemination and uniform adherence to the campus written affirmative action program. On the campuses, procedures for the application of personnel policies are developed and implemented. In a very real sense, affirmative action is the manner in which the ongoing personnel programs, both academic and staff, are carried out by the departments. Program management on the campus also involves constant and time-consuming interaction with groups of all sorts: employee groups, supervisors, administrators, advocate groups and community representatives.

Generation and analysis of data includes the high cost of adapting our computer information systems to the demands of affirmative action reporting requirements. This has been expensive and complicated, and the process is by no means complete. Further technical improvements are necessary to ensure accuracy and usefulness of computer reports. It is also necessary that our data processing system be modified to provide comparative studies based on historical personnel information.

We must produce reports on University workforce composition by sex, ethnic group, and occupational category and must maintain detailed records of all internal personnel actions. This involves not only the expense of computer hardware and software, keypunch operators, programmers, machine time, and report production, but also the cost of personnel throughout the University system who develop and maintain manual records and who analyze these and computer print-outs to produce a variety of statistical reports.

It is in this area, particularly, that the costly effects of changing Federal definitions and inconsistent requirements are felt. Seemingly minor differences in reporting requirements, such as counting or not counting non-citizens separately, or including or excluding Other Non-Whites from the Total Minority category, necessitate reprogramming and recalculating all down the line.

Quite apart from Federal reporting requirements, however, the expense involved in data gathering and analysis relates directly to the monitoring process and the identification of possible problems. Only by learning where these problems exist can we investigate them and take corrective steps. So we are committed to the expense involved, major as this is.

As I have mentioned, much of the cost of affirmative action is absorbed through a revision of institutional priorities and redirection of staff energies. Without question, affirmative action is the single major focus of administrative activity throughout the University at the present time. It touches nearly every employee, from the faculty members who spent time reviewing the 900 applications recently received in response to widely advertised vacancies in an English Department to the secretary who recorded each applicant on a computer input form by sex, ethnic group, recruiting source, and reason for acceptance or rejection. It affects the supervisor who interviews eight to ten candidates for a secretarial position, instead of the two or three of former times, to provide consideration of a diversified pool of candidates and opportunity to appoint qualified candidates who will meet affirmative action goals. It affects the personnel manager who meets with employee and community advocate groups. It affects the department head whose employees are away from their desks attending training courses.

If I may cite a personal example of the effect on existing staff, which I believe to be typical: two members of my immediate staff who were hired for general administrative staff work are now spending close to 100% time on affirmative action matters. For my own part, I have recently been spending 50% time in this area.

You may be interested to know that figures compiled only last week indicate that 61 employees in the University are currently filling positions which are specifically earmarked as affirmative action positions. These employees are responsible for such functions as implementation of affirmative action policies and procedures, affirmative action data maintenance, statistical analysis, and report writing, making recommendations for correction of problem areas, monitoring and evaluation of program results, and employee development and training. The majority of these staff are part of a campus or laboratory affirmative action or equal employment opportunity office. The 61 positions do not include estimates of the substantial time spent by the president and chancellors in providing leadership or by the various vice chancellors and vice presidents while carrying out line responsibilities, nor do they take into account the vice chancellors and the vice president who serve as affirmative action officers.

With the knowledge that effective affirmative action programs depend upon the support of the entire University community, affirmative action advisory committees have been established throughout the institution. There are approximately 275 members on these committees, providing representation from the academic, staff, student, community, women, and minority segments of the University system. The committees review and monitor the various affirmative action programs, assisting with formulation and implementation of policy and monitoring of compliance. A new University-wide committee, advisory to the president, is being planned to assist in establishment of institutional priorities and review of programs. This group, also, will include broad representation from the University community.

Add, too, the cost of paper. I believe I could have brought you two box cars of reports produced in the past year. In addition to reports produced for government agencies and distributed, as well, to internal Affirmative Action Officers and advisory committees and the Board of Regents, there is the requirement for written affirmative action programs and the wide dissemination of these both within and outside the University. We have 14 such programs, as well as University-wide guidelines for the Programs, all of which have received broad, and therefore costly, distribution.

Aside from the paper which we generate, there is the paper which we receive and must retain at considerable cost; that is, application materials and resumes on the enormously increased number of candidates now applying for University positions. In fact, one serious problem for us concerns the length of time during which we must retain these records in order to respond to complaints and suits.

One very costly area which we have only begun to explore concerns the in-depth analyses of individual personnel actions which must occur, under Executive Order 11246 and implementing regulations, when data indicate a disparate effect on women or minorities. Such analyses may involve an individual-by-individual review of all job applicants within a particular occupational category, and a comparison of their qualifications with qualifications listed for vacancies and the qualifications of candidates who were appointed. An in-depth analysis now being conducted on the Berkeley campus involves a review of the qualifications and appointment levels of all new ladder rank faculty in a three-year period. Should this review indicate genuine salary inequities, compensatory payments will be needed. Nowhere in the budget figures I quoted earlier is this taken into account, nor can we guess what the cost, if any, might be.

At your request, I have emphasized the costs of affirmative action. In closing, I would note briefly some of the achievements. Faculty recruitment furnishes a particularly good example. Departments which would never have considered advertising faculty vacancies in journals read widely by women and minorities now do this routinely. And the results are significant.

On the Berkeley campus, for example, women represented 3% of the appointments to ladder rank faculty positions in 1967 and 6% in 1970; in 1973, women filled 13 of the 48 vacancies, or 27%, at the Assistant Professor level, where all but a few of the total vacancies occurred. A comparison of actual ladder rank appointments of women and minorities in 1972 with the expected numbers of such appointments, based on availability data, shows that the actual number of women hired was twice the expected number (16 v. 8) and actual number of minorities hired was more than three times the expected number (11 vs. 3). Women and minorities represented 27 of the 73 new ladder rank appointments in that year, or 37%.

At the Santa Cruz campus, affirmative action goals for academic appointments in the fall of 1974 were set at 11 appointments for women and 6 for minorities. Of the 35 new fall appointees on that campus, 4 are minority women, 10 are Caucasian women and 6 are minority men, for a total of 20 appointees who are women or minorities or both. Thus the campus exceeded its goals for both minorities and women. At the San Diego campus, 39% of the 173 new full-time faculty appointments from 1971 to 1973 were women and minorities.

There is also evidence of progress in the staff area. For example, minorities comprise 24.7% of the civilian labor force in the San Francisco-Oakland Standard Metropolitan Statistical Area. Currently, minorities comprise roughly 30-35% of all staff employees at the UC Berkeley campus, the San Francisco campus, and the Office of the President. These figures demonstrate that progress has been made in bringing minority group members into University employment. However, we are well aware that there are too few minorities and women in the higher paying professional and management job categories.

In the student area, substantial gains have been made in recruiting the ethnic minority student. The Educational Opportunity Program, an undergraduate program to encourage disadvantaged youths to enroll in the University, had an enrollment in 1965-66 of 100 students on six campuses. By 1972-73, 7,679 students on eight campuses were participating in the program. In 1972-73, ethnic minority students made up 83% of the students participating in the EOP program. I would emphasize that the University has put $30 million of its own resources into that program between 1967 and 1972. Since 1968, there has also been a substantial increase in applications and enrollment in the graduate financial assistance programs for ethnic minority students organized at the Berkeley, Davis, and Los Angeles campuses.

Policies governing University employees have been altered remarkably. Maternity leave benefits have been implemented, nepotism policies essentially gutted, and retirement policies revised. As evidence of a commitment beyond that required by law, the University has implemented two programs—the Affirmative Action Construction Program and the Minority Vendor Program—which show remarkable potential to extend affirmative action principles to the business arena. And now we are launching a comprehensive, University-wide student affirmative action effort.

I can say with conviction that we are a better institution for all this and that, although the "cost" has been heavy, the benefits are certain.

The above concludes the oral testimony. The remainder of my written statement describes briefly a variety of additional activities and concerns which together indicate the impact of affirmative action on the University of California.

Employee Training.—To some extent, this effort can be translated into dollars. But, insofar as mobility of women and minorities within the University's work force depends upon supervisors who are trained to upgrade and encourage employees and who can take time away from general administrative duties for this, the cost of training cannot be assessed.

On the staff side, training emphasis has been on the education of supervisors to an understanding of affirmative action as it related to employment interviews, selection among candidates, performance evaluation, and identification of employees for promotion. Two programs intended to develop meaningful support for the University's affirmative action programs were developed last year at the University-wide level in coordination with the campus training officers, "Performance Appraisal" and "Supervisor-Supervisee Training."

Employee training and development programs vary in availability and sophistication fom campus to campus. Each campus does maintain training programs, however, and is expanding those programs with emphasis on affirmative action principles. Courses are offered to employees, without cost and during working hours, on subjects ranging from Shorthand to a program for women entitled "How to Stop Discriminating Against Yourself." University training efforts include a personnel policy which permits employees to draw up an employee development plan and, based on this, take courses at a variety of educational institutions with reimbursement for fees from the University.

On the academic side, a special summer benefits package is proposed for faculty at a cost of $2,000 per participant. This would enable junior faculty to be given this sum for purposes such as summer research salary, computer time, travel to libraries, and laboratory assistance. This program would help in enabling new women and minority faculty members, most of whom have heavy teaching and student counseling assignments, to complete the research necessary for advancement.

Related Programs.—Two programs discussed here reflect the University's commitment to affirmative action in the broadest sense. One of these, the Minority Vendor Program, was designed to increase the University's purchasing volume conducted with minority-owned and operated businesses. In a four-year period, this volume has risen from virtually zero to over $1.5 million after a strenuous effort on the part of material managers. With existing staff, we anticipate doubling that figure next year. No subsidy of minority business is involved; materials are obtained only on a low-bid basis. Costs of the program relate to identification of minority vendors, matching vendor abilities to University needs, training vendors in the processes of University bidding, encouraging submission of bids and shepherding paper work, and education of University staff to the importance of this effort. We had estimated a cost of $112,000 for this program in the current year. Although it now appears that no University funds will be available, funds may be available from the State Minority Business Agency.

The second program, Affirmative Action Construction Program, we believe to be one of the most comprehensive of its type in the country. Designed to prevent discrimination on University construction jobs and provide positions for members of minority groups at every level of the trade, the program will enable the University to provide leadership in setting a trend for the requirement of affirmative action programs on all construction jobs.

Briefly, the program consists of two major components: the education of all contractors and sub-contractors to Federal and University affirmative action requirements, and the provision of assistance to such contractors in developing affirmative action programs; and the determination of bidder eligibility under affirmative action program requirements and the monitoring of all construction jobs to ensure strict compliance with affirmative action programs and principles.

Much of the work of this program is handled at the campus level by existing staff. In addition, $80,000 will be expended at the University-wide level to conduct the educational programs, develop appropriate personnel goals, and monitor contract compliance.

Student Programs.—While there are presently no Federal regulations requiring the development and implementation of student affirmative action programs, the University of California has moved ahead in this area. Our commitment to action on student enrollment stems from our belief that institutions of higher education have a fundamental obligation to assist in enlarging the pool of women and members of minority groups qualified to hold professional positions. We also believe that affirmative actions are necessary to comply with the spirit of Title VI of the Civil Rights Act, as well as Title IX of the Education Amendments.

Since 1965 the University has been engaged in an Educational Opportunity Program designed to provide access to the University and academic support services for undergraduate students who, for socio-economic reasons, might not otherwise have pursued higher education; to increase the number of students from ethnic and economic groups underrepresented in the University; and to increase the cultural diversity of the University's student enrollment. In 1965–66, there were 100 students enrolled in the Program on six campuses. By 1972–73, 7,679 students were participating in the Program on eight campuses, and the annual budget had grown to $13,887,000 including $1,759,000 in administrative costs which include 134 full-time employees.

Various support services are provided by the campuses for the EOP student, including initial recruitment, pre-admission counseling, and on-going academic and personal counseling once enrolled. Tutorial services are available. Financial assistance is also available to the EOP student. Of the 7,679 EOP students registered for academic year 1972–73, 84% received some form of financial aid. Of the financial aid funds available to EOP students, 44% was funded from Federal sources and 56% from University resources.

Campuses have also recognized the need for special services for the low-income, disadvantaged, or ethnic minority graduate student. One campus has an organized recruiting committee whose purpose is "to search for the student who would not otherwise enroll in graduate study without special recruitment, financial assistance, and/or academic support services." For the most part, recruiting efforts and academic support services has been left to the discretion and resources of individual departments and professional schools at each of the campuses. Faculty and students donate an appreciable amount of their own time for recruitment. Many third and fourth year graduate students provide tutorial support for the first year graduate student. These efforts are reflected in the dramatic increase, over 500%, in the number of applications to the graduate financial assistance programs, and the fact that an appreciable number of the students participating in these programs are obtaining graduate degrees. The social sciences and the professional schools have made the greatest advancement toward recruiting and graduating the ethnic minority student.

Recently, interested parties from the campuses have convened to discuss ways of combining campus efforts to attract more ethnic minority students, particularly to the hard sciences. This group has suggested publication of a booklet describing the various programs and financial aid available on each of the campuses for disadvantaged and/or ethnic minority graduate students. They have also proposed an active admissions and financial aid referral system and a uniform "offer" date for financial aid. The group plans to serve as an "information exchange" and to use their combined interests and knowledge to find financial and institutional support for recruitment, tutorial, counseling, and financial aid services for these students.

Given the substantial progress in these specific student programs, the University is, nonetheless, now in the process of reviewing all aspects of the educational process—including recruitment, admissions, academic and student life support, and financial aids—in an effort to identify any barriers to equal opportunity. Once such barriers are identified, we must move aggressively to eliminate them through policy changes and corrective programs.

Title IX Regulations (As Proposed by DHEW).—Since Title IX guidelines dealing with sex discrimination in higher education have only recently been distributed for comment, and since such guidelines will not take effect until at least January 1, it is difficult to make an accurate estimate of the potential cost of institutional compliance. Following, however, are a list of the affected areas and a description of the type of activities which may be required to comply with the executive mandate.

Recruitment: Where members of one sex are underrepresented in a given educational program, institutions may be required to undertake special efforts—above and beyond normal, non-discriminatory recruitment—to attract members of that sex. This might well involve hiring new recruiters with special knowledge and skills, publication of new recruitment materials, or any number of other, potentially costly devices.

Policy Dissemination: The guidelines require that, once the Federal policy takes effect, each institution publicize its adherence to the policy within 90 days in local newspapers and in all catalogues, applications, periodicals, and other materials with general distribution. Cost of revising all such publications within 90 days could be high.

Financial Aid: As currently worded, the guidelines would prohibit institutional acceptance or administration of scholarship funds designed for the use of only one sex. Compliance with these sections would require the University to nullify single-sex designations in gifts and bequests accepted prior to January, 1975 and to refuse all new gifts and bequests restricted as to sex of the recipient.

Housing: During the past several years, the University has gradually extricated itself from the "in loco parentis" policy of policing the quality of off-campus student housing. The new guidelines appear to require that we reverse this trend and carefully supervise the quality, quantity, and cost of student housing. If rigidly interpreted, these sections would require the University to either (A) hire large numbers of staff members to investigate all housing listed by the University and conduct appropriate statistical comparisons of housing available to men with that available to women or (B) discontinue off-campus housing listing services.

Comparable Locker and Shower Facilities: A recent inventory of University recreational facilities revealed very little in the way of inequities in this area. Most campuses, in fact, have nearly identical facilities for men and women. On several of the older campuses, however, either the men's or women's facilities could be labeled inferior due to age, size, etc. While most campuses have included plans to correct these problems in future building proposals, financial support for building programs is presently quite limited. Without additional funds these corrections may be some time in coming.

Athletic Opportunities: Intercollege athletic programs at the University approximate $6.1 million in annual cost. Historically, the bulk of this money (over 95%) has been spent on men's programs. In recent years, however, expenditures on women's programs at the University have climbed at a remarkable rate—faster, perhaps, than anywhere else in the country. While we are approaching the standard of equality of opportunity suggested by the guidelines, a lack of additional funding has hampered this movement. Compliance with the Federal standard will undoubtedly eventually require hundreds of thousands of new dollars for women—as well as a gradual cut-back in men's programs.

Mr. LEHMAN. Thank you, Mr. Johnson.

Mr. Dellenback.

Mr. DELLENBACK. I will put the same question in general to Mr. Johnson that I put to Mrs. Vetter. As I listened to what you have to say, Mr. Johnson, and read what you have put into this very helpful testimony, you talk in terms of the increment.

On page 6 you are talking of the Berkeley campus, of what you have done in 1973 in the filling of vacancies. You don't talk in terms of the total mass. Is your emphasis on affirmtaive action directed to each year's increment, or are you striving relative to affirmative action to reach some sort of goals so far as the total mass is concerned?

Mr. JOHNSON. We certainly are striving to reach a goal, but at the same time the only place one has any opportunity to change substantially is at the margin, which is that increment that you were talking about. Particularly in a period of steady state we have to deal with what positions become open. We have set numerical goals as best as we can determine them. This, of course, as you know, is one of the ar[illegible] of considerable conflict in talking about availability.

[illegible]. DELLENBACK. You said in 1973 women filled 13 of the 84 vacancies or 27 percent at the assistant professor level.

Mr. JOHNSEN. Right.

Mr. DELLENBACK. I don't know what the composition of the assistant professor level is for the entire Berkeley [illegible]mpus. I would be certain that it would be considerably less than 27 percent. Now was 27 percent for women at the assistant professor level the goal, either for the mass or for the increment?

Mr. JOHNSON. No; I don't think that it was the goal for either. I don't happen to have their particular plan in front of me, Mr. Dellenback. I would have to see this. We estimate that there will be so many vacancies, given normal attrition, in a year. But then again this has to be looked at by department and by discipline with respect to the manpower availability that was referred to earlier.

Mr. **Dellenback.** Person power availability.

Mr. **Johnson.** So I can't answer you without having those specifics in front of me.

Mr. **Dellenback.** You see the concern that I feel, and I am not quarrelling with you. I am just seeing a difficulty here and maybe Mrs. Vetter was giving us a good guide as we reach for that in saying that affirmative action should strive to make the full knowledge of available positions widely known. There should be a genuine search to bring into the process not just the old boy or not just the best bet but to bring in the widest possible set of people who might fit and then in the ultimate selection it will be on a basis of the best qualified, not on the basis of saying we will pick so many women, so many males, so many caucasians, so many minorities.

Mr. **Johnson.** I would subscribe to that, speaking personally now, with one caveat; that is, without some effort at a reasonable goal for individuals who are going to be making the decisions.

Mr. **Dellenback.** Goals for the increment or goals for the mass?

Mr. **Johnson.** Probably goals for the mass, trying to look at a long period of time. Let us take Ph. D.'s in biochemistry, for example, over a long period of time. I am simply afraid without some kind of target, changing that status quo which has produced primarily Caucasian males, is probably not going to occur.

I totally agree with the previous statement that one of the things that we have to do is to make sure that the ethnic minorities and the females are a part of our search pool and that in itself will certainly make a number of changes, but I am not sure that left to its own momentum that will automatically produce the kind of momentum that we are talking about.

I happen to think that one can talk about goals without talking about quotas and without talking about making preferential hiring on a personal basis.

If I may just for a second, I think one of the very unfortunate things which has occurred here is that somehow the higher education community has tended to get itself into some kind of adversary position with HEW.

Now, there is no question that we have a lot of things to correct, but I assume that what we are talking about here is increasing the number of women and ethnic minorities in positions in higher education at all levels.

If that is our goal, and I don't know of anybody in higher education who would deny that we ought to be doing that, we ought to be able to sit down and figure out how we can achieve this without perhaps getting into the kind of detailed quibbling over availability, utilization, complicated reports, none of which in my judgment is going to really add people.

I mean the report process and procedures. As a result we get into very elaborate intellectual arguments over statistical significance, over what is by chance.

It seems to me this is superfluous. We know what the job is. I would submit to this group that the greatest contribution the higher education community can make to affirmative action in this country is to increase the number of women and ethnic minorities who are available for all kinds of positions throughout this country.

I just regret that somehow we have gotten into this kind of jockeying position about regulations and compliance officers' interpretation of industrial relations for an academic community, because we are different. But I don't think there is any difference in our objectives.

Mr. Dellenback. Thank you very much. I do appreciate your testimony. We regret that the contingencies keep us to such a short time.

Mr. Lehman. Dr. Benitez, would you like to take the chair now and ask some questions. I will have to excuse myself.

Mr. Benitez. Thank you. I will retain this chair and inquire.

I am very sorry I was not able to hear your full testimony, but there are some questions that I hope you will clarify for me. If they have been covered already, I am sure that the answers will bear repeating.

The first question: How long have you at California, which has been noted to be one of the outstanding liberal institutions throughout the world, how long have you at California been deliberately pursuing this goal of a wider commitment to the equalization process of opportunity for students and faculty, but at this point the faculty, as far as females and minorities are concerned?

Mr. Johnson. At the student level the university undertook its own educational opportunity program in 1965. This was a program really designed to improving access to the institution for those population groups which have traditionally been disenfranchised as far as admittance was concerned.

With respect to affirmative action at the hiring level, we began to undertake programs in 1969—I am talking about designed kind of effort—and then, of course, most recently since the revised orders and regulations in 1972 and 1973 which very clearly spoke to the application of the laws to higher education.

Mr. Benitez. So, as far as faculty is concerned, it is a rather recent undertaking?

Mr. Johnson. In an organized or recordkeeping sense, sir, yes.

Mr. Benitez. Now, you talk about goals for this purpose, but how much do those goals, if at all, speaking with frankness, impinge on the other goal of quality and excellence in your instruction and in the nature of the university responsibility?

Mr. Johnson. I think that it impinges very heavily. I can answer that question in a variety of ways. Having said that they impinge, I don't think that that means that they are contradictory. Let me put it to you this way.

Mr. Benitez. Will you then clarify how they impinge and yet are not contradictory?

Mr. Johnson. Certainly. Let me use the student area as an example first.

The University of California admits from high school only those students in the upper 12½ percent. In reality it probably comes closer to the upper 5 percent of graduating high school seniors. Now, I am very much convinced that there are loads of high school students who fall within that rubric whom we are not getting at the university.

The notion that somehow that means we have to lessen our admission standards to bring in people is simply not true. There is a pool of youngsters there. For a variety of reasons they don't come to the university. That, I think, is something we have to work at.

Now, I think the same thing is true at the faculty level when one goes to hire. This gets into one of the subtleties and one of the difficulties in talking about availability because, as the previous witness said, a Ph. D. is probably, you know, the first indication of qualification, but a Ph. D. is not a Ph. D. is not a Ph. D. as far as we are concerned.

We have some very real feelings about the long-range contribution of an individual to the discipline that he or she is going to undertake. You know, we make a lot of qualitative subjective judgments, but I do not think, in fact it seems to me that it is impossible to take the position that all groups in our society can't produce individuals that meet those same qualifications.

Mr. Benitez. The argument is, to my judgment, clear enough as far as students are concerned. Where I think the problem will come, and I am asking you to address yourself to it, is with the faculty, because of the multiplicity of departments which are oftentimes associated with university leadership.

I know that the basic crucial criteria of intelligence, training, independent minds, must hopefully constantly prevail in selectivity of teachers, yet because of the previous injustices and the previous imbalances you are going to have much lesser numbers of the union-card-carrying members of the profession at levels where you find yourself the weakest.

Mr. Johnson. That is correct.

Mr. Benitez. Is your institution and are the institutions of higher learning in the United States adopting a position where these antecedents are balanced or taken into account in endeavoring to comply with this basic responsibility?

Mr. Johnson. They are taken into account in evaluating any one given individual in the sense that some of those antecedents could be particularly judged or a decision made. But there has been no change in the fundamental position of the institution with respect to the overall quality or attainability of the individual to be hired.

You might very well evaluate some things in background different, but the ultimate decision is still the same.

Mr. Benitez. Would you agree that there will have to be, of necessity, if these goals are to be advanced, not achieved, just advanced, a disposition to appreciate the higher value of intelligence and imagination and intellectual qualities rather than compliance with the set of norms which have become appended to the process of employment? Is that an accepted criterion today?

Mr. Johnson. I can't say that that is an accepted criterion, but I would certainly say that is a point of view that, if not concensus, it surely is a growing one.

I think I can give you better illustrations with the admissions process. I realize you are speaking to the hiring.

I think there is no question in our own institution we are looking very hard at those admissions criteria that we have used for years to judge just exactly the sort of thing you are talking about for young people who don't come through the normal process.

Mr. Benitez. Thank you very much.

I am very happy to see that our regular chairman is back.

Mr. O'Hara [resuming the chair]. Thank you, Mr. Benitez.

Mr. Dellenback, do you have any further questions?

Mr. Dellenback. No, thank you.

Mr. O'Hara. I want to apologize for missing this hearing. I had to be a blood donor this morning, and then there was a matter involving the new Committee on the Budget, of which I am a member. If you are going to serve on the Budget Committee, you are going to have to learn how to give blood.

I thank you very much for coming.

I see someone has already made a point of order that a quorum is not present. The House is unable to do business until we get over there. That is the only time we really feel important.

Mr. Johnson. Thank you, Mr. Chairman.

Mr. O'Hara. We have another witness to hear. I am wondering how we ought to best do this.

We are going to ask Mr. Benitez if he can stay. I will go answer the quorum and return as quickly as I can. I would like Mr. Robert Stitt of Columbia University, who is legal counsel of Columbia University, to take a place at the witness table.

Mr. Benitez, if you wish to take over again, I give you the badge of office.

Mr. Benitez. For 30 years I have used this.

Mr. O'Hara. That is right.

Mr. Benitez. Mr. Stitt.

STATEMENT OF ROBERT S. STITT

Mr. Stitt. I feel at home with you because my firm also does work for the Commonwealth Oil Refining Co. I have been to Puerto Rico on a number of occasions.

Mr. Benitez. I hope that this association has given you a better insight into the problem we are discussing.

Mr. Stitt. My name is Robert Stitt. I am a lawyer; my firm, Thacher, Proffitt & Wood. My specialty is civil litigation. One of the firm's clients is Columbia University.

As I pointed out in my statement, my testimony is as an individual only. I am here on my own time and at my own expense.

In my statement I have tried to summarize the problems involved in the development of Columbia's affirmative action plan, which is about a 2-inch thick document, problems regarding agency investigation, production of records, and the litigation that a university finds itself in, in a variety of forums, in this whole area of equal employment opportunity.

In my oral statement I will try to concentrate on some of the key problems confronting universities in this area, and then I will try my best to answer the questions the subcommittee may have.

With regard to affirmative action plans, I would simply state that HEW representatives on too many occasions have been too eager to interfere or to threaten interference with university Federal contracts.

Now, Columbia's problems have been solved. I am speaking now in general, and I do not intend to rehash our experience of 1971 and early 1973. But I would state that universities depend heavily on

Federal revenues. Even a private institution such as Columbia, half of our money each year comes from Government sources.

Federal contracts and grants are revised and reviewed periodically, if not annually. It does not require a formal debarment order to shut off this income. A single letter, a single telephone call to a single contracting agency within the Government will stop the flow of this income. I have been there, I know this is the fact.

Mr. BENITEZ. How come?

Mr. STITT. Because when a contract, say, for $1 million or more is coming up for renewal, say it is a contract for Lamont Doherty, oceanographic observation, under which Columbia has done work for the Navy. Say one of their contracts comes up for renewal. A contract of that amount requires under the procedures then in effect to place a call to the compliance agency within the Government for educational institutions, in this case, HEW. If HEW says, "Well, we are not sure that Columbia has the capability of complying with its equal employment opportunity obligations," just that simple statement, just that simple letter shuts off that contract.

Now, these short delays not only place severe financial handicaps on colleges and universities, and we have all been operating at sizable deficits, even Columbia's resources which are great are not unlimited.

But in addition to financial damage, there is scientific damage. In oceanographic research experiments have to be programed in advance. We have to have ships. We have to have men to man them. We have to have scientific personnel on board. What may seem a very slight interruption to someone in HEW may have very severe consequences at Lamont-Doherty.

In my opinion, and there are men and women I respect who disagree with me on this, but in my opinion, and I have set it forth in my statement, due process requires that a government not interfere, and I emphasize the word "interfere," with the contract of a college or university or any other contractor without first giving adequate notice, hearings where you have an opportunity to be heard, and then a decision with written findings.

Now, section 13 of the 1972 Equal Employment Opportunity Act is ambiguous on this point in two key respects. First of all it is ambiguous with regard to the rights of institutions whose plans have not been approved and it takes a long period of time for a plan to be approved in this area.

Second, it is ambiguous with regard to institutions who have approved plans, such as Columbia, but who are accused of a substantial deviation from that plan.

Now, my recommendation is that section 13 be amended to make it crystal clear that no Government contract should be denied, withheld, terminated, suspended, or interfered with without notice hearing and adjudication provided for in the Administrative Procedure Act.

Now, this will have an added benefit beyond due process. When an educational institution is subjected to the pressure of having its Federal funds shut off or even the threat of it, their first instinct is to do anything, in colloquial terms, to get the Government off its back; and in those circumstances under that kind of pressure, when you are dealing with a team of investigators, an educational institution is apt to make compromises about records, concerning private individuals, which should not be disclosed which upon further reflection the investigator did not really need but which were disclosed because you simply lacked the time to sit down and discuss and negotiate.

My firm, and I personally have never had a problem with a single investigator from a single agency in this area, whether it is HEW or EEOC or the New York State Division of Human Rights or the City Commission on Human Rights. When we have simply been dealing with a single investigator investigating a single complaint, we have always been able to work out an accommodation.

But a revision of section 13 will, I think, provide the additional time, reduce the pressure which will enable records to be handled responsibly even with regard to the team compliance reviews.

One point I do want to touch upon, and I will try to be brief, is in the area of multiforum litigation. The pertinent legislative history, as I can understand it, and the deferral procedures which are found in the Equal Pay Act and in title VII seem to say, seem to intend that an employer need litigate a given issue, a given grievance, once, not twice.

Unfortunately, some loopholes have developed and these loopholes should be closed. This duplicative process is an imposition not only upon universities but also the administrative agencies themselves and beyond that the Federal courts.

The Federal courts, and I am speaking particularly of the southern district of New York, where I do most of my practice, are overcrowded with claims of litigants, many of them deserving litigants, who have no other place to go.

Now, I have four basic recommendations, and I will cover them briefly.

First, I would recommend that complainants be required to use intrauniversity grievance procedures first before proceeding with these agencies. At Columbia we have had informal grievance procedures for years. I don't believe they use a stenographic transcript. There are no lawyers, but a complainant is heard by a panel of his peers, and they have worked well. And they are inexpensive.

In June of 1973 I was at a panel of the National Association of College & University Attorneys. Mr. Frohnmayer, from the University of Oregon, was on the panel, so was John Pemberton, from EEOC. Mr. Pemberton and I disagreed on many things. There was one thing we did agree on. That was by and large, within universities, individual complainants make out better, get better results from intrauniversity grievance panels than they will from governmental agencies.

In my view it makes no sense to incorporate into these large affirmative action plans—as I say Columbia's is 1½ to 2 inches thick—it makes no sense to incorporate into these plans, union grievance procedures, staff grievance procedures and faculty grievance procedures, if the complainants are not required to resort to them first.

If that were done, I think this would reduce the administrative caseload in this area and the court caseload.

Mr. BENITEZ. May I interrupt you at this point.

Mr. STITT. Please.

Mr. Benitez. Am I to understand that although there are these intrainstitutional complaint procedures, the complainant is at liberty to foresake them and go directly to another structure of complaint? What other structure is that?

Mr. Stitt. The complainant can go to many places. She can go to HEW.

Mr. Benitez. Direct?

Mr. Stitt. Direct. She can go to OFCC.

I am not saying this is the way this should legally be done. I am saying this is the way it happens, this is the way it is. Go to HEW; go to the OFCC; go to the National Labor Relations Board; go to the New York State Division of Human Rights; the City Commission of Human Rights; and the Equal Employment Opportunity Commission.

Mr. Benitez. Your position is that as a matter of orderly procedure and perhaps propriety, the built-in system of complaint should be the first step?

Mr. Stitt. That is right. I am not saying that he or she should be prohibited from going to these agencies ultimately or if they lose in the university they are prohibited from doing so. But this should be the initial procedural step.

Mr. Benitez. Is what you are saying equivalent to the old principle of law that you have to exhaust the administrative remedy?

Mr. Stitt. That is exactly the principle. Apply an administrative remedy to a university with an approved affirmative action plan.

Mr. Benitez. It has not been observed, you say?

Mr. Stitt. We still have a number of grievances. We had one employee recently who brought suit against the university in the supreme court in New York County. Judge Silverman said, "Will you offer this woman in-house grievance procedures?" We said, "Of course we will." That was the end of that lawsuit.

Mr. Benitez. Then what are you complaining about?

Mr. Stitt. Unfortunately, there are a lot of judges and a lot of administrative agencies that do not take that view. This was a simple employment grievance.

Mr. Benitez. What you are recommending is that a specific declaration be placed in the regulations or in the law to that effect?

Mr. Stitt. Either in title VII or in the regulations. I think probably in title VII would be best, but I am really not qualified to express an opinion on that point. I am interested more in these basic changes than I am as to how it is done.

Second, the deferral to State 706 agencies should be extended. Under the present procedure, when EEOC gets a complaint, they defer to local State agencies which meet the 706 standards which our agencies in New York do. But EEOC can reclaim the case after 180 days.

In New York it takes a local agency a year to investigate and decide a case. The statute should be amended to require EEOC to defer beyond the 180-day period, and it should prohibit EEOC from reclaiming a case if hearings have commenced.

Third, I recommend the scope of the Federal court review be limited. Now, at the present time, a complainant can receive a complete trial de novo in Federal court even if the complainant has had a fair and full hearing before a local agency. I would recommend that the Federal court's scope in this area be limited to simply a review as to whether the local agency has acted arbitrarily or capriciously and whether the findings are supported by substantial evidence, pretty much the type of appellate review that already prevails in the Federal system.

On the other hand, I think the Federal court's power of stay should be increased. It has the power now to stay title VII actions while State proceedings are pending, but this is only for a period of 60 days. This is too short a period and the courts are reluctant to use this tool.

It should be increased; it should be made more flexible.

Last, when a complainant proceeds in more than one agency at a time, the investigative process and even conciliation is complicated, it becomes more expensive. When this situation arises, and here I would recommend interagency agreements, a lead agency should be designated to handle the case.

This is done by insurance companies in defending liability claims where more than one insurance carrier is on the risk, a designated company is the lead carrier, and the lawyer reports to that company.

Mr. BENITEZ. Are you recommending that this be done in advance or after the complaint is filed?

Mr. STITT. It could be done in both. I think the agencies should be encouraged to exchange letter agreements in this regard, but they should defer their own inquiries while the lead agency is proceeding with its investigation. If the lead agency and the parties themselves should agree on conciliation, the other agencies should be prepared to give their prompt written approval.

I have had a lot of difficulty where I have been able to work out a conciliation with a party and the particular investigating agency which is conducting the investigation at the moment but then when I have to get approval from several other agencies before whom similar complaints have been filed by the same individual, it takes time and it is expensive.

Those are my basic recommendations. I do thank the Congressman and the staff for their attention.

[The formal statement referred to follows:]

STATEMENT OF ROBERT S. STITT*

PRELIMINARY STATEMENT

During the past three years much of my time has been spent helping prepare Columbia University's affirmative action plans and in defending a variety of claims including allegations of unequal pay, wrongful termination, refusal to hire, violations of the affirmative action plans and refusal to grant admission to remedial programs. These matters have brought me in contact with the United States Department of Health, Education and Welfare, the Department of Labor, the Equal Employment Opportunity Commission, the New York State Division of Human Rights, the New York City Commission on Human Rights, the Supreme Court, New York County and the United States District Court, Southern District of New York.

I appear as an individual only. My statements are my own and should not be construed to be the position of Columbia University or any other client. In his invitation of August 7, Chairman O'Hara stated that these hearings are

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designed to provide the Subcommittee with an objective, informed view of what the federal government is "requiring of or suggesting to" institutions of post-secondary education under the Civil Rights statutes and executive orders and regulations. Chairman O'Hara asked me to focus on procedural difficulties and deficiencies of agency enforcement. I will try to concentrate on the problems involved in the development of an affirmative action plan, debarment from federal contracts, individual complaints, agency investigation and multi-forum litigation.

AFFIRMATIVE ACTION PLANS

No useful purpose would be served by rehashing the past difficulties between Columbia and HEW. The University has prepared and HEW has accepted its Affirmative Action Plan submitted April 10, 1972. The last significant modifications were made in March 1973. Since that time HEW has conducted several compliance reviews. In each instance HEW has found that the University was in full compliance with Executive Order 11,246 as amended, and that all personnel decisions were being made in a non-discriminatory manner. The University has been given written assurance by HEW that its government contracts will not be withheld or suspended again without being given prior notice and an opportunity to resolve any complaint that may be made. Yet, a brief summary of Columbia's experience may be of interest and, perhaps, helpful.

The thrust of HEW's principal complaint against Columbia was that it lacked an adequate personnel system. In the light of standards imposed by federal equal employment opportunity regulations, the personnel practices of universities generally are extremely archaic. For example, as of November 1971 there were 390 listed job titles at Columbia for which the Personnel Office had job descriptions for only 110. Generally universities keep only rudimentary data on applicant flow, appointment, promotion and transfer practices. This is especially true in the academic area where employment and promotion decisions are made at the departmental level.

There has been an extraordinary amount of linguistic footwork by federal officials seeking to set forth the view that goals for minority employment at universities are not in fact quotas. The Jewish community is deeply concerned about this problem. Having struggled for so many years with discriminatory quotas set up by academic institutions to keep them out, it is not easy for them to accept reverse discriminatory quotas set up to bring new minorities in.

Half of the University's annual income comes from government sources. No institution likes to be in the position of negotiating for its survival with Uncle Sam sitting at the other side of the table. An institution's instinct in these circumstances is to promise almost anything in order to get the government off its back.

The pressures from the federal government relating to real or threatened loss of federal contract funds are enormous. They can polarize an educational institution creating a situation in which those who hold contract funds will feel that the administration is not doing enough to hold them whereas those who are not supported by federal contracts will maintain tha adminisraors are in danger of selling out the institution's integrity under federal pressure.

It was expected that Columbia's conception of reasonable goals in the employment of minorities and women during the five year period ahead would be rejected as inadequate and that newer and more ambitious figures would have to be produced. This did not happen. Columbia was permitted to project its own goals for affirmative action without interference.

Under its affirmative action plans, the University institutes search programs designed to seek out qualified women and minority candidates. The adequacy of each search is reviewed by a faculty affirmative action advisory committee. This committee has been in existence since February 1972 and has always including female and minority members. Only after the committee has certified that the nominee was selected in a non-discriminatory manner will an offer of employment be made. The figures which are available show that during the past two years 25% of faculty appointments have been women and 10% have been minorities. These figures are significant since women comprise approximately 10% and minorities 1% of the national pool of potential candidates. In order to achieve these results, Columbia has not been required to engage in preferential hiring of minorities and women. It has not been required to inject any considerations beyond merit and excellence into its appointment process. Failure to give an appointment to a minority person or a women in one instance does not force the University in any way to make an appointment in another instance.

On the other hand, the style of federal enforcement thus far involving as it has a variety of forms of tough handling, including real or threatened suspension of federal funds, can occasionally cause university administrators to make mistakes in order to remove themselves from the stress caused by government pressures. For example, President McGill has seen letters from deans and department chairmen in universities across the country stating that a faculty appointment being offered was specifically reserved for a black person or a woman. In a letter to a brilliant Chinese student in physics at Columbia, a university in the mid-south explained that he could not be considered for faculty appointment because the appointment was reserved for minorities under the protection of affirmative action and that even though he had an oriental name, he was not an American citizen and thus not qualified.

This kind of thing is illegal and must be stopped. These examples, including the one just cited, are illustrative of panicky, over-zealous reactions on the part of university administrators attempting to interpret their obligations under affirmative action rather than what I consider an accurate reflection of federal policy.

It is still too early to judge the full force and effect that affirmative action has had on American colleges and universities. Everything depends on how the federal government intends to enforce affirmative action programs. It seems perfectly correct that universities should state numerical objectives for faculty employment of minorities and women provide that such objectives are treated as good faith statements of what universities seek to achieve and not as enforceable contractual commitments. The question arises as to what will happen should a university, despite its best efforts, fail to meet its goals. Is such a failure to be treated as a violation of a contractual commitment to the government and thus subject to federal enforcement action? If this should happen, then the so-called goals of affirmative action are employment quotas, no matter what they are called.

DEBARMENT FROM FEDERAL CONTRACTS

Withholding contracts is a drastic remedy and its use as a tactic to express displeasure or to force compliance exacerbates these pressures and is manifestly unfair. Although questioned by others, it is my opinion the government cannot legally interfere with a university's status as a federal contractor without first according the university a full hearing and adjudication.[1] There are three thrusts to this argument: (1) due process; (2) Executive Order 11,246; and (3) the Civil Rights Act of 1964, as amended.

With respect to due process, recent Supreme Court decisions have confirmed the standards and procedures which an agency or department must follow before depriving an individual person of benefits received from the government. Among such requirements are a hearing where the person who may be affected by a proposed agency action has the opportunity to confront and cross-examine adverse witnesses and to present evidence on his own behalf.[2] Any action by HEW declaring that a university is no longer a responsible contractor, without notice and without hearing, is in my view a clear violation of due process. Any other result would be unconstitutional taking from the university since summary suspension prior to hearing is only permitted where "harm to the public is threatened and the private interests enfringed is reasonably deemed to be of less importance."[3]

Similar provisions for hearings prior to the imposition of sanctions against the contractor are provided by the Executive Order[4] and the Equal Employment Opportunity Act of 1972.[5] There are, however, some difficulties raised by Section 13 of the 1972 Act. It is clear that once a contractor has had its affirmative action plan approved, the contractor can be debarred from further contracts only after full administrative hearings conducted pursuant to the Administrative Procedure Act.[6] But what are the rights of a contractor prior to the approval of its plan, and what are its rights when there are allegations of a "substantial deviation" from its approved affirmative action plan?

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[1] *Gonzalez v. Freeman*, 334 F. 2d 570 (D.C. Cir., 1964), *Crown Zellerbach v. Wirtz*, 281 F. Supp. 337 (D.D.C., 1968).

[2] *Goldberg v. Kelly*, 397 U.S. 254 (1970).

[3] *R. A. Holman & Co. v. Securities and Exchange Commission*, 299 F. 2d 127, 131 (D.C. Cir. 1962).

[4] Section 208(b) of Executive Order No. 11246, as amended provides that:

> No order for debarment of any contractor from further government contracts under Section 209(a)(6) shall be made without affording the contractor an opportunity for a hearing.

In *Crown Zellerbach v. Wirtz*, supra note 1, the district court held that this provision prohibited the Department of Labor from interfering with the contractor's eligibility for government contracts prior to a full administrative adjudication on the merits of the contractor's compliance with the Executive Order.

[5] Section 13, P.L. 92-261, 86 Stat. 103 [42 U.S.C.A. § 2000e-17 (Supp. 1973)].

In the first situation, where there has been no approval of the plan, it appears that full administrative hearings are still required.[7] It does not appear from the statute's legislative history that the *Crown Zellerbach* case[8] was intended to be superseded in any way. Indeed, judging from the comments of Senator Ervin during the Senate debate, this provision was intended to provide the same protections as accorded the court in *Crown Zellerbach*.[9] It is my opinion that when there are allegations of a "substantial deviation" from the approved affirmative action, the contractor is entitled to some sort of pre-suspension hearing to determine whether there has been, in fact, a "substantial deviation." Under the standards established by the Supreme Court in *Goldberg* v. *Kelly*,[10] such a hearing need not take the form of judicial or a quasi-judicial trial with a particular mode of proof. Nevertheless, a university should be provided with timely and adequate notice detailing the reasons for the proposed determination plus an opportunity to confront adverse witnesses and to present evidence on its own behalf. The agency's determination must be in writing, must give reasons and must be based on evidence produced at the hearing. Anything less would be denial of even "rudimentary due process."[11]

Nevertheless, it has been suggested that Section 13 could be construed as authorizing the elimination of the aforementioned notice and hearing procedure with respect to a contractor whose affirmative action plan had not yet been approved. It has also been suggested that the statute authorizes elimination of such notice and hearing procedure for an employer who has submitted an approved affirmative action plan if he is being accused of having "deviated substantially" from that plan. Section 13 is especially obscure on this point. These ambiguities should be eliminated.

Therefore, Section 13 should be amended to make it crystal clear that no government contract or portion thereof will be denied, withheld, terminated, suspended or interfered with by HEW or by any other agency without first having accorded the contractor the notice, hearing and adjudication provided in the Administrative Procedure Act.

AGENCY INVESTIGATION—PRODUCTION OF RECORDS

The opening salvo of any investigative agency involved with colleges and universities—HEW, EEOC or local commissions—is usually a demand for records which is often broad and all-encompassing. The demand is made by letter, request to produce, subpoena or, in some cases, all three. These demands are always subject to discussion and negotiation. No client of my firm has had any difficulty in a "one-on-one" relationship with a single investigator investigating a single complaint. A more difficult situation is when an institution is confronted with a group or team of investigators conducting a "pattern" inquiry or a compliance review and contracts have been held up pending the results of the inquiry. Under these circumstances, an educational institution may be compelled to fight a rear guard action against compromising its rights. Thus, the recommended revision of Section 13 of the 1972 Act so as to make it clear that the government cannot interfere with the status of any contractor without first having notice, opportunity for hearing and other due process should have the additional effect of enabling educational institutions to deal reasonably and responsibly with demands for production of records.

Disclosure of confidential employment information to federal officials involves two strong countervailing policies: the government's need to obtain this information and the University's equally strong right to protect its internal procedures and processes from unnecessary governmental intrusion. Columbia has adhered to a case-by-case approach. Since each request for information is unique, no inflexible rules can or should be adopted.

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[6] U.S.C.A. § 554 *et seq.* (1967).
[7] Such hearings would be conducted pursuant to 41 CFR Part 60-30. (1973).
[8] *Supra*, note 1.
[9] Cong. Rec. S. 578-580, January 26, 1972.
[10] *Supra*, note 2.
[11] *Id.* at 267.

I have read with interest the report of the Equal Employment Opportunity Task Force of the American Council on Education dated December 18, 1973 concerning procedural deficiencies in HEW's administration of Executive Order 11,246, as amended. This document contains recommendations which should be carefully considered by the Committee, HEW and other regulatory agencies. Nevertheless, my own experience is that a clear Congressional statement on due process for contractors through a revision of Section 13 is the sole additional protection that a college or university needs in order to protect its records from undue disclosure.

In summary, a relationship between a university and governmental agency, when based on mutual respect for the proper functions and needs of each, can and has worked well. Members of the university community realize that they do not enjoy legal privileges and immunities not enjoyed by other citizens. However, the government must recognize and respect the privacy of individuals which is jealously guarded by the university community.

MULTIFORUM LITIGATION

Problems arise when an individual or group of complainants proceeds in more than one forum or tribunal concurrently or consecutively. Such repetitious litigation imposes burdens on universities which are readily apparent. The time which concerned officials must spend preparing for an attending hearings and trials can be enormous. Attorney's fees are also increased significantly. While there are some techniques and procedures available under current law which tend to reduce these burdens, none are completely satisfactory.

At Columbia, informal, inexpensive grievance procedures have worked well over the years. The University has been spared the expense of legal fees and individuals have learned that they can receive a fair and sympathetic hearing from a panel of their peers within the University. At a panel discussion before the National Association of College and University Attorneys in June 1973, an EEOC representative conceded that by and large, complainants receive more favorable results from university grievance panels than from governmental agencies. This has been my own experience. Certainly, there is little point in having universities incorporate union, faculty and staff grievances procedures into affirmative action plans if complainants are not required to resort to these remedies before going to state or federal administrative agencies.

In the event a complainant should proceed before administrative agencies, minor revisions in the law could give universities meaningful relief from the burden of duplicative litigation without diminishing the rights of complainants to due process. Usually, EEOC will defer all complaints to a local 706 agency.[12] However, EEOC can reclaim the case after 180 days. In New York, it usually takes a year for a local agency to investigate, hear and decide a particular case. Accordingly, EEOC should be required to continue its deferral beyond the 180 day period. Certainly, EEOC should be prohibited from reclaiming a case if the local agency has commenced hearings.

I would also suggest that the scope of review by the federal courts be limited. Under the present law, a federal court is required to conduct a complete trial *de novo* even if the complainant has had a full and fair hearing in the state administrative agency.[13] It would be more appropriate to limit the role of the federal courts to a determination as to whether the state agency has acted arbitrarily or capriciously and whether its findings are supported by substantial evidence. This approach has worked successfully in dealing with complaints of discrimination by federal civil service employees.[14] Certainly, such limited judicial review is sufficient when the hearing was held before a local agency whose procedures and practices have been examined and approved by a federal agency such as EEOC. In summary, this recommendation would extend the existing Section 706 deferral procedures to federal courts.

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[12] Section 706(c) of the Civil Rights Act of 1964, as amended, [42 U.S.C.A. § 2000e–5(c) (Supp. 1973)] provides that a complainant must file charges with the local FEP agency before pursuing the EEOC remedies. *Love v. Pullman Co.*, 92 S. Ct. 616 (1972). By administrative rulings, these deferral procedures are applicable only with respect to state and local agencies which have been designated "706 Agencies" by the EEOC. 29 C.F.R. § 1601.12 (1973). See also *Crosslin v. Mountain States Tel. & Tel. Co.*, 400 U.S. 1004 (Douglas, J. dissenting) (1971).

[13] See, *e.g. Voutsis v. Union Carbide Corp.*, 452 F. 2d 889 (2d Cir., 1971) *cert. denied* 406 U.S. 918 (1972).

[14] *Hackley v. Johnson*, 360 F.Supp. 1247 (D.D.C., 1973), *Johnson v. United States Postal Service*, 364 F.Supp. 37 (N.D.Fla., 1973), *Handy v. Gayler*, 364 F.Supp. 676 (D.Md., 1973), *Tomlin v. United States Air Force Medical Center*, 369 F.Supp. 353 (S.D. Ohio, 1974), *Thompson v. U.S. Dept. of Justice*, 7 FEP Cases 347 (N.D.Cal. 1974).

Under present law the federal courts are authorized to stay Title VII actions while state agency proceedings are pending but only for a period not to exceed 60 days.[15] Such a limited remedy is insufficient to protect universities from duplicative litigation and the courts are reluctant to employ it. Title VII should be amended to permit a longer stay pending completion of state administrative proceedings. This is especially appropriate if the state tribunal has been designated a 706 agency.

When complainants proceed before more than one agency investigation and even conciliation becomes complicated. My experience is that one agency is reluctant to rely on another agency's investigation. I have also encountered difficulty in obtaining consents of other agencies to conciliation agreements. When one agency learns that another has already commenced an investigation it should postpone its own inquiry. Similarly, when the "lead" agency and the parties themselves have agreed on conciliation, the other agencies should be prepared to give their prompt, written consent.

Such duplicate administrative process is not an imposition upon educational institutions alone. It is also a burden upon the agencies themselves and the federal courts which, as the Committee already knows, are overcrowded with litigation.

CONCLUSION

The issue of equal employment opportunity is one of the thorniest problems to confront universities in many years. It will also prove, I am sure, a difficult problem for this Committee. I hope that my testimony and this statement will be of some assistance.

Mr. BENITEZ. Thank you very much.

I have raised most of my questions during your testimony.

Thank you, Mr. Stitt.

Mr. STITT. I thank you. It has been a pleasure to be here.

Mr. BENITEZ. Thank you very much, all of you.

The meeting is adjourned, subject to the call of the Chair.

[Whereupon, at 11:30 a.m., the subcommittee adjourned, subject to the call of the Chair.]

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[15] Sec. 706(f) (1), Title VII of The Civil Rights Act of 1964, as amended.

CIVIL RIGHTS OBLIGATIONS OF INSTITUTIONS OF POSTSECONDARY EDUCATION

TUESDAY, SEPTEMBER 17, 1974

House of Representatives,
Special Subcommittee on Education
of the Committee on Education and Labor,
Washington, D.C.

The subcommittee met at 9:40 a.m., pursuant to call, in room 2175, Rayburn House Office Building, Hon. James G. O'Hara (chairman of the subcommittee) presiding.

Present: Representatives O'Hara, Dellenback, Benitez, and Kemp.

Staff members present: Jim Harrison, staff director, Webb Buell, counsel, Elnora Teets, clerk, Yvonne Franklin, minority counsel.

Mr. O'Hara. The Special Subcommittee on Education will come to order.

Today we are resuming our hearings on the civil rights obligations of institutions of post-secondary education.

These hearings have variously been described by those who have been discussing them as "affirmative action hearings," "title IX hearings," "EEOC oversight hearings" and by other descriptions.

All of the above to some extent are true. But I think it would be worthwhile to state once again on the record what it is I am trying to have this subcommittee do in this particular phase of our hearings.

We are getting ready for legislative actions on the provisions of the Higher Education Act which will expire during the next Congress.

One of the basic questions which this subcommittee must face as we look toward that legislative action is what an institution of post-secondary education should be and do in order to qualify for participation in Federal programs.

First, we have sought to find out by talking to the agencies involved and the spokesmen for the institutions what it is that those institutions are presently required to be and to do. What are, in short, the current civil rights obligations of such institutions? To what extent do these arise out of statutory law and to what extent do they arise out of Executive order, regulations, and practices of the agencies?

During the next 2 weeks we will be taking testimony from people who for the most part will be telling us what they believe these obligations ought to be. I suppose some of the witnesses will have views on how those obligations should be formulated, whether it is statute or administrative order.

I think it is fair to say to the witnesses, who are going to be testifying today and in the days just ahead, the chairman of this subcommittee has some views on those subjects.

My views are not fixed in cement. They are not lightly held either. Nor are they any mystery to most of those who have been listening to me talk on this issue.

First, as to how these obligations should be imposed, I have a long-held belief in article 1, section 1, of the Constitution. I believe that individuals and institutions have rights and obligations. They should arise out of the Constitution itself or out of statute law in conformity with the Constitution.

I think the Congress has erred substantially over the past generation. I have been as guilty as any in compounding these errors, in giving to administrative agencies too broad a mandate and leaving too many blanks in the law to be filled according to the wisdom of civil servants whose numbers, anonymity, and job tenure relieve them of public responsibility.

No statute can cover all the possibilities. Administrative action and administrative agencies will always be needed to make decisions of fact and to apply the law in specific cases.

But I very deeply believe that those agencies should be limited to applying the law as it stands written by the legislative branch and should not extend to the making of whole new areas of law simply by administrative fiat.

So whatever the Congress decides in the last analysis should be the civil rights obligations of postsecondary institutions, should in my judgment be written into the law and not left to stand on the dubious authority of Executive orders and administrative rulemaking.

There may be a direct irreconcilable contradiction between civil rights statutes and Executive orders on which most affirmative action programs are based. If this is the case then the requirements of the statute should take precedence. If this result is unacceptable to the legislative branch or repugnant to the Constitution, then the statute should be changed so as to eliminate the conflict if there is one.

I should also freely state for the record that I have some views on what the law should be as well as on the procedural question of where it should be stated.

I will continue to give my total support to the proposition that each individual American is entitled to the full range of human rights and in institutions of higher education and that Government should be blind to color, indifferent to sex, ignorant of creed and deaf to accent. I read the Constitution and the laws as requiring exactly that.

But I read the regulations and Executive orders as they are enforced as requiring that institutions become hypersensitive to the very qualities which the law and the Constitution say should be irrelevant.

I listen to witnesses urging in the name of equal opportunity that we apply unequal standards depending on accidents of birth.

I do not hesitate to admit, indeed to boast, that I don't share that view of what the Constitution, the laws or the simple requirements of human equaliy require in institutions of postsecondary education or permit for Government agencies.

We have today witnesses who are going to contribute a great deal to our understanding of just what institutions of postsecondary education ought to be and what they ought to be required to be for participation in Federal programs.

The first of these witnesses is a distinguished Representative from the State of Colorado who has made admirable contributions to the U.S. Congress during the short time in which she has been a Member of the House.

I refer to the Honorable Patricia Schroeder, Member of Congress.

TESTIMONY OF HON. PATRICIA SCHROEDER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Mrs. SCHROEDER. Mr. Chairman, I appreciate the opportunity to testify today on the subject of civil rights compliance requirements for institutions of higher education. I am very concerned because it appears to me that a sentiment is developing that somehow current civil rights obligations required by the Federal Government of its university contractors place an unwarranted and unnecessary burden on academia, a burden not felt by the general run of Government contractors.

What I would like to do is state what my understanding is of the current obligations and suggest why my experiences as a law student and as a lawyer seeking a teaching job at a law school convince me that—although there is certainly room for strengthening and improving current procedures—these requirements are absolutely vital to assure equal educational and economic opportunity on campus.

The status of women in law school, both as students and faculty, has improved in the past few years. When I entered Harvard Law School in 1961, I was 1 of 20 women in a class of 558: a 3-percent minority. Last year over 18 percent of the entering class at Harvard were women. In two other schools of special interest to me, the University of Colorado and Denver University, women this year composed 23 percent and 28 percent of the entering classes, respectively. Nationwide the total enrollment of women in law schools has increased from 3 to 4 percent during the fifties and early sixties to 15.6 percent in 1974. Obviously, a number of factors account for this dramatic change, not the least of which are the increased expectations of women of what they can achieve.

But any woman who went through law school at an earlier time can tell you it was not a "revolution in rising expectations" alone which accomplished this change in women's enrollment in law schools. Also important was the fact that for a variety of reasons law schools decided more women should be in law school. Initially in the mid and late sixties, increases were prompted by the need to fill empty chairs left by men who had been drafted to fight in Vietnam. In the early 1970's when increases in women at law school were exponential, title IX which forbade sex discrimination against students in programs receiving Federal assistance appeared to play a major role. Schools learned, for example, they could not stack the deck of who would apply to their schools by only recruiting at male institutions. If recruiters were sent to single sex undergraduate schools, they had to recruit at both women's and men's schools. They also found that traditional barriers to women applicants, including refusals to accept married women students or women with small children were contrary to title IX. As these barriers dropped, applications from women increased and so did admissions.

The situation of women on law school faculties has also shown improvement, though the progress has not been spectacular and generally is confined to the lower ranks. While only 4 percent of faculty members were women in 1970, 8 percent were so reported in 1973. Most of the increase was accounted for by improved representation of women at the instructor level—up 7 percent from 16 percent to 23 percent. Women still compose a small fraction of the top rank of full professor—2.5 percent. And while 49 percent of male faculty have tenure, only 21 percent of female faculty do.

Despite the weak spots, generally a record of progress in achieving equal opportunity for women and minorities is being recorded at the law schools and other branches of academia. It is my contention that these gains can be directly attributed to the civil rights obligations imposed on higher education institutions by Federal law. All one has to do is juxtapose the dates of the marked patterns of improvement with the extension of civil rights coverage to colleges and universities. But at the very time a true merit system is developing within universities—and thus threatening the status quo—a growing opposition to "Government interference" is emerging. The criticisms seem to center on Revised Order No. 4 and its affirmative action requirements as the chief instrument of big brotherism on campus.

It seems to me that Revised Order No. 4 has three basic components. The first requires contractors to analyze their staffing to determine the extent to which women and minorities have been hired. This is the so-called utilization analysis. The second major requirement is that in light of the utilization analysis, the organization must set goals and timetables for rectifying any deficiencies in its utilization of women and minorities. The third component is comprised of a number of suggested procedures the organization may utilize in its efforts to promote equal opportunity for women and minorities on campus.

Since each of these components has come under attack, additional comment on each seems in order. The utilization analysis is an essential first step for an organization to find out what the true status of equal opportunity is within its ranks. Only in this way can discrepancies between the number of minorities and women on board and the number in the available pool be brought home to institutional leaders. Once confronted with the statistics they will be forced to acknowledge what the rest of us already know.

The establishment of goals and timetables is the most controversial part of the revised order. First, I must reiterate that goals are not quotas. Quotas have historically been used—significantly by universities as well as other organizations—to exclude or limit certain groups. Quotas are clearly illegal and must not be permitted on campus again. Goals, on the other hand, are target figures which are set by the institution in light of its present utilization of women and minorities in comparson to the available pool of female and minority talent. They are not ironclad figures which must be achieved at any cost, but guidelines to remedy the effects of past discrimination. For example, Berkeley has no women in its 40-member chemistry department yet 8 percent of all chemistry doctorates are women. It would seem reasonable that when Berkeley develops its affirmative action program, it would determine that a female chemistry professor would be added to the staff when equal opportunity measures are implemented. A timetable would be established based on likely turnover in the staff over the next year or two.

The third component of revised order No. 4, the suggested procedures for achieving equal opportunity on campus would come into play when the university begins to try to figure out how it can attract talented people of all types to its job opportunities. These procedures may include open advertising in scholarly journals and professional magazines, contacting women's or minority caucases in the appropriate disciplines, or establishing a variety of tools that academic departments must use in conducting a search for new talent.

A question might be raised as to whether contacting special groups and soliciting job applications is reverse discriminaton. I don't think so. The reason such special measures may be necessary is that there has been a good deal of racial and sexual apartheid in academia. As others will no doubt testify, if department heads and senior faculty follow traditional methods of recruitment, they will rely on the "old boy" network of personal contacts which is almost exclusively male and white. Professional associations and their meetings have also been dominated by relatively small groups of white male professionals, and it is unlikely that even active participation in the national associations such as the ABA will broaden institutional leaders' contacts with women and minorities. Thus, since traditional recruitment methods tend to produce only nonminority male candidates, it seems reasonable that new techniques would seek to increase the applications from women and minorities.

While on the subject of reverse discrimination, I should like to return to the subject of goals. To my knowledge, not a single school has even been in a position to say, "Look, we set a goal, we tried hard but didn't come up with the talent we expected and therefore that goal has been deferred." If a school were in a position to make that statement, it is inconceivable to me that HEW would order a school to meet a goal or risk losing Federal funding. What has happened, however, is that schools have not tried hard to broaden their contacts with women and minorities, have not established goals and have then complained when HEW found the university deficient in its compliance.

The true roots of opposition to affirmative action lie not in resulting reverse discrimination, but in an increase in competition for those who have traditionally been given preferential treatment. Taking an example from law school admissions, an article in the ABA Journal put it bluntly:

> In the fall of 1974 there were 900 fewer men in law school than there were in 1972.

If this decrease meant a loss of equal opportunity as some claim, then we should be compelled to reexamine the situation. However, the same article points out that women's mean scores on the LSAT are 531 while men's are 520. Women's and men's grade point averages are approximately the same with women's slightly higher. Clearly there has been no favoritism, no reverse discrimination, in the increased attendance of women. The same principles apply to faculty hiring. It will of course be harder for nonminority males who traditionally have been given preferential treatment to find jobs when they are genuinely competing with qualified minorities and women.

While the fundamentals of revised order No. 4 and the affirmative action program are sound, these basis components have been subject to attack and some wide-ranging changes proposed in the Federal civil rights compliance program for universities. One proposal would exempt universities from revised order No. 4 and offer instead an arbitration board composed of university people which would settle individual complaints of race and sex discrimination. While most of us believe arbitration is generally a good thing, in this case it is totally inappropriate. Most importantly, it would thrust the burden of obtaining equal rights back onto the individuals on campus. Anyone familiar with the civil rights struggle during the 1950's knows that the greatest impediment to progress in that era was the requirement that rights be established on a case-by-case basis. There could be no more effective sabotage of equal rights than to abandon affirmative action on the grounds that an arbitration panel could do the job.

A second proposed change is that universities should be exempt from the revised order No. 4 requirement that employers define the skills required of job applicants. Allegedly, academics hire people with talent—not people who perform certain jobs—and talent is mysteriously unmeasurable. But somehow I do not believe that the skills required for academic jobs cannot be defined. If some insist that they need rubber yardsticks such as "capacity to succeed" for measuring job candidates, I am suspicious. Anyone who has ever made a personnel selection knows that the better defined the job skills, the more likely it is one will hire the right person to do the job. Far preferable to the elastic skill qualification is a list of specific requirements: teaching skills, research funded, papers published, professional association participation. These are relatively concrete, easy to specify and comparately easy to use in measuring various candidates qualifications in each area.

A third proposed change is that if HEW must continue to enforce civil rights regulations on campus, then a special office should be set up to monitor civil rights compliance at the major, national universities. The claim is made that regional offices are not uniform in their application of revised order No. 4 and this places some of the major universities at a disadvantage. This proposal could be rejected on a number of grounds, but one practical reason will be sufficient. Although the charge of inconsistent interpretation and application of the regulations has some basis, it seems that the smaller and less prestigious universities are the ones who truly suffer. The proposal for a special office could be rejected on a number of grounds, but one practical reason will be sufficient.

What is a major university? Is it only the Ivy League plus Berkeley? Denver University and the University of Colorado have students from all 50 States. They are national institutions: will HEW determine they are major also? And what will I tell them if it won't? Colorado School of Mines is the finest metallurgical mining school in the country. Does it qualify? The pitfalls in this proposal are endless. It seems to me the equitable solution is not giving certain prestigious schools a special office in HEW so that they can browbeat HEW officials into giving them preferential treatment, but rather that we instruct HEW to do a better job of communicating uniform standards to regional offices. Then, all our institutions of higher education will receive equal treatment from HEW. I would be less than candid if I did not state that I find the elitism and favoritism implicit in this proposal morally repugnant and another example of unequal treatment under the law.

As I am sure my colleagues are aware, the Griffiths Joint Economic Subcommittee last week held hearings on the Department of Labor's Federal contract compliance program in certain areas including higher education. Describing the efforts of the Labor Department's Office of Contract Compliance and its designated compliance agencies as "puny," Mrs. Griffiths suggested that the discrimination review functions of the Labor Department might be better handled by the Equal Employment Opportunity Commission. The Civil Rights Commission first made this suggestion in 1969, and many others have made it since.

Another alternative which should be considered is a strengthening of HEW's current operations. The Director of HEW's Office for Civil Rights testified before the Griffiths subcommittee that many of the current difficulties in enforcing its compliance responsibilities stem from inadequate staff and resources. Others—including women's and minority groups as well as university administrators—have complained of the OCR's lack of clear policies and its general inefficiency and incompetence.

Affirmative action has been rightly hailed as potentially one of the Government's strongest tools in the effort to bring about equal employment opportunity. Although there have been some just complaints, and errors acknowledged by HEW officials themselves, the solution should not be to abolish the law or exempt higher education from its coverage. Rather, we should remedy the defects in enforcement procedures. OCR's Director also noted in his testimony the unwillingness of some institutions to cooperate in supplying needed information to compliance officers. If we do not demand that our institutions of higher learning practice equality, we will have difficulty in convincing the rest of the Nation of our serious commitment to that goal.

Mr. O'Hara. Thank you very much, Mrs. Schroeder.

In your testimony, you call attention to the article from the "ABA Journal" with respect to law school admissions.

You point out that the article contains the information that women's mean scores on the LSAT are 531 and men's are 520. Grade point averages are approximately the same with women's slightly higher. "Clearly there has been no favoritism, no reverse discrimination, in the increased attendance of women."

I gather that you are of the opinion that the difference in attendance is due to the fact that law schools are now requiring the same standards for men rather than requiring higher standards for women. Is that right?

Mrs. Schroeder. That is right. When I went to law school it was reverse discrimination for women. You had to have higher scores.

Mr. O'Hara. Is it your feeling then that this is the appropriate way to do it?

Would you object to a system that required lower grade point averages and lower scores for women?

Mrs. **Schroeder.** Yes, I would. I think what women want is the right to compete equally. I don't see why we have to have higher grades and higher law school scores to get in, which was the instance in my case.

Mr. **O'Hara.** I am not making any defense of any past practice. I want that clearly understood.

With respect to the faculty hiring you speak of a situation where the chemistry department at Berkeley had 40 faculty members and none of them were women. But 8 percent of the chemistry Ph. D.'s are women.

So you are suggesting that Berkeley ought to hire a woman Ph. D. as a member of its chemistry faculty?

Let us suppose that we had a vacancy at Berkeley right today. Let us suppose they went through affirmative actions you suggest and advertised the vacancy and brought in more people for interviews and tried very hard to get men and women applicants both.

Then let us suppose further that after this affirmative action effort—mind you, there is just the one vacancy—they narrow the field down to two candidates and the selection committee believes, being as objective as it can, that the male candidate in this particular instance is better qualified than the female candidate.

What do you think they ought to do?

Mrs. **Schroeder.** Mr. Chairman, you have hit a very sore point with me because I have been in the position of looking for one of those university jobs at one time.

I must tell you how very painful it is as a woman who went to all the local law schools at our local area and went through the interview procedures.

I was immediately suspicious that something was wrong because none of the local law schools hired any women. The entire faculty would take me to lunch at the most elegant place in town. I would be wined and dined. I would sit there and realize that half of them were classmates of either my school or Yale that I had seen at many alumni things.

Then I would always be told, "If you would like to teach part time a course called 'Women in the Law' at $4 an hour, of course you can't have an office or anything, we would be glad to have you. But we probably aren't going to hire any more Harvard or Yale graduates because we think we are a little heavy right now on that."

Everyone had a different one. "We want somebody from our own university. We are moving in that area."

Then they would turn around and hire someone. Once they hired someone from my own class who had a lower grade point average and less teaching experience than I had. I still can't figure out what that excuse was.

I went back and confronted the dean with this. He said, "It is because we don't have a faculty women's room and it will cost a lot of money."

I am just very impatient with those kinds of things because I have felt that very intensely. "If you want to come down here for a couple of hours and teach 'Women in the Law,' but you didn't want to, fine. But we don't want to really have to deal you into the deck."

We had a tremendous problem with this. I think if they can make a good case—this is why I feel so strongly about setting up the job qualifications—if they can make a good case that someone has more teaching experience or a higher grade point or has written more scholarly articles or anything, I could accept that. But I don't like this fuzzy stuff.

Mr. O'Hara. I agree completely with that. I see no reason why they can't set up job descriptions and objective criteria so they can be checked on what they do.

Mrs. Schroeder. They haven't been. It has been much more the "old boys' club."

Mr. O'Hara. That is absolutely correct. That is the usual way for filling faculty positions, for the head of a department to call up a couple of friends of his or heads of departments of other institutions and say, "I am looking for an instructor. Do you have any good people?"

Usually they don't put something in the classified section.

Mrs. Schroeder. That is right. I had one dean ask me if I would give a course on how one obtains babysitters when one becomes a lawyer. I really thought that was kind of condescending.

If they can make the case that, yes, the male was truly more qualified, fine. I don't think HEW should shut off their funding on that basis. But I haven't heard any schools saying that. They are against reverse discrimination. But they haven't done anything to prove it.

Mr. O'Hara. I don't think that our views are very far apart on this. I think we can find statutory language that will do the job.

Mrs. Schroeder. Thank you.

Mr. O'Hara. Mr. Dellenback?

Mr. Dellenback. Thank you very much, Mr. Chairman.

We welcome your testimony, as always eloquent and helpful.

Certainly the kind of thing we are concerned about here is the sort of thing with which the Congress, both the House and the Senate, ought to set its procedures up and show the rest of the country how eloquently we do it. We, of course, don't discriminate. We, of course, have adequate job descriptions. We, of course, are very balanced in the way we do this kind of thing—we don't have any sexual imbalance. If we can just get that message across to the public then we would have a standard to which all should repair. But I won't do that.

I would like to follow up for a moment on the question that the chairman asked as that is really one of the tough ones.

I think that so far as sexual discrimination and minority discrimination is concerned, there is clear evidence that it has existed and in the halls of academia. Further, we should be doing something constructive about it. This should be not only in the admission of students, but in the composition of faculty, as well as practices within the faculty for tenure and raising of salaries.

The tough issue comes, Mrs. Schroeder, when we get to the question of how do you rectify the situation in a mass that is unbalanced?

Let's assume you have an institution where you have 2,000 people involved in the mass. There are very few minority employees—very few, if any, women involved. The increment—the turnover each year—is 100. It is about a 20-year term on the average.

One feels that one wants to change that composition of the mass. We do it by dealing with the increment. How do we do it? Do we set a goal for the increment? Or do we set a goal for the mass?

If we set a goal for the mass, are we going to have a turnover of 20 years to bring about that change, or do we attempt to do it in 5 years. How do we structure our efforts so as not to discriminate with the increment if what we are really struggling to do is to change the imbalance of the mass?

Mrs. **SCHROEDER.** My feeling is that it isn't quite as difficult as a lot of people make it out to be. I think we make a long step forward when we just make the faculty sit down and look at what they have.

Mr. **DELLENBACK.** Any difficulty with that first point: the analyzing of staffing? There should be no difficulty whatsoever.

Mrs. **SCHROEDER.** That is exactly right. Then I think they have to realize how narrow their normal procedures of hiring the new group coming in really is. It is a very narrow and old boy club when you call your buddy and find out.

So that seems to make sense.

Mr. **DELLENBACK.** I agree with you completely, Pat. If you talk loudly about breaking discrimination, and then so structure your method of looking for additions that you just don't have any balance, you are not going to bring about a change. I strongly agree with you on that.

Mrs. **SCHROEDER.** Then I think you try very hard to write objective job descriptions, to be aware of where you are short on your faculty as new people come in through turnover. That is where you really direct yourself to.

You are obviously not going to take someone with tenure and push him aside and say "now we are going to put in five women or two blacks or three Spanish-speaking." You really can't do that.

Mr. **DELLENBACK.** You are not really answering my question; nor did you answer the chairman's question.

Mrs. **SCHROEDER.** I don't think women are asking for special treatment, nor are racial minorities. It is just to be considered, No. 1. I think they can compete very well once they are considered.

Mr. **DELLENBACK.** Let us go back to the chairman's question and try to pin down an answer. If, in an academic department with a faculty of 20 males where there is going to be one change this year, their analysis concludes that the best applicant is a male——

Mrs. **SCHROEDER.** Do they have objective criteria for saying that?

Mr. **DELLENBACK.** Oh, yes, perfectly objective criteria. They have really researched it and they say objectively—there is always judgment in this but let us assume it is really objectively done—the best applicant is a male.

Do you have any difficulty now in their choosing the male, even though it means that there is no change in the mass? The mass is still 100-percent male.

Mrs. **SCHROEDER.** OK. I could accept that if it is true, truly objective. But I don't think it has ever been objective before.

Mr. **DELLENBACK.** If it is truly objective, do you have any difficulty?

Mrs. **SCHROEDER.** No.

Mr. **DELLENBACK.** So, we are not really talking about setting a goal for the mass. You don't think that in affirmative action there should be a goal set for the composition of the mass.

What you think should be done is to focus on the increment and insure that there is no discrimination in that year's increment. Is that correct?

Mrs. SCHROEDER. All I am saying is that I see no way of dealing with the mass without some kind of pumping and pushing laterally. I think that would be intolerable because you have people who have tenure.

But let us look at the new people. They have to have goals. They have to know where they are. They should be moving ahead.

When they start saying, "Yes, we truly tried and we contacted with these other groups and we did interviews on women and with our objective criteria based on this we selected a man," fine. But I haven't heard them say that yet. They are just screaming about the fact that they don't want to have to bother.

Mr. DELLENBACK. You and I understand each other on all the things that are wrong. They should change procedures. They should set standards. They should set job descriptions. They should really search the matrix and bring people in.

When it comes to setting goals, you are telling us that the goals should not be set for the mass.

Mrs. SCHROEDER. That is right.

Mr. DELLENBACK. The goals should be addressed to the incremental addition.

Your testimony has been very helpful to us, and your analysis is good. I appreciate your taking the time to be with us.

Mrs. SCHROEDER. Thank you.

Mr. DELLENBACK. Thank you, Mr. Chairman.

Mr. O'HARA. Thank you, Mr. Dellenback.

Mr. Benitez?

Mr. BENITEZ. Mrs. Schroeder, I also congratulate you on your statement. I must say that there are some qualifications I would make. I would inquire as to your views concerning your trust of the objectivity and on the potentials of achieving this rectification without adopting a moral position concerning the overall situation.

My utmost concern is not so much with the situation as it affects women because I am somewhat of a male chauvinist since I come from a culture where that is practiced. I am deeply concerned of the racial and ethnic problems on a number of bases which are not rational.

But my point is this: unless one assumes that the only thing that needs to be done is to establish a sort of formula of mathematical equality that will achieve the objectives, it will be of course much better than anything that prevails at present.

I agree with the thrust of your presentation. I think that we are dealing with a present evil which is moral in its nature and one which requires a disposition to assess, once the scheme of objective tests has taken place.

There is a wide marking of other necessities in any statute. I would formulate that given the unbalanced situation it is not only legitimate but necessary to take into account in the evaluation the desirability of balancing in this objectivity that must be present in any type of academic selection.

You don't agree with that?

Mrs. SCHROEDER. I think that that certainly is one thing that should be taken into consideration. I really do. I don't think that is the primary thing. If you find that you just don't have somebody else qualified to teach something.

I am really very apprehensive about subjective judgment because we have seen it used for centuries to discriminate against qualified people.

Mr. BENITEZ. You would have to have them now to balance the score because subjectivity is of the essence in human relations. They have to be projected. I agree that as far as you can solve the situation via the obviously minimal requirements or even basic fundamental requirements then there is a point of value judgment and we cannot erase value judgment from the evaluation.

I would think that we have to face the basic fact that this is how value judgments have been exercised against the minorities.

When we say, "let the value judgments be exercised for the minorities if otherwise they qualify," I don't think we are doing anything worse than trying to balance and to be fair to the fundamental composition of society.

Mrs. SCHROEDER. Yes. But the more objective you are, the more I think you will be able to confront this. I think that is what I mean.

Mr. BENITEZ. We cannot erase——

Mrs. SCHROEDER. That is right.

Mr. BENITEZ. The evaluation of many human relationships.

Mrs. SCHROEDER. That is right.

Mr. O'HARA. Thank you very much, Mrs. Schroeder.

What that last colloquy added up to is that if one is better qualified than the other objectively, go ahead and take that one. If they are equally qualified objectively.

Mrs. SCHROEDER. And you have no women or blacks or Spanish speaking. Is it going to be pretty hard——

Mr. O'HARA. If in the past you have discriminated against women now you should discriminate against men.

Mrs. SCHROEDER. I don't think that is discrimination. I think that is filling a need.

Mr. O'HARA. That is sort of an equity in a way.

Mr. BENITEZ. That is my position.

Mr. KEMP. Mr. Chairman?

Mr. O'HARA. I am not sure I would agree with that.

Mr. Kemp?

Mr. KEMP. I have a few brief questions. What effort do you think should be made with regard to the utilization anlaysis? Would you explain how you would define "minority" and how you undertake a utilization analysis?

Mrs. SCHROEDER. How would I define "minority?" I think we would probably have to use the same definition that is in the Civil Rights Act. I think you could do it on the basis of the ethnic background, religious background——

Mr. KEMP. You would include ethnic and religious?

Mrs. SCHROEDER. I think in our part of the country we lean toward the Spanish speaking and the black-type of discrimination. I don't think we are going to have, you know, 1 percent Greek, 2 percent, that type of thing.

Basically the bilingual, bicultural aspect of the society which is more prevalent in certain census tracts and the racial breakup and the sexual breakdown. Those are the easy ones.

Mr. KEMP. So it is sexual, racial, and religious and ethnic. And utilization analysis would include a statistical breakdown of all of these various groups.

My area, I would suggest, is made up of Polish-Americans, Americans of Italian descent, Americans of Irish descent, German descent. It is a totally heterogeneous community.

I wonder in practice with a utilization analysis as you describe it, how you would dissect a university and identify religious, racial, and ethnic and sexual differences.

I ask with a sincere desire, to learn how this would come about in our society.

Mrs. SCHROEDER. I think most of them already have the facts on file. They have them from their employment data. They have them in the record. It is just a matter of compiling it.

I think nationwide we have two problems here. You have the naitonwide problem and the narrow problem.

I think the biggest problems we have nationwide are including the female sex, including blacks, and including the Spanish speaking, because it is one of the bilingual, bicultural groups of our society today.

In other words, the German-Americans, the Polish-Americans and the others have broken through and become absorbed.

I can tell you that if I were a university up in your area I would suggest to the staff that they also take into account some kind of having people on the staff that would deal with those different minorities, especially if there are a lot of first generation people, because I think it would be very helpful in recruiting. It would be helpful as a community liaison. It would be helpful for all those different kinds of things.

Mr. KEMP. Going back to this hypothetical utilization analysis what if we find that on a particular campus there is an underutilization of a particular ethnic group that does not happen to be so defined as a minority?

Mrs. SCHROEDER. I think that is up to the particular campus. We could leave that to the States and the local areas. I think we could make suggestions that they may want to consider it. They may not want to consider it because it may not be relevant.

They may be interested that half are Irish Americans. But they are third generation and they don't think of themselves that way.

I think it is up to the area. I think the basic nationwide area that we are concerned about is bilingual because that is certainly a cultural problem. Indians in certain parts, the blacks, and women. I don't think it would hurt to have them look at it. They would be better institutions for looking at it.

Mr. KEMP. My next question—because I know we want to get on to other Members of Congress who are to testify—would you describe—I don't mean to try to pin you down for just dispute's sake—utilization analysis again, how or who would do it and how would it be accomplished?

Mrs. SCHROEDER. Utilization analysis could be done easily by the school itself. They have all the employment records. They have all the current job descriptions, history professor, so forth and so on, women's dean, men's dean, so forth and so on. You just put it all out on pieces of paper. It is already in most of their files, all the background.

Mr. Kemp. All this analysis would be sent to HEW, I presume?

Mrs. Schroeder. No; it is like an inventory. You do a personnel inventory, which most companies do anyway. This would be your personnel inventory for the personnel records that you already have. They are probably already there.

Mr. Kemp. I guess the point that I am trying to make is that, in recognizing the great need of our society to be more open and to provide more opportunities for all people and for minorities, it is important one minority is not less equal than another.

Mrs. Schroeder. I agree.

Mr. Kemp. I would hope in our discussions that we recognize that fact.

I appreciate your testimony.

Mrs. Schroeder. But I can see that higher education may not be as concerned about some minorities as others because just as if half the people in your district spoke Spanish and you had no one that spoke Spanish on your staff you would be very concerned. If half of them were Polish-Americans but all spoke English you probably wouldn't bend over backwards to change it. I think that reason enters in too.

Mr. Kemp. Thank you, Mr. Chairman.

Mr. O'Hara. Thank you.

Thank you very much, Mrs. Schroeder. We appreciate very much hearing your testimony.

Mrs. Schroeder. Thank you.

Mr. O'Hara. Our next witness is one of the ablest and most effective Members of the House. He is Representative Andrew Young, Congressman from the State of Georgia.

TESTIMONY OF HON. ANDREW YOUNG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. Young. Mr. Chairman and members of the Subcommittee on Special Education:

With the enactment of the civil rights legislation over the last decade, the Nation made a commitment to redress grave injustices. Great hopes arose for equality in employment, in education, in political life and government services. And these hopes were nourished by the development of constructive programs to bring new opportunities to those who had been wronged.

So it was in the field of higher education. As segregation came to an end in southern colleges and universities, and as more minority students entered northern institutions, Federal assistance to higher education rose rapidly. A very great amount of the progress in education emanated from the House Committee on Education and Labor.

One of the most important advances was the adoption of affirmative action in our colleges and universities. Affirmative action is no more than a practical way of meeting a moral commitment. When a whole segment of a society has been denied opportunity in a given field, the remedy is to make such opportunity a right, and enable people to exercise that right. Thus, the passage of the Civil Rights Act of 1964 was but one step in a process which had to be followed up with policies and programs to implement the rights.

Affirmative action plans are designed to seek out individuals in groups which were systemically excluded from equal educational opportunity—excluded either by legal segregation, or by inadequate primary and secondary education, or by academic tradition. In the case of exclusion based on race, the problem has been massive, because the exclusion existed in America even before the birth of this Nation.

Unfortunately, just as affirmative action plans in higher education have begun to fulfill part of the Nation's commitment to complete equality, and at a time when those plans should be strengthened and continued, the concept of affirmative action has been under heavy attack. "Affirmative action" has been translated by some to mean "quotas"—a code word with the potential damaging impact of the term "law and order."

To me, and I trust to the members of the subcommittee, affirmative action means keeping a solemn promise, and doing what will make this a more healthy, stronger society: Making sure that all citizens, whatever their station or background, will have opportunities to become teachers, doctors, lawyers or educated citizens making a contribution to this Nation.

When that has been achieved, we will have not "quotas" but representative participation in this society—something which many groups have already attained. It is time to finish this job.

Mr. YOUNG. Thank you, Mr. Chairman.

I thank you very much for the privilege of testifying before this subcommittee.

I would just try to share with you my prejudices if I might. I say prejudices because I think that it is a problem that I have with the whole concept.

Before Congressman Schroeder leaves I would disagree with two parts. The main part is that there was a speaker at the American Bar Association who was female. She was president of the Hookers' Union. I wonder if this doesn't say something about or say more about the professional view of American women than we might like to admit to sometimes.

I guess my problem is I don't believe there is such a thing as an objective criteria. I see the truth of our society, the truth as we know it in our time. This is really coming from all of the diverse factors which make up the society.

One of the things we need to do as a society is break out of the ethnocentric bag in which we find ourselves.

I think education historically and perhaps of necessity has been a predominantly white Anglo-Saxon-Protestant phenomenon and that anybody that doesn't come under that category is automatically discriminated against.

And yet my experience has been that that is basically what is wrong with our society and that that is one of the basic limitations of our educational system and until we find a way to broaden the cultural and educational perspective of higher education we are going to continue to suffer from some of those limitations.

My own experience I guess is about all I can draw on. But going back to my early days in college when a white professor of sociology tried to argue with me about the nature of juvenile delinquency—and if it was one thing I knew about as a freshman in college it was juvenile delinquency since half of my classmates from grammar school on up had been at variance with the law—and yet the disagreements over that and the constant arguments we had were responsible in part for just a complete conflict. That kind of conflict you don't get unless you agree with professors in any institution. It seems you don't get grades.

So when I found myself applying to a variety of schools I always found myself rejected. I don't know whether this says a whole lot about me. It probably does. But I think it also probably says a little about the schools since a couple of those schools have since invited me back to give me honorary degrees. One of them even invited me to be dean of one of its colleges or at least talked with me about it.

The point I am making is I think we ought to think of our educational system as a part of our society, reflecting the sickness of that society, and that what we call objectivity most of the time inevitably no matter who says it has a particular cultural or ethnic frame of reference.

Anytime we try to set up criteria according to that frame of reference, whatever it is, I think we are going to exclude somebody. We are going to exclude some concept of truth that we very definitely need in order for our society to function.

We see young lawyers practicing civil rights law out of the frustrations that they experienced in growing up and developing a whole new category of law.

I think we are beginning to see the same thing in the practice of medicine.

All I am saying is that affirmative action is a concept that keeps the doors of education open to new groups. While that may give minorities a little edge in some instances and you may run into the danger of what we now commonly call reverse discrimination, I think the educational system needs this. Society needs this as much as the people we are trying to help.

I think that if we find ourselves bending over backward to be inclusive we will find that that inclusiveness will pervade our society and we will be developing an expansion of resources and even in the instance where the famous case out in Washington—I mean, I think of a white attorney who probably could have gone to a number of white law schools but who instead chose to do his legal work or part of his legal work at Howard University. He also happened to be in the Justice Department at the time of the Kennedy administration. Much of the sensitivity of that administration came from the experience that he had in a predominantly black law school.

My feeling is that a society working toward affirmative action and toward inclusiveness is going to be a stronger and more relevant society than one that accepts the limited concepts of objectivity which we now consider permanent.

I would just stop.

Mr. O'Hara. Thank you for your very valuable insight into the problem.

In essence you say that a person's racial or ethnic experience can be a factor that you would look at in selecting him as a student or for a position on a faculty just as his academic experience might be or his work experience or some other kind of experience the person might have had.

In other words for appointments to the faculty of a department of sociology, that a person's experience, his ethnic experience, his experience, his youth, his childhood, that could be a factor to look at in determining whether he was better qualified than someone else, right?

Mr. YOUNG. I think it is a factor that would never be considered unless we had some kind of overall concept of affirmative action.

We have probably had more books produced from the black community in prison than by college graduates. I for one have come to feel that our prison system probably has much more in the way of intelligence and talent than sometimes our universities and that our universities are functions of privilege and not necessarily talent and intelligence.

There is no way it seems to me to write those kinds of laws unless we have a concept of inclusiveness or affirmative action. I would rather say "inclusiveness" because it says that something is wrong with the society and something is wrong with the institutions.

A law school is going to be better that has a healthy component of female and minority faculty.

Mr. O'HARA. The trouble with that is that while you are talking about a limited number of opportunities as you have in law school now, what you are also suggesting is individual injustices in arriving at a racial or ethnic or male-female proportions in the institution.

I was talking to a friend of mine who was an old friend who is a dean of a large law school. They have a program where they have got to get a certain percentage of minority students.

This is one of those institutions that has a very large number of applicants. They sort of set them up on a grade point average but primarily on LSAT scores.

They run them down a list when they pick up their new entrants until they reach a certain point. At that point they stop and then they wait and see how many black applicants they picked up. If they don't have the right percentage, they start the rest of the way down the list.

It seems to me that whoever that next person was on that list before they started making up their goals for minority students has been done an individual injustice.

That is what troubles me. I wonder how you would react to that.

Mr. YOUNG. I would admit that it is perhaps an individual injustice. But it might be necessary in order to overcome a historic group injustice or series of group injustices.

I would say that because the chances are that that a young white person that is skipped over will have a dozen other opportunities in graduate school, in business.

That would not be true to the person from the lower economic strata or some ethnic minority or a woman.

I would go so far as to say that if I were running the admissions program if a young person happened to be a young person of lower economic strata from Appalachia, for example, I wouldn't skip over him.

I think what we have got to consider is people who have not had opportunity as a result of group discrimination.

A person who comes from a lower income ethnic white community, Irish, Italian, or Polish in a major city, I wouldn't skip over them because I think that in many respects their lot, their plight, in terms of economic discrimination has also been an injustice in our society.

I think we have got to get to the place where we overcome group injustices. I would think that our society is strong enough and healthy enough that what happens while there might be a shortage of law school slots, there is not a shortage of opportunity to serve in this society. Persons of talent where there is no group discrimination will find opportunities to serve.

Mr. O'Hara. I think you and I disagree. I really don't see group injustices. If someone discriminates against Dellenback it is no injustice to me. I might object to it. But I feel no pain, no individual pain.

If on the other hand those last two places in law school—let us make it the last two places now—we had two sons, both male, two sons of migrant farmworkers, one white and one black, I don't see any basis for preferring one over the other.

Mr. Young. I don't either.

Mr. O'Hara. If we had Charley Diggs' son and my son competing for those two spots I don't see any basis for favoring one over the other.

Mr. Young. I would agree with you on those two instances.

Mr. O'Hara. So can't we then set up a system that is color blind, that looks at whether one has overcome obstacles and whether or not one has overcome language problems, whether or not one has overcome other difficulties, economic deprivation and so forth or interrupted schooling or what have you and look at it without looking at the race or ethnic back ground of the applicant?

Mr. Young. Let me backtrack and disagree with myself on that. You sucked me in a little bit. The white migrant and the black migrant, no difference. You and Charley Diggs' children, yes, because the chances are his children grew up in a city, Detroit, and still would have a kind of handicap as a result of that school system. I think that factor has to be taken in there in some instance because——

Mr. O'Hara. On the other hand if his kids are brought up in the suburbs and mine are brought up in the inner city, Detroit, would you give preference to mine?

Mr. Young. Yeah, I think I would. The reason I say that is I would like to stick with the notion that democracy does not work unless it is inclusive. As long as you leave some part or some section of society out of the equation not only does that person suffer but the society as a whole suffers. There has got to be some notion of inclusiveness.

My wife is just part of a faculty in a new junior college that has been established in Atlanta, Atlanta Junior College. It has been very interesting to watch them establish a new junior college from scratch under HEW guidelines.

I think they got a far more exciting and relevant faculty because they were working on a balance of black and white and male and female. They considered the notion of cultural inclusion. They have a really ecumenical faculty.

I think that is going to produce a much better quality of education than, say, Georgia Tech, which is still struggling with guidelines. It was just 2 years ago that they couldn't even find any black football players. There was nobody qualified to play football at Georgia Tech.

Mr. O'Hara. They found some in the meantime.

Mr. Young. After Alabama found them they figured they better.

But I am saying that the institutions will be stronger because of their inclusiveness. This is probably the only point I want to make. The more inclusive they are and the better balanced they are, sexually, racially, ethnically, the better results they are going to produce for a democratic society.

Mr. O'Hara. Mr. Dellenback?

Mr. Dellenback. Thank you, Mr. Chairman.

Let me just say for the record before I put a few questions to our [illegible]ness that not only do I agree with the chairman that the present witness is one of the most able of the new Members of this House of Representatives, but I personally have come to the conclusion that he is one of the most sensitive, one of the warmest, one of the most independent, and one of the most courageous members——

Mr. Young. Can I interrupt the gentleman just for a minute?

Mr. Dellenback. To disagree or agree?

Mr. Young. I am going to take your word for it but remind you that I was rejected at 90 percent of the colleges that I applied to.

Mr. Dellenback. I don't want to be facetious.

Mr. Young. On the basis of their objective criteria.

Mr. Dellenback. That doesn't detract from what I said, Andy.

Mr. Young. I hope it says something about the process of the committee.

Mr. Dellenback. You and I don't always agree on every issue—occasionally you are wrong. But I just wanted to give a personal testimonial to having a friend who I have great respect for as a witness.

In response to some of the dialog that took place between the witness and the chairman of the subcommittee, I really think that schools are being very narrow when they make their selection on just scholastic measures. Exactly what measures we use when we go beyond scholastic measures may be the kind of thing, Jim, you were referring to when you talked about overcoming hardships or something else. However, I think if you stay with strictly LSAT measures, and GTA measures, you are hard put to start selecting at any stage of the game.

I am not sure that I would agree with you, Andy, when you said that there can be no objective measurements, if indeed you said that. I jotted that down as one of the comments that you made.

Indeed, there can be objective measurements. It just can't be done by getting a vibration that this one ought to be "yes," and that one ought to be "no." There have to be measures in any system of equity.

I don't really read you as saying that you don't agree with that. It is just a case of what those measures should be, and how equitably they are applied.

I would ask again—not because I think it is the only issue but because I think it is one of the most difficult issues that is involved—if you are trying to bring about a redress of what can be considered imbalance in the mass, how can you do it without being discriminatory in the increment that is added to the mass on a continuing basis?

If your answer is that it cannot be done without being discriminatory in the increment, then what you are really suggesting to us—even assuming we have gotten away from scholastic measurements and are going to broader measurements—is that the law ought to say, "We discriminate in the increment in order to bring about balance in the mass." Does my question come through clearly?

Mr. YOUNG. It does. I guess I feel that way. I don't want to admit it though. I feel that way because I think I do feel that there is no purely objective criteria.

I had never seen a standardized test until I walked into the college entrance board. By the same token my children started off in kindergarten in a private school simply because we were trying to integrate private schools in the south in those days. They started taking standardized tests in kindergarten.

We got them back in public schools after the private schools were integrated. But they have never had any more trouble with tests and they always do pretty well because they have had them since kindergarten.

I am saying that those tests are going to be discriminatory against certain people. So I don't think we can consider those test scores as purely objective. So I think there has got to be some discretion used to balance out the cultural factors which are present not only in the past but also in the grading of our educational system altogether.

Mr. DELLENBACK. I would agree with at least part of the thrust of what you are saying. In talking to Mrs. Schroeder, it was my feeling that she was willing to ignore setting goals for the mass, and saying, "let us just not discriminate in the increment."

Maybe I misinterpreted. In any case, if we are really nondiscriminatory in the increment, I believe it will come out favorable to women. I am not so sure that is true with minorities. I think that is implicit in what you are saying because with all of the strides that have been made in recent years to bring about equality of educational opportunity, there may be inequalities that arise from the differences in such things as test scores—which are old hat to many white Anglo-Saxon Protestants but are not old hat to many blacks.

Therefore, I think it is more difficult to be both nondiscriminatory in changing the mass and nondiscriminatory with the increment when considering minorities than it is when considering women.

Mr. YOUNG. I would agree with you.

Mr. DELLENBACK. I read you as really saying, in part from your own example, it makes the problem more complex rather than less.

Mr. YOUNG. I think it does. I think it would even be more difficult in regard to places where cultural differences are coupled with language differences.

Actually, with 200 years of attempts by and large at assimilation the distance between blacks and whites in this country is narrowing.

That is not the case with men in many American Indian communities. I think that cultural sensitivity and inclusiveness are things that I keep coming back to.

Mr. DELLENBACK. I appreciate that. I close by saying I think at least on the surface that I disagree with you when you indicate that part of the answer is to discriminate on a reverse basis, even with the increment where you feel it is necessary to do that in order to bring about recitification of past imbalances.

I can't really come to that, Andy, and I think it is a wrong way to do it. For me, the answer lies in writing the measurements for the increment such that they are more than just a few rigid types of measurements which clearly or implicity favor one group over another.

I think that is what we do when we go to law school aptitude tests, or to straight GPA's. I think there are cultural differences and background differences which are certainly not the exclusive measure we should be using in making such determinations.

Thank you very much.

Thank you, Mr. Chairman.

Mr. O'Hara. Thank you.

Mr. Benitez?

Mr. Benitez. Mr. Young, I think your testimony has been excellent.

There is one point that I would like to underscore. I assume you don't agree with the chairman when he says that if an injustice is done to me that it is not an injustice done to him.

Do you feel that if anyone is treated unjustly in a society that that affects the whole of society and not merely the one who was affected?

I take it that is the reason why you claim that opportunity given to a member of a minority does probably more for the society at large than for the individual who happens to benefit.

Mr. Young. That is my contention, Mr. Benitez.

Mr. Benitez. Thank you.

Mr. Young. I might say to the chairman that if the chairman found that Mr. Dellenback was being discriminated against because he was a Congressman and that all Congressmen were being held in some disrepute I would think the chairman would tend to feel very sensitive even before it hit him.

Mr. O'Hara. I think that is right. I would agree that "no man is an island." But I don't think you can remedy the injustice that was done Mr. Dellenback by giving me preference.

In other words if an injustice was done to Mr. Dellenback it ought to be remedied and whoever it was that treated Mr. Dellenback unjustly can't square the account as far as I am concerned when I come along by giving me some preferential treatment.

Mr. Young. Let me take on that question. Let us suppose the American Bar Association had a convention and refused Mr. Dellenback the right to speak on this subject this year and this was the major issue of the convention and because of the refusal to have this point of view represented, the point of view of the subcommittee, by Mr. Dellenback because of internal politics in the Bar Association next year there was an effort to have you speak. Somebody would say that is discrimination in reverse. I don't think so.

That say "we still have to have so many professors. We don't have time for any educational controversy in the Bar Association." It is not reverse discrimination to have that point of view represented in that convention whether it be by you or by Mr. Dellenback.

I think that is the image that I have of our educational system. The educational system has been denied certainly a black perspective. For the most part it has been denied a female perspective. It has been denied the perspective of the folk cultures which make up America. I would think the inclusion of those folk cultures and those minorities would strengthen our educational system.

Mr. O'Hara. I think there might be something to the idea of inclusion of different cultures. If you frankly said that "in selecting our student body we shall use the following criteria, 1, 2, 3, 4" and one of those criteria you used was an effort to obtain representation from various regions of the country—I have seen that, the college admissions criteria in an effort to achieve representation from the various cultural backgrounds, you know——that is all right with me.

But when you say we are going to admit on the basis of ability as demonstrated by performance in previous academic work and as demonstrated by scores on the appropriate tests indicators of success in law school or wherever it might be and then not do it that way. I just don't like the idea. I don't think we are terribly far apart. You are very persuasive. I am not sure we should have asked you here.

Mr. Kemp?

Mr. **Kemp**. Thank you. Mr. Chairman.

Andy, if I can call you so——

Mr. **Young**. Fine.

Mr. **Kemp**. I want to congratulate you on your testimony.

I agree with the chairman that we are not far apart and that we have the same goal. It is a question of how to reach that goal. There are honest differences of opinion. People with honest differences of opinion can disagree certainly without being disagreeable.

I welcome your testimony. I welcome you to Congress. I have only been here 4 years. You have been here 2 years.

But I think that you were elected on the basis of your individual ability, on your articulateness, on your background.

I should hope that you would want to be elected on that basis, not as a white or a black or whatever.

What bothers me about this discussion is that we are sitting here, Andy Young, who may be a Democrat maybe from the South, talking with Jack Kemp, who happens to be a Republican from New York, and in our discussion placing an undue emphasis on color.

You made the statement earlier about white Anglo-Saxon Protestantism. I happen to be a white Anglo-Saxon Protestant and don't take particular pride other than to say this. I was brought up in a family, in a church surrounding, that did not teach discrimination and in fact practiced what it preached.

I find it a little bit unfortunate that the discussion seems to center around that particular subject. I have come from the world of professional sports, where I think there have been cases and there are cases today of discrimination. But generally speaking in practice it seems to me that sports is an area of our society in which ability has been the sole criterion of inclusiveness.

I want to say parenthetically that I do very much agree with you that we should think in terms of inclusion, of trying to make this society of ours as heterogeneous as possible, to make a democracy—where we take advantage of cultural differences. I think we should be proud of it.

But the question I have is this. It seems to me I don't suggest it is right now but it seems that affirmative action to be coming to mean—in some areas inclusion for the sake of inclusion.

For instance I think there are some cases and there is one in particular I know of where a university was looking for a black economist.

If I were an economist and I were black I would find that abhorrent. I think that is the antithesis of what this society should be about. I don't see us moving toward the type of democracy that you want for your children and I want for my children, where people are picked as an economist because they happen to be black.

I wish you would comment on that possibility. I don't suggest it is that widespread. But do you want to live in that type of——

Mr. Young. I think I do for a while.

Mr. Kemp. For how long?

Mr. Young. Until being black no longer means being poor.

Mr. Kemp. No longer means being what?

Mr. Young. Being black no longer means being poor for the most part. The reason I justify a black economist is I have a notion that our society suffers problems. The people who suffer the problems first are people who are on the fringe of the society.

So we have had a problem of unemployment in the black community since the war. So black economists by and large have been living with that problem already for 25 years. And so the inclusion of a black economist in particular in view of the situation that we find ourselves in now where unemployment is affecting everybody in this society like it used to affect only blacks and browns, that temporarily to deal with this problem it might be a good thing to have a black economist.

Mr. Kemp. So you are suggesting that there is black economics and white economics.

Mr. Young. I am suggesting that there are—yeah there are black economics and white economics.

Mr. Kemp. And there are female economics and male economics.

Mr. Young. Yeah.

Mr. Kemp. And there are Catholic economics and Protestant economics.

Mr. Young. Very little any more in our society.

Mr. Kemp. How was it achieved? That is my point. Was it achieved by finding a Catholic economist or a Protestant economist?

Mr. Young. In part it was.

Mr. Kemp. Or in trying to move toward a freer economy.

Mr. Young. Achieved by Catholics by achieving a greater political power base. All of a sudden Catholics became part of our society when Catholics started voting in Boston and New York and Chicago. They developed a power bloc. It was amazing how acceptable Catholicism became. When I was coming up in the South that was not the case.

I think where we are now in terms of blacks is give us another 10 years. Nobody will call it discrimination in reverse anymore. They will want blacks represented because the State legislature will have a power bloc. We have 28 blacks in the State legislature in Georgia now. There is a black on the board of regents which wouldn't have been there had it not been for these guidelines.

The faculty themselves are beginning to see that it is to their advantage to have blacks represented in their——

Mr. Kemp. That is not where the disagreement occurs at least in my mind. What I am concerned about, reducing this to its logical conclusion is this: If there is not a black economist are we denying those black students and those white students on the university campus, quote unquote, "black economics?" We are probably discriminating against all of the students.

I don't know how you can get through guideline to a point in a society where each is going to have the opportunity to be taught white economics or black economics.

Mr. YOUNG. I don't mean that there is such a thing as black economics. I would say that there is a black perspective on the economic life of these United States which is different. I would say that the perspective of a Southern economist is going to be different from the perspective of a New England economist.

One is going to be dealing basically with the problems of a developing area. The other is going to be dealing with the problems of a declining area to a certain extent.

Mr. KEMP. But how would an individual know that he or she has been chosen for a position on the basis of their talent with all the objective criteria that we try to——

Mr. YOUNG. I don't think they ever are in the first place. That is the problem. What we are dealing with is a society that has been discriminating in favor of whites from the very beginning. The Declaration of Independence and the Constitution, they really weren't concerned about blacks and certainly not about Indians, nor about women.

Mr. KEMP. Nor about Italians, Polish——

Mr. YOUNG. That is right. And everybody has had to fight their way up.

Mr. KEMP. A lot of people have been successful. You have been successful not on the basis, I suggest, of being black but on the basis of being a talented, able, articulate spokesman for the area you represent. I wouldn't want to be known for anything else.

Mr. YOUNG. I was successful, frankly, because my daddy was a dentist.

Mr. KEMP. A dentist?

Mr. YOUNG. A dentist. He had enough money to send me to school. That was not true of the other kids in school with me. There were a lot of kids in school that were a lot smarter than me that went to jail, went to the Army and were killed, went every place but to school. It was never on the basis of merit. It was on the basis of economic opportunity, the economic opportunity that was available to us.

I would say that my daddy was a dentist because the churches at the end of the Civil War maybe practiced a little reverse discrimination. I don't know what they called it. But they set up hundreds of schools and colleges in the South for ex-slaves. My parents happened to be among those that got a college education very early as far as blacks are concerned.

So in a sense nobody should discriminate in favor of me. But they ought to in favor of many people of equal and superior ability who have not had the economic opportunities. I would say that is what I call a wholesome society, a society that seeks to include the people who have been systematically excluded.

Mr. KEMP. We agree and the record should be clear that we do agree. My concern is your concern.

But a college wrote a letter, I won't mention which college, saying that it is currently engaged in an affirmative action program, the goal of which was to recruit, hire, and promote ethnic, racial, and women candidates until they comprise the same proportion of the faculty as they do of the general population.

I would suggest that with the tremendous degree of diversity in the ethnic and religious heritage that this country has, that type of a society which each university campus must reach some hypothetical heterogeneity seems to me to be not only impossible per se but exclusionary and the antithesis of the type of society you want for your children.

Mr. YOUNG. Except that the university system in Georgia just since these guidelines is beginning to move along. It is amazing the number of qualified and competent people that they are getting.

The interesting thing is that in that university system where students have an opportunity to choose their professors the blacks who may have 2 years ago been considered less qualified don't have any problem with people volunteering to take their courses.

I would say that I would hate for us to get away from that goal because I think that it has been a worthy goal.

I want to take just a moment to disagree with you about professional sports because that is still a struggle. I guess the little book "North Dallas 40" would be good reading for you sometime.

Mr. KEMP. I have read it. I am not saying there is not a struggle, Andy.

Mr. YOUNG. That is the kind of testimony I get from black athletes on the Atlanta Falcons even still.

Mr. KEMP. Again for the record I didn't say that there were not problems and not injustices and not discriminations. But one can look, say, at professional basketball and see that there are not enough whites in professional basketball.

Mr. YOUNG. That is true.

Mr. KEMP. So what is happening to the NBA or the ABA? The NBA and ABA seem to operate on the basis of ability and most people accept this. People are going to the games. I think it is a manifestation of the type of society that ought to be prevalent in other areas. Education is one.

I have no further questions, Mr. Chairman.

Mr. YOUNG. Thank you very much.

Mr. O'HARA. Thank you, Mr. Kemp.

Mr. Huber?

Mr. HUBER. Mr. Chairman, I missed the speech of my colleague. I do have his report here. It just seems to me that we have had some testimony, I think, and Congressman Kemp referred to a black economist who was very upset because he was solicited as a black economist. That is in the record.

My only point was that I don't think that two wrongs make a right. I think you are trying to solve the problems of 200 years of wrong by going in the other direction. I think what it is going to do is what has happened in the busing situation. I think you are crystallizing the opposition and you are opening the door to a backlash that is going to be disastrous to what you really hope to accomplish.

I think if we try to write laws to rectify 200 years of discrimination by going in the opposite direction I think it is going to be a great mistake for this country. I think it is going to be a great mistake for black minorities as it has been in the school situation.

All the evidence we keep talking about is really fanning the fires. I have seen this in Detroit. We just had a report in Michigan of the black situation where the blacks decided that they were going to use force and violence as a means of accomplishing their ends. With 13 percent of the population it is not a very smart position to take. The local papers have been full of this for the last 3 weeks. I hate to see that.

But I think if that is going to be pushed by black leadership—you are a black leader—if that is going to be the testimony that the only way we are going to solve our problems is by affirmative action, is by reverse discrimination, I think that is going to work to your detriment.

That is just my comment.

Mr. Young. May I just make a response to that? Our experience over the last 10 years has been exactly the opposite. I took children to school in Mississippi and Louisiana and Georgia where there were mobs just like Boston.

I wish you would go back with me now and see those kids and their parents sitting together in the PTA meetings.

The record of integration of public education in the South is really an amazing testimony in the same places.

I would contend that it has been exactly the opposite, that what happened in the South was the leadership, black and white, decided that integration was not as bad as the violence which was being caused in every instance by a small minority.

That is a small minority on the streets in Boston. That was a small minority in Pontiac. When the majority of people of good will in the Nation as in the South assert themselves and when the political leadership begins to stand up and affirm the principles of this Constitution it is amazing how quick the people begin to fall in line, respect the law, and begin to see the good things that come with people living together in spite of their race.

Mr. Huber. Can you give me one instance in the State of Michigan of a successful candidate who took the position that you take, just one instance?

In this room we have got a couple here from Michigan whose position on busing was just the reverse. If I could find one instance in Michigan—in the South Federal force had to be used. Nobody is talking about Federal force in the North now because that is where the population is, down South. It is quite a different situation. It seems to me that we are opposite positions on this.

I will be glad to meditate on a specific example where that situation that you have just said holds forth in my State of Michigan.

Maybe the chairman knows. I don't know one.

Mr. Young. One reason for that is that we have not had any national political leadership for almost a dozen years now. In fact we have had national leadership that has exploited the fears and anxieties of the society. We are reaping the seeds of that discord which was sewn through the last years.

But people are going to come to their senses before long. Governor Askew in the South, who openly campaigned a couple of years ago against Wallace and who was elected overwhelmingly.

Michigan may be a little bit behind Florida and Georgia. But I think you are going to catch up.

Mr. O'Hara. I thank the gentleman for justifying my original introduction.

Mr. Young. Thank you very much.

TESTIMONY OF HON. CHARLES B. RANGEL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman, I am grateful for the opportunity you have given me to appear before your subcommittee and submit my views on the importance of affirmative action programs to provide equality of educational opportunity for minorities and women in our society.

Minorities and women have been, and still are, severely underrepresented in institutions of higher education, both in student bodies and in faculties, and as a result, in professions requiring higher education. Only 5 to 7 percent of the undergraduate and 3 percent of the graduate college population is black. Two fifths of the undergraduate blacks and one half of the graduate blacks attend predominantly black schools of lesser quality and status. Fifty-two percent of the Spanish speaking population between the ages of 25 and 29 has never completed high school, and 20 percent of the Spanish speaking population has less than 5 years of schooling. This underrepresentation is not a result of a lack of educational aspiration on the part of minorities and women, but is due to overt, and more frequently, subtle methods of discrimination. Lack of educational aspiration, where it does exist, can be traced to cultural factors. Minorities and women have not traditionally been made to feel that we are adequate higher education and professional material. Guidance counselors have directed black, Spanish speaking, and other minority students into vocational rather than academic courses of study. Women, both minority and nonminority, have been directed into secretarial schools.

Because of the greater awareness brought about through the civil rights revolution in the last two decades, minorities are demanding their right to an academic education. More and more minorities and women are applying to colleges and universities for admission at the undergraduate and graduate levels and for faculty positions. The large increases in minority and female student enrollments and faculty positions, however, have been at 2-year colleges and predominantly black schools. Many minorities and female applicants are being turned down at higher prestige institutions because they allegedly lack the proper qualifications. As of 1973, only 5.4 percent of the black and 8.7 percent of the female Ph. Ds. in the United States were employed as compared to 86.8 percent of the white male Ph. Ds., 0.9 percent of the white male Ph. D.s were termed unemployed and looking as compared to 2.7 percent of the minority and 3.9 percent of the female Ph. Ds. It cannot be said, therefore, that minorities and women are unemployed because they care to be. It is time we took a critical look at just what these qualifications are and examine whether or not these qualifications themselves are a discriminatory tool used against minorities, particularly, and secondarily, women.

Firstly, the elementary and secondary educational system, as it is presently constituted and operated, is not geared to the education of minorities. Many minority students have cultural and linguistic problems to overcome before they are capable of tackling traditional school work. As a result, their grades are not reflective of their ability to succeed in college. The frustration built up by years of trying to overcome such obstacles without adequate sympathy or assistance by uncaring teachers causes many students to "turn off" on education. In addition, minority students may have had teachers who gave them lower grades out of their own social prejudices. IQ tests and college entrance tests have been given almost exclusively in English, thus discriminating against the Spanish speaking minority. A bi-lingual test given in San Francisco showed that 45 percent of those children who had been classified as "educationally mentally retarded" were reclassified as average or better when given the same test in Spanish. The high cost of higher education also acts as a deterrent to further education of minority students who are dependent upon scholarships and loans because they cannot obtain the necessary funds from family resources. Once accepted at a college, the minority student faces a cultural distance which makes it harder for him or her to succeed, and to later obtain a good job on a teaching staff elsewhere. In hiring faculty, institutions of higher education often use the number of publications and amount of research as qualifications. Minorities and women may well have already been discriminated against by publishers or in getting research grants.

It is definitely in the interest of society as a whole, as well as the interest of minorities and women, to increase minority and female representation in student bodies and faculties. In order to provide a relevant learning experience, a school should acquaint the student with the realities of the world that he or she is to live and work in. Keeping a student in a vacuum without contact with members of society different from him or herself can lead to the formation of attitudes and misconceptions that lead to disastrous encounters in later contact with those members of society. Minority and female professionals and students serve as the necessary models to younger minority and female children and show them that those positions are not unattainable. Finally, minority and female professionals are needed in the larger community. A black lawyer is generally better able to win that trust and to solve the problems of a black client, and a female doctor can generally better relate to a female patient. In his article, "Preferental Admissions: Equalizing the Access of Minority Groups to Higher Education," Robert O'Neil states that less than 1 percent of the members of the American Bar Association are black. Only 17 percent of them are located in the South where they are needed the most. Only 10 out of the 2,000 Denver lawyers have Spanish surnames, while the Chicano and Mexican-American population of the city is 9 percent of the total population. These minorities are being legally underrepresented.

Ideally, the answers to these problems would be to better the elementary and secondary systems of education, and financial barriers to the poor, end cultural biases, and find alternative testing procedures that would be less discriminating. If all of these things were effectively done, an individual could just apply and be accepted purely on his or her recognizable achievement. Unfortunately, these tasks are not easily achieved. So many people are applying for acceptance into the postsecondary education system that some qualified people are inevitably turned away. We cannot just sit back and wait for the above mentioned changes. They are goals we must work toward. In the meantime, we must take affirmative action to get minorities and women into the system to provide an example for those to follow. The affirmative action programs being used now, have increased, somewhat, the minority and female representation in universities. These programs must be continued and expanded. If these programs are terminated, it would serve as a severe blow to our efforts to provide full and meaningful equality of educational opportunity for minorities.

There have been many criticisms of the affirmative action programs required of all schools receiving Federal funds. The establishment of goals and timetables for increasing their minority and female populations have been especially criticized. The predominant criticism heard is that the affirmative action programs require schools to establish quotas, which, it is said, necessarily reduce standards by forcing admission of less qualified minority candidates at the expense of presumably more qualified whites. This type of criticism clearly stems from a misunderstanding of what is required. Revised order No. 4, issued by the Department of Labor requires each school receiving Federal assistance to do an "availability-utilization" analysis which would determine the availability of qualified minorities and women in relation to their proportion in the student body and on the faculty. It does not require the school to accept any student or hire any faculty member that would lower the standards of the facility. In fact, the court has decided in *Commonwealth* v. *O'Neill* that it is unconstitutional to hire less qualified people. Revised order No. 4 states:

"Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work."

Judgment of the extent of compliance with the order will not be based solely on the attainment of goals, but on the efforts made to attain them.

A second major criticism of affirmative action is that it results in "reverse discrimination;" that qualified students are being denied access to higher education because minorities and women are being given preferential treatment. In response to this commonly voiced complaint, I would like to point out that preferential treatment is nothing new in higher education. Preferential treatment has been given to athletes, the children of trustees and prominent people, and to individuals from a geographic area who have been desired to give the university a regional or geographic mix to produce greater diversity. The greater number of people applying for admission and for teaching positions at universities necessitates some of them being turned down, as has been above mentioned. Those decisions are often quite arbitrary. In that sense, someone is always being discriminated against. If a white male is denied an acceptance which is offered to another white male, there is no cry of discrimination. But as soon as that acceptance is offered to a black, it is called discrimination. All other things being equal, why not accept the black to add "diversity" to a campus just as one would accept the Californian to add diversity to a New York campus? And why not, upon closely looking at an applicant's history and finding certain indications of motivation and success, accept a minority or female applicant even though their grades might be somewhat lower?

Richard Lester himself, in a book which attacks affirmative action programs speak of the complex acceptance and hiring procedures of American universities. Grades, test scores, publications, and the like, are not the only criteria, he says. Why not use those other "complex" and abstract criteria to the benefit of minorities and women rather than against them?

Another criticism of affirmative action programs is that race, ethnicity, or sex should not be a criteria at all. Universities should be "color blind" and simply accept the best qualified person. However, until the complex cultural biases of the earlier education systems are changed so that all individuals may apply on a truly equal basis, the universities must be "color conscious" in order to increase the representation of minorities and women.

A fourth criticism is that not all minorities and women are "disadvantaged," and, therefore, should not all be lumped together. Although not all minorities are poor, they have all suffered the emotional effects of discrimination, which may have in turn affected their qualifications as compared to nonminority students.

University officials also complain of the paperwork required of them to prove that they are making "good faith" efforts. The records asked of them are, for the most part, records which they should have in their possession. If the universities are to be considered responsible employers, these records are ones which should be kept anyway.

From a superficial examination of previous testimony and related acts and others, there appear to be certain valid citicisms. Universities have complained that orders are complex and hard to follow, and that different Federal agencies often have multiple lines of jurisdiction. The Department of Health, Education, and Welfare is responsible for dealing with "pattern" compliants of discrimination and the EEOC is responsible for dealing with individual complaints. Each office has its own specific requirements governing what the school must do to prove compliance. These requirements are often contradictory. For example, in regard to pensions, the EEOC requires that no program differentiate between monthly payments to men and women even through the cost may be unequal due to the longer life expectancy of women. HEW requires that overall contributions be the same for men and women. Executive Order 11247 states:

"The Attorney General shall assist Federal departments and agencies to coordinate their programs and activities and adopt consistent and uniform policies, practices, and procedures with respect to the enforcement of title VI of the Civil Rights Act of 1964. He may promulgate such rules and regulations as he shall deem necessary to carry out his functions under this order."

Where departmental discrepancies do exist, the Attorney General should make use of the powers vested in him and solve the said discrepancy. Lack of clear policies and demanded obligations on the part of departmental agencies is no reason to end a severely needed program.

The critics of affirmative action programs have offered alternative suggestions. One prominent suggestion is to allow universities to arbitrate privately. Up until this point, many universities have not made the effort to increase minority and female representation. It left to arbitrate privately, this practices may continue. If the school is truly dedicated to increasing the representation of minorities and women, it should not matter who does the arbitration. Justice is justice no matter who declares it. The other suggestion is that the burden of proving "good faith" should not be on the school. The EEOC should identify discrimination and deal with it where it exists. This would be an after-the-fact solution. Asking a school to submit a program before discrimination is found is a preventative measure which can help avoid later strain.

In conclusion, affirmative action programs are a necessary tool in increasing minority and female representation in higher education in a situation where leaving things to the staatus quo might do so. Affirmative action programs have advantages for the whole society and are vital to the individuals who benefit directly from them.

STATEMENT OF HON. JAMES BUCKLEY, A SENATOR FROM THE STATE OF NEW YORK

Mr. O'HARA. The Chair is going to yield to the gentleman from New York, Mr. Kemp, for the introduction of our next witness.

Mr. KEMP. Thank you, Mr. Chairman.

I would like to take a moment to introduce the very able distinguished, and articulate Senator from the State of New York, Senator James Buckley.

He has a long history of interest in this subject. He is a supporter of civil rights laws and has a perspective that I think can be very useful to this subcommittee.

I personally want to welcome him and thank him for his testimony because I have read it and appreciate very much his insights.

Thank you, Mr. Chairman.

Mr. O'HARA. Senator Buckley, you are very welcome. You represent one of the most populous States. Not only that but you are a leader of your party. We are very happy to have you.

Mr. BUCKLEY. Mr. Chairman, I want first to express my thanks to you and to the members of the committee for the opportunity to offer my views on what I am convinced is a problem of profound importance to our Nation. I also want to express my personal thanks to you and the committee for holding these hearings which, I believe, are the first to be held in regard to the problems of affirmative action programs.

It is by now a commonplace that the Congress and the American people will usually not respond to a problem unless that problem first reaches critical dimensions; for example, the energy crisis. The facts that led to the energy crisis were apparent years before the actual crisis occurred. Yet little was done to increase dwindling supplies and reduce consumption until the Arabs reminded us of the dangers of an excessive dependence on foreign sources.

I bring this to your attention because I believe there is another potentially explosive situation occurring in the United States, one that could set back the cause of social harmony. The facts are available, but there does not seem to be any sense of urgency in dealing with them. More and more, we see evidence that the discrimination inherent in the "affirmative action" programs now being enforced by the Federal Government are already causing hardships and controversies throughout the land. The problem is complex, but at its heart is a simple question: Is it just for the U.S. Government to require discrimination in favor of some ethnic or racial groups as opposed to other ethnic or racial groups? In short, are some Americans to be treated as more equal than others? This is what I consider to be at the heart of what may well develop into a new civil rights crisis. I want to emphasize that what we are talking about is not "reverse" discrimination; it is discrimination period.

The New York Times, June 28, 1974, carried a news story headlined "Minority Hiring Said To Hurt Colleges." The story said in part:

> The affirmative action program by which the Federal Government is compelling colleges and universities to hire more women and blacks is lowering standards and undermining faculty quality, according to a report to be published today under the sponsorship of the Carnegie Commission on Higher Education.
>
> Lacking an adequate pool of qualified women and blacks for tenured appointments, the 168-page report asserts, institutions are "playing musical chairs," pirating the limited number of minority and women faculty members from each other.
>
> Moreover, it is charged that new minority and women appointees may be paid more than white male faculty members at the same level and that some do not have proper qualifications for the tenured and untenured positions to which they are appointed * * *.

The report in question has received nationwide publicity and for good reason. It is the first scholarly study to stress what many have long known: The affirmative action programs now being enforced by the Federal Government are a mockery of fair play and a perversion of the concepts of individual dignity and of equal justice for all under the law. Today I would like to address myself to some aspects of this growing national problem, one that is entirely the creation of overzealous bureaucrats.

For the record, I want to state that my interest in this problem is longstanding. As you know, New York State is blessed with more than its share of this country's institutions of higher learning. As a result, I have received more than my share of the cries of anguish now issuing from our campuses as the tireless agents of the Department of Health, Education, and Welfare's Office for Civil Rights seek to impose "affirmative action plans" on all educational institutions hapless enough to receive funds pursuant to contracts with the Federal Government.

As early as May 22, 1973, I made a statement, "What Does Affirmative Action Really Affirm?" pointing out the obvious inequities in the "affirmative action" programs. At that time I said:

> The absurdity of the exercise ought to be self-evident. But it is worse than absurd. The notion of affirmative action plans designed to achieve precise goals is inherently vicious, inherently discriminatory. It flies in the fact of everything that the civil rights movement has sought to achieve—a society in which every human being is judged on his merits as a human being, a society that is truly colorblind, a society that applies a single set of standards for employment and advancement irrespective of the accident of birth.
>
> This is true whether quotas are applied to universities or businesses, or unions. The human soul does not know distinctions of race or sex or ethnic origins. To attempt to catalog human beings by such categories for purposes of employment is to insult their humanity * * *.

Mr. Chairman, I support the Civil Rights Act of 1964. I also support the principles underlying Executive Order 11246 from which the entire affirmative action programs have directly arisen. What I do not support—what I cannot support—is administration appointees and bureaucrats asking young Americans today to pay for the sins others have committed in the past.

I recently came across two documents which I believe have very much to tell us about the crisis. The first was an article by George F. Kennan, concerning parts I and II of Alexandr Solzhenitsyn's "Gulag Archipelago," and the second was a speech given by the distinguished member of the House of Representatives, Representative Edith Green. At first glance, there two documents would appear to have little in common, but I am convinced that both are speaking to the same issue.

The review by George Kennan contains the following statement, concerning the Stalinist terror of the 1930's:

> * * * Only a tiny percentage of those who were made victims of the system can be said to have been in any sense political opponents of the regime. People were arrested and consigned to this terrible half-world not as individuals—not, as a rule, for anything they themselves had individually done—but as members of categories. 'Prophylactic' considerations—i.e., the reflection that certain categories of people might be theoretically more capable than others of making trouble for the regime in the future—no doubt had something to do with the identification of the categories from which arrests were to be made * * *.

Mr. Chairman, the idea that human beings should be treated as members of categories is repugnant to Americans. Yet, we are at this very moment treating certain Americans as members of "favored" categories and others as members of "nonfavored" categories in hiring, in academic institutions and in a broad range of areas. We are, in short, officially engaging in a practice which formed the philosophical structure of the Great Terror.

I need not emphasize the fact that Congresswoman Edith Green has long been at the forefront of the fight for true equality of opportunity. This is why her words are so important. Here is what she said:

> In drafting the language of Title IX I never intended it to be interpreted as establishing a quota system. I consider the rhetoric of some in saying, 'We don't require quotas, we require goals', as nothing more than a game of semantics * * *
>
> One of the most damaging things about prejudice, in my view, is that it gives primary value to a group characteristic rather than recognizing the unique individuality of each human being. It does not matter whether this discrimination works in the person's favor or against him. What he or she still loses is the irreplaceable privilege of being looked upon as an individual rather than an anonymous face in the crowd.
>
> As I see it—only genuinely equal opportunity—containing neither advantage nor disadvantage can provided this * * *.

The eloquent words of Representative Green are something more than a denunciation of the wrongs perpetrated by bureaucratic quota systems. They are instead an appeal to the conscience of the Congress, an appeal that cannot be denied and no longer can be ignored. And there is ample evidence that what Representative Green has warned us against is fast becoming accepted practice in many parts of our nation. Allow me to illustrate that point with one recent example.

The Wall Street Journal—Friday, August 2, 1974—carried an article which shows just how far we have moved as a nation toward accepting an alien and dangerous philosophical viewpoint concerning the true meaning of equality. It seems that one of the biggest growth industries are the consulting firms that help companies implement equal employment opportunities programs. Here is what the article stated about the motivation behind most affirmative action programs:

> "It's a business problem of dollars and cents and should be approached as such," says Barbara Boyle, a partner in the consulting firm of Boyle-Kirkman Associates, Inc. Her own scare tactics include showing clients a pamphlet distributed by the National Organization of Women that gives women step-by-step guidance on how to sue their employers.

So we have come to the highly ironic state of affairs in this country that scare tactics are used to bludgeon employers to hire high-priced consultants whose chief task is to show the employer ways in which he may most expeditiously discriminate against present and would-be employees, all in the name of justice.

In order to demonstrate what the bureaucratic mind can do to twist the clear intent of the legislation we enact, I believe it is worthwhile to examine briefly one part of the affirmative action programs.

In trying to thread my way through the labyrinthian world of affirmative action policies, I had had occasion to read "The Higher Education Guidelines" issued by the Department of Health, Education, and Welfare through its Office for Civil Rights. On page 3 of that document we find the following:

> The *affirmative action* requirements of determining underutilization, setting goals and timetables and taking related action as detailed in Revised Order No. 4 were designed to further employment opportunity for *women* and minorities. Minorities are defined by the Department of Labor as *Negroes, Spanish-surnamed*, American Indians, and Orientals.

Now it happens that the word "minority" does not appear at all in Executive Order 11246 or in the 1964 Civil Rights Act. I therefore wondered how the term came to be used as it is in the guidelines for implementation of that Executive order. I discovered that the Office for Civil Rights relies on a document of the Department of Labor called "Revised Order No. 4 as the basis for its guidelines. An examination of "Revised Order No. 4" revealed that the word "minority" or some form of that word is used no fewer than 65 times—but is never defined. Where, then, was the basis for the particular definition of the word "minority" contained in the OCR guidelines?

I asked the scholars of the Library of Congress to attempt to answer this question. I want to include in these remarks excerpts taken from a response given to Mr. Paul Downing of the Library of Congress by Mr. Irving Kantor, Assistant Executive Director, U.S. Civil Service Commission:

> The term "minority group" first appears in our files in connection with a 1961 study of minority group employment in the Federal government, conducted by the President's Committee on Equal Employment Opportunity . . . the Civil Service Commission developed a working definition for field use and identified those groups that appeared to be identifiable and significant enough to measure statistically in the Federal civilian work-force. These minority group designations—Negroes, Spanish surnamed Americans, American Indians, and Oriental Americans—as you indicated in your letter, remain pretty much the same in current usage.
>
> Obviously, there are numerous other ethnic and religious minorities in our pluralistic society, but ethnic and religious identification of all employees would be impracticable, and we believe not particularly useful for equal employment opportunity program purposes. . . .

In his covering letter, Mr. Downing stated:

> . . . On 3/22/74 I discussed use of this term with Mr. James Scott, an assistant to Mr. Kantor. Mr. Scott cited two reasons for selection of particularly minority groups.

(1) The minority groups selected are those which have historically suffered most discrimination and which have suffered discrimination continuously to the present.

(2) The minority groups selected are those most easily identifiable as minority groups. . . .

Some questions arise at this point. Why should the criteria for special governmental treatment be limited to identifiability and the statistical prominence of one group? And how, precisely, is "identifiability" defined? Why is it "impracticable" to identify other ethnic groups? What have the bureaucrats done to analyze the reasons for this alleged "impracticability?"

Now I believe the record shows it is reasonable to state that the arguments given by these bureaucrats for making some minorities more equal at the necessary expense of others is at the very least questionable, when seen in the light of the nondiscrimination requirements of the 1964 Civil Rights Act. But to make matters even more complicated, there are, unknown to most Americans and, I would think, even to most in Congress, whole categories of minorities who are by official admission discriminated against but are not, apparently, important enough in the eyes of the bureaucracy to warrant protection. Once more I want to quote from my previous speech in order to show what the affirmative action philosophy has brought us to:

. . . the problem of the universities in attempting to cope with the infinite variety of human beings is just beginning. To show what may lie ahead, let me quote from "Guidelines on Discrimination Because of Religion or National Origin," issued by the Department of Labor and printed in the Federal Register on Friday, January 19, 1973, which have to do with affirmative action in another area of employment. Part (b) of 60–50.1 of those guidelines reads as follows:

. . . the problem of the universities in attempting to cope wit hthe infinite variety of human beings is just beginning. To show what may lie ahead, let me quote from "Guidelines on Discrimination Because of Religion or Nationai Origin," issued by the Department of Labor and printed in the Federal Register on Friday, January 19, 1973, which have to do with affirmative action in another area of employment. Part (b) of 60–50.1 of those guidelines reads as follows:

> Members of various religious and ethnic groups, primarily but not exclusively of Eastern, Middle, and Southern European ancestry, such as Jews, Catholics, Italians, Greeks and Slavic groups, continue to be excluded from executive, middle-management and other job levels because of discrimination based upon their religion and/or national origin. These guidelines are intended to remedy such unfair treatment.

. . . All of this presents us with a complex problem . . . As it stands now, the Government of the United States has decreed, officially, through the Department of Labor, that while members of European minority groups and certain religions are definitely victims of discrimination in business employment, it has also decreed, through HEW's Office of Civil Rights, that when it comes to employment on a campus, they are not entitled to the same regulatory protection that is now accorded Negroes, the Spanish surnamed, American Indians and Orientals. I, for one, have no doubt that in due course, the OCR will not only catch up with, but leapfrog the DOL as more and more groups seek the very real advantages of reverse discrimination that will accrue to them by virtue of membership in a class officially found to be subject to job discrimination. And so our colleges and universities will find themselves forced to punch into their computer cards more and more categories of human beings so that they may achieve the exact mix of sex, race, religion and national origin that will be required to satisfy their ever more fastidious inquisitors . . ."

Mr. Chairman, I am in no way arguing that we should add new categories of Americans to the "preferred list." I am instead directing your attention to the logical and practical inadequacies and injustices inherent in any system of preferment. The way to rid ourselves of this new discrimination is not by setting up officially designated groups for special treatment or by adding more and more categories to the arbitrary list in order to make the new discrimination look more justified. The way to achieve equal employment opportunity is to simply enforce the laws already on the books concerning discrimination and to let every man and woman know that it is the person, not the group to which he belongs, that counts when it comes to employment. Let's not discriminate against some minorities as a means of making up for past discrimination against other minority groups. Most important of all, let us return to commonsense and common decency when it comes to dealing with the complex and important task of racial and ethnic harmony in this country. However noble in original purpose they may have been, the "affirmative action" programs have become disasters in practice. What we need is a fresh start, with each individual guaranteed that he or she will be free from discrimination.

I would like to conclude, Mr. Chairman, by quoting from an excellent study of this problem. George Roche, the president of Hillsdale College, who has already eloquently testified before this committee, has written in his new book "The Balancing Act."

> If we give way before the force which now menaces higher education and our saciety as a whole, we are not only opening the door to second-rate standards and a ne and more vicious and permanent form of injustice. We are also passing control of tomorrow's leaders and tomorrow's dominant ideas from the privacy and independence of the academic community to the realm of egalitarian politics. If Affirmative Action gains the final say in curriculum, faculty, and admissions throughout higher education, effective control of society will have passed to the social engineers and the politicians, and America will have lost one of her greatest resources in the struggle to remain an open and effective society.

Mr. BUCKLEY. Thank you very much, Mr. Chairman.

Thank you, Jack, for your kind remarks.

Mr. O'HARA. Thank you very much, Senator Buckley, for a very good statement.

Senator Buckley, in your statement you indicated that you had no objection whatsoever in fact you supported the implementation of affirmative action programs. It is the manner in which affirmative action was to be achieved through the system of numerical goals and quotas to which you objected.

Is that a fair statement?

Mr. BUCKLEY. Yes. By that I meant to make sure that we didn't rely entirely on the "buddy system" of phoning cronies at the next campus, but, instead make a fair attempt to make known the availability of jobs so that applicants could be notified and screened.

Mr. O'HARA. I don't suppose that you would have any objection to a system of admissions to institutions of higher education or a system of screening for employment that took into account particular circumstances in the history of the individual applying and the applicant's economic background, whether the applicant has overcome particular difficulties associated with interrupted schooling, associated with language problems or whatever, as long as they were applied in a way that was not racially or ethnically select.

Mr. BUCKLEY. Correct. I find it easier to answer your question in the context of admissions to schools. Schools will set for themselves a whole variety of standards of what they hope to achieve both in academic terms and in terms of benefit for the student and faculty alike.

I believe that rigid criteria that can be mathematically determined is probably the worst way to go about that. With respect to employment I would certainly reject any requirements that are unrelated to the capacity of the individual to perform that job that has to be done.

Mr. **O'Hara.** Yes; I think that is right. I also think that if one demonstrates a great strength of character, determination, by overcoming great obstacles, that is something that you would look at when you were looking for a member of your staff.

Mr. **Buckley.** Certainly.

Mr. **O'Hara.** Thank you very much, Senator.

Mr. Dellenback?

Mr. **Dellenback.** Thank you, Mr. Chairman.

Thank you, Senator Buckley, for taking time and waiting so patiently. We apologize for such prolonged dialog with preceding witnesses.

Mr. **Buckley.** We have such problems at the other side of the Hill.

Mr. **Dellenback.** I thought the Senate ran smoothly and never suffered from this sort of thing.

Senator, let me be sure that I understand what your feeling is, per se, about affirmative action.

If affirmative action means to take such steps as are in order to be sure that discrimination does not occur, then you would favor and do favor affirmative action.

Mr. **Buckley.** In principle. The question is how is that principle translated into practice.

Mr. **Dellenback.** I am trying to walk it through because quite frankly, as you perhaps noted from the questioning of previous witnesses, we have great difficulty when we talk about selecting new people, trying to see how we can bring about a rectification of the imbalance that exists, whether it be racial or sexual or whatever it is. Without doing something that is potentially discriminatory.

Mr. **Buckley.** May I interrupt you right there?

Mr. **Dellenback.** Yes; please do.

Mr. **Buckley.** I don't see how one can move to redress an existing imbalance without in fact embarking on inherently discriminatory practice.

Mr. **Dellenback.** One can rectify an imbalance in procedure, but one can only with great difficulty rectify an imbalance in the composition, numerically, of those who make up the group, without falling into the trap that you and I are both seeking to avoid.

Mr. **Buckley.** Right. In other words I think in the course of time if one were truly nondiscriminatory in future hirings one would end up with a turnover, a natural rollover, a natural attrition, with a student body or a faculty body that would in the availability of a particular case represent a true merit system.

Mr. **Dellenback.** I can see that within the practices of an already existing body, when it comes to applying uniform procedures for faculty advancement, for tenure, for promotion, for salaries to be paid, et cetera. I can see how this can be done—how one can redress the imbalances of the mass.

But where I have difficulty is with the additions to the mass—if you really try to be fair and impartial with the increment, then you can't have one eye cocked on how to skew the additions this year so as to bring about a rectification in the total over a short period of time.

I gather that is really what you are speaking about on that particular point.

Mr. **Buckley.** Yes. I find it abhorrent that, in too many cases, letters are going out saying, "white male of German extraction, American, specializing in Byzantine theology, need not apply."

Mr. **Dellenback.** You have more esoteric courses in your colleges than mine, but I understand what you are saying. I appreciate your input. This has been a helpful dialog, and I also appreciate your printed testimony. Again I say "thank you" for having joined us.

Mr. **Buckley.** Thank you.

Mr. **Benitez.** Mr. Buckley, I am very happy to have seen you now in this reverse situation momentarily. I also thank you for your patience.

I would like to raise a few questions.

Question No. 1: Is it your feeling that, prior to the affirmative action program and legislation, the system of selection at campuses and faculty were fair and nondiscriminatory?

Mr. **Buckley.** I can't speak from any broad knowledge. My guess would be that they were not consciously discriminatory, but rather they were habits of selection. People would automatically go to such and such graduate schools for such and such skills.

One would telephone a friend teaching at some other university and say, "Do you have any bright Ph. D.'s coming along who might be interested in a position in my department?"

To the extent that your entire educational system at the doctorate level on up was drawing its strength from certain categories of Americans, then the whole system was, in fact, nonrepresentative.

But I am not at all persuaded—let me put it this way: I have no basis in experience to suggest that if an extremely competent American of Spanish background were to present himself at Yale, with credentials in physics, that he would be turned down because he happened to be Spanish speaking.

Mr. **Benitez.** That might be so at Yale or it might not. But certainly if you look at the wide spectrum of the Nation and look at the universities throughout and take a point of reference of the year 1960, would you still say that you would have no basis for judging that the academic input was loaded with discrimination, even if it was not conscious?

Mr. **Buckley.** I have no personal basis of knowledge to suggest that did or did not represent discrimination. That the faculties were predominantly male and white, I find as easy to explain by virtue of the fact that very few nonwhites were going into higher education, which is a natural reservoir for drawing your professors. Women, by and large, were not seeking higher education.

If the question is, was the representation in those faculties represented by a cross-section of the Ph. D.'s seeking employment in those faculties, I just don't know.

Mr. **Benitez.** And seeking admission to school?

Mr. **Buckley.** And seeking admission to school.

Mr. **Benitez.** Would it be a more likely assessment in the absence of personal knowledge—which is not what I am inquiring about—on what is the situation if you have zero members and either in the student body or in the faculty and a potential candidacy of hundreds or even thousands, would there be in that situation a nonrepresentative structure of the Nation?

Mr. **Buckley.** I think if you go back far enough, there were quota systems at various colleges, which is something we are supposed to be getting away from. There have been accusations that there were quota systems affecting Jews in Ivy League colleges. I feel that is wrong.

I think also that it is clear that there have been categories in the past. But I think that going into the past doesn't give us any useful guide as to what we should be doing now—what is just now, what is just for the future.

Mr. **Benitez.** The reason for the questions is that even assuming that the particular bent that affirmative action has taken is evil or is inadequate, unsatisfactory, is there an evil that was meant to be remedied which was cause for at least some other answer than just letting what exists pass?

Mr. **Buckley.** I believe that we have taken giant steps in remedying such discrimination as did, in fact, occur in the past by passing the law saying there shall be no discrimination in hiring practice based on race, color, religion, or sex.

Then the question is, how do we see to it that these laws are observed?

The Civil Rights Act of 1964 and the Executive orders issued thereunder went a step further and say rather than allowing a rather passive process of having the aggrieved party sue, let us require affirmative action, which originally at least was interpreted to mean let there be a demonstration of bona fides measured in terms of allowing vacancies to be published broadly so that anyone who might have the qualifications would know where and when to apply.

But I think where we have gone, namely to the establishment of quota systems—and this is the only candid way of describing this—a quota system is the total antithesis of any concept of human equality, of human right.

Mr. **Benitez.** Holding no brief for bureaucracy. I would like to inquire if you have any method or any other methodology or any other suggestion as an alternative way out of the present unbalances.

Mr. **Buckley.** If you are speaking about the present imbalances I have no overnight solution because the only way you are going to change the present imbalances is to fire an awful lot of people who have been around for a number of years. I don't believe that you and I believe that would be just.

All I can offer is to make sure that the current laws against discrimination in future hiring be obeyed and if someone has a complaint—and Lord knows people aren't shy about going to the courts these days to assert wrongs—let that be the course taken.

And let one of the burdens of proof be that an employer has to submit that the employer has, in fact, made wide enough, widely known, the nature of the jobs for which there are vacancies and let it be demonstrated that the examinations and the standards required are standards that are relevant to the job to be done.

Mr. **Benitez.** Mr. Senator, isn't the whole history of social rectification and change that passing a law and letting it stick on the books without any structure to make it real and imperative just results in a negation of the objective that it sought to achieve?

Mr. BUCKLEY. I would deny that that is a necessary consequence of merely passing laws. I believe we have seen in this country, certainly in the last decade or so, innumerable groups that have a passion for sniffing out any scent of a potential injustice and going to the courts to rectify this.

Mr. BENITEZ. Thank you.

Mr. O'HARA. Thank you, Mr. Benitez.

Mr. Kemp?

Mr. KEMP. I, too, Senator Buckley, want to commend you on your remarks and your eloquence in bringing to the attention of the committee what possibilities exist with regard to the implementation of these so-called affirmative action programs.

I noticed in your press release you said you were going to meet with Secretary Brennan. What do you feel can be done vis-a-vis Revised Order No. 4 in order to bring about some type of amelioration of some of the absurd consequences of a desirable goal?

I know that you share the goal, as do I, of having an open opportunistic society and higher education opportunity.

What can be done with regard to Revised Order No. 4?

Mr. BUCKLEY. First of all, dismantle the whole concept of imposed quotas. This is what we are talking about.

Secondly, perhaps to define the kinds of procedures that I suggested to Congressman Benitez of establishing some procedures which an employer would have to satisfy to support a prima facie attempt to hold positions open to the broadest possible category of applicants with a selection made on merit, again, the emphasis being on allowing the public to know that the job is there and secondly making sure that none of the screening tests and other practices have the effect of loading the dice in the direction of one group or another.

Mr. KEMP. There is a debate as to where these practices exist, or what the cause of these practices is, whether or not it is at the university level or whether it is at the level of, say HEW.

I would like to quickly read into the record a statement that was made by a university and also identify the remark of HEW with regard to the treatment.

A letter was received from an individual seeking employment opopportunity at a college in the Northeast.

The response from the college was this:

> It is quite true that we have an opening here and I have examined your dossier. It is a very impressive dossier indeed. And I wish that I could invite you for an interview. But at present our department is interested in the appointment of only minorities. I appreciate very much your interest in the college and I know with your excellent qualifications you will find a position. Naturally I shall keep you in mind should any changes occurs.

He complained to Mr. Stanley Pottinger about his treatment and he was told, among other things, in a letter by the Director of Contract Compliance Division, that—

> In these instances what appears to be reverse discrimination was in effect an effort to correct discrimination and appointment against those protected classes which in the past have been denied equal employment opportunities in educational institutions.

So in practice what is happening, as you pointed out, is that we are categorizing people. We do reach, it seems to me, the conclusion somewhere of that type of a society in which people are put into a computer and lose their individuality and seem to be part of a category to the exclusion of, as I said, their individuality.

Mr. BUCKLEY. I think you have put your finger right on the central problem. The report Mr. J. Stanley Pottinger was giving us was pure bureaucratic gobbledygook. There is no way you can parse that sentence of his without coming up with discrimination:

> No, we are not discriminating against this gentleman. However we are bent on discriminating in favor of other gentlemen.

Well, what is the practical effect of that but discrimination? I personally regret that the Supreme Court did not undertake the hearing of the *DeFunis* case to settle this point once and for all.

I cannot believe that our Constitution can justify that kind of a system.

The insidious effect of this kind of thinking is that it causes Americans to think of themselves in terms of categories. I think this is a vicious—this is contrary to what the civil rights movement was supposed to be all about.

Therefore I think that not only is it per se a setback but it will cause increasing numbers of other hapless individuals to feel that they are in fact being discriminated against and thereby give rise to renewed racial consciousness.

Mr. KEMP. It seems to me it points out my statement as well as yours that the problem is with this attempt to bring about affirmative action and how it gets translated into quotas somewhere down the line. It seems to me that the focus of attention is on the wrong side of the equation.

What we need to do in reaching a more equitable treatment of people in a pluralistic society is to work for a greater supply. But they are on the immediate demand side of this equation, trying to, as you put it earlier, play musical chairs on faculties with the available amounts of categories.

It seems to me that what we have to do is to open up opportunity to provide a greater supply and ultimately allow for a manifestation of this pluralism or heterogeneity.

I have no further questions.

Thank you for appearing. We appreciate your efforts.

Mr. BUCKLEY. Thank you.

Mr. O'HARA. Thank you, Mr. Kemp.

Mr. Huber?

Mr. HUBER. I just want to welcome my classmate from Yale to our House of Commons. Having had Senator Buckley and Mr. Lindsay and Mr. Huber from Yale they certainly didn't discriminate unduly.

One question I tried to communicate to Mr. Young, somehow unsuccessfully, do you perceive a blacklash in this type of affirmative action, a backlash in business as well as the educational community?

Do you feel there is a backlash? Do you think this kind of affirmative action, as reverse discrimination, will polarize and set back the movement that it is realistically trying to have equality in race, color, creed, national origin?

Mr. **Buckley**. This is my great concern, Mr. Huber, that there is this tendency. I think you can see it growing. There are people who are increasingly beginning to feel they are dealt with as second-class citizens. They don't want to discriminate against anybody. But they do not want to feel that they are precluded from competing for specific jobs on the basis of merit or the basis of accomplishment.

I think it is a dangerous step backward in your goal and mine for a society in which each one of us goes about, unconscious of the national origin, unconscious of race.

Mr. **Huber**. So you actually see as I see in Michigan the reverse happening, the step backward, polarization, strong resentment on the part of the majority that will lash out in a backlash. Do you see that occurring.

Mr. **Buckley**. I see in New York a growing concern, particularly among the Jewish community. The Jewish community in the past had been victims of quota systems to restrict access to institutions of higher learning. The fact that that quota system of some years back as a tacit practice finally was broken was for them a great step forward in terms of civil rights.

They hate to see something equivalent to that restored.

You do begin to hear people, white collar workers and blue collar workers, beginning to express resentment at the fact that they feel they are no longer accorded equal opportunities.

Mr. **Huber**. I have no other questions, Mr. Chairman.

Mr. **O'Hara**. Thank you very much.

Thank you, Senator.

I can recall when I was a student many years ago objecting to the quotas that limited the number of Jewish applicants that would be accepted at the university medical school at the university I attended. They had such a quota. I felt it was very wrong. I took part in efforts to remove that.

I can imagine now that the children of some of the kids who were denied admission to medical school back then because they weren't Christians are now maybe experiencing difficulty because they are not black or don't have a Spanish surname.

Mr. **Buckley**. That is correct.

Mr. **O'Hara**. I just think that is terribly unjust to handle it that way. I certainly very much appreciate your testimony here today.

Mr. **Buckley**. Thank you, Mr. Chairman.

Mr. **O'Hara**. Our next witness is a very old friend whom I have been associated with in many efforts seeking a common goal.

He is Mr. Norman Hill, associate director of the A. Phillip Randolph Institute.

Mr. Hill, I would like to welcome you. I look forward to hearing you. We appreciate your waiting for us this morning.

TESTIMONY OF NORMAN HILL, ASSOCIATE DIRECTOR, THE A. PHILLIP RANDOLPH INSTITUTE

Mr. **Hill**. Thank you very much, Chairman O'Hara, members of the subcommittee.

I would like to read a brief statement on behalf of the A. Phillip Randolph Institute, its executive director, Bayard Rustin, and myself as associate director.

The controversy over affirmative action and quotas has raised a number of important issues for American society.

Its critics assert that affirmative action as currently administered by government is nothing less than reverse discrimination, forcing employers to give minority groups and female applicants preference over better-qualified white males.

Others see opposition to affirmative action as further proof of the dominant society's resistance to racial advancement.

Some deny that affirmative action formulas devised by the Government and the courts constitute quotas.

Others justify the quota doctrine as a legitimate method for redressing past and present racial inequities.

The A. Phillip Randolph Institute believes the affirmative action concept to be valid and a central contribution to an overall program designed to ameliorate the current effects of racial bias and ultimately to achieve the long-sought goal of racial equality.

We do not believe, however, that affirmative action can or should occupy the pivotal role in a strategy for racial progress. Affirmative action can only succeed when combined with programs which have as their objective the much more fundamental economic transformation than affirmative ation could bring about.

We are furtherore unalterably opposed to the imposition of quotas or any other form of racial hiring.

Our specific objections will be spelled out later. I would only observe that the implementation of affirmative action programs—which have on occasion included—and we must be honest here—the inclusion of quota formulas—has totally failed to bring about any measureable improvement in the economic condition of the black community.

What the imposition of quotas and the resulting furor they have generated is to exacerbate the differences between blacks and other racial and ethnic groups. And to the degree that these tensions and divisions have been provoked, the time when black people are accepted into American economic and social life as full and equal participants has been that much delayed.

The basic issue raised by the quota controversy has less to do with the behavior of the Federal bureaucracy, the role of the courts or even the persistence of racial discrimination, than it has to do with a much more basic consideration. That is the issue of how Government is to proceed about the task of fully and peacefully integrating all segments of society and most particularly how Government is to close the sizable gap between the economic status of blacks and whites.

One of the most striking although almost always overlooked aspects of the affirmative action debate is the fact that it has arisen during the tenure of a Republican administration which has demonstrated little enthusiasm for many of the traditional strategies for racial change.

I am not sure that this is a contradiction, however. We believe, in fact, that the troubles which the affirmative action program has encountered are due in large part to a lack of interest and absence of policy of the administration.

We must remember that black people enjoyed steady economic progress during the 8 years prior to 1969.

There were three basic reasons for this progress. One obviously was the passage of laws which laid the legal framework for the abolition of outright discrimination.

A second reason was the decision of the Government to intervene on behalf of black people and the poor in a broad range of social institutions. Pressure was applied to employers, universities, and other institutions to abolish racially discriminatory hiring and admissions practices and to make special efforts to include those who previously had been excluded.

This early affirmative action was combined with a series of manpower training programs established to help those handicapped by inferior education opportunities to qualify for better skilled, higher paying jobs.

An important point is that this program was not the paramount reason for the economic gains achieved by the black community. The basic reason was the policies of economic growth and high employment promoted by the Johnson administration. These policies increased the living standards of white and black alike. Jobs were available for the unemployed. Better jobs began to open up for those with special skills and abilities.

For the black community the consequences were profound.

To note just a few statistics:

1. The median income of black workers doubled between 1960 and 1970.

2. The median income of black families increased from 51 percent of median white income to 61 percent between 1959 and 1969.

By 1970 black husband and wife families whose head was under 35 years old were earning an income 82 percent of corresponding white families.

3. The percentage of black families living in poverty declined from 56 percent in 1962 to 31 percent in 1969.

4. Unemployment in the black community dropped from 12.4 percent in 1961 to 6.4 percent in 1969.

These represent serious changes that were not produced by persuading a few corporations to hire additional black workers, although the affirmative action effort certainly helped.

More important though was the availability of jobs, improving opportunities for higher education and all the other aspects of an expanding economy.

Today the situation is quite different. The most recent report of the Census Bureau on the social and economic status of blacks shows a real across-the-board pattern of decline.

For instance since 1969 joblessness among black workers has nearly doubled.

The number of blacks living in poverty has increased by nearly 160,000.

The earning gap between black and white workers has once again begun to widen.

The real income of black families has failed to keep pace with inflation while the incomes of white families have remained slightly above price increases.

Finally, a statistic which relates to affirmative action problems, the numbers of minorities moving into higher paying jobs has declined significantly during the last 5 years.

We believe there is a direct link between the economic failures of the last 5 years and the problems which the affirmative action program has encountered.

It is painfully obvious that an affirmative action program will not achieve its objective peacefully and democratically if it must function within the context of scarcity.

We are particularly dismayed by the notion that opportunities are to be expanded for some groups at a time when the job market is shrinking for all. You simply cannot elevate significant numbers of blacks or women into better paying higher skilled or more satisfying jobs if those jobs don't exist.

Racial discrimination still exists. But the high rate of current unemployment and the reversal of hard-won economic gains is not the result of discrimination.

All indications show that racial prejudice, particularly in the area of employment, is declining year by year. Black economic decline is a function of much broader economic failures which have left their mark on all Americans regardless of race.

But as long as inequality is treated as the product of racism rather than economics you seriously divert the attention of society from difficult issues which must ultimately be faced.

Another important reason why the affirmative action program has evoked the criticism of those who would on almost every other occasion support programs which seek the upgrading of minorities is that its basic function has been changed to meet new economic realities. Originally conceived as a means of discouraging racial and sex bias, affirmative action has been transformed into a process to deal with the effects of a faltering economy.

Two areas which have been drawing the most attention from contract compliance officials have been the universities and the construction industry, both of which also happen to be suffering quite seriously from the recessionary economy.

To integrate the construction field has long been a goal of the civil rights movement. But this cannot be accomplished when there are less jobs for everyone and when industry is insufficiently strong to meet employment demands.

There are those who argue that on a short-term basis quota hirings represents an effective and expedient means of resolving a difficult social problem.

But we are convinced that the inherent dangers of the quota principle far outweigh any temporary gains that they might bring.

One of the most serious dangers of the quota doctrine is that it will perpetuate the stereo typical and profoundly mistaken view that blacks lack the ability and the will to make it on their own.

Should quotas become institutionalized as part of social policy society would no doubt conclude as black educator Thomas Sowell has warned that Negroes "must be given something in order to have something."

Quotas are tokenism taken to its logical conclusion. Blacks have objected to the token because it denigrates the abilities of the individual, cheapening both his or her accomplishments and the accomplishments of other blacks to follow. The same is true of the quota, only to a greater degree. The black who "benefits" from the quota suffers the uncertainty of never knowing whether he made it on his merits or simply was hired to meet a government decree.

A predominantly white society will automatically question the abilities of all blacks including the overwhelming majority who have succeeded because of their intelligence, skills, and self-discipline.

We also believe that the wide-scale application of quotas works to the exclusion of certain racial or sexual groups.

One of the affirmative action programs most signal accomplishments is to force society to reevaluate the standards to determine who is hired and admitted to college and so on.

But we are opposed to a broad assault on the concept of qualifications. If legitimate standards are weakened or abolished altogether it is those who are most vulnerable to discrimination who will suffer the most severe consequences.

Blacks are underrepresented in particular professions not only because of racial discrimination but very often because of the inability of large numbers of blacks to qualify for a good job is a function of poor educational background.

It is for this reason that we believe it is essential that Government expand its efforts to compensate for the inferior education in the inner cities.

We would like to conclude by offering some specific proposals for a program of racial advancement.

One. Affirmative action efforts should be largely directed to instances of racial discrimination. Ratio or quota formulas should be prohibited. Those institutions that have been found guilty of practicing discrimination should be given stiff fines.

In other areas of recalcitrance such as have been exhibited by southern police departments, we urge the courts to institute racially blind lotteries to determine hiring procedures.

Two. Federal manpower and education programs should be expanded.

In the manpower area we would like to point to the success of the recruitment and training program which has helped place over 12,000 minority youths with apprenticeship programs with the building trades as a possible model for other programs.

Three. Government should continue to question the standards and qualifications for hiring as to their objectivity and relevance to the task or job performed. But it should keep in mind that standards are most important to those who are the most likely victims of discrimination.

The reforming of standards should not mean their weakening or outright abolition.

Four. Finally there should be a realization that affirmative action by itself can do little to help blacks unless it operates in a positive economic framework.

Affirmative action programs cannot find jobs for the unemployed or help the underemployed in to better jobs if those jobs do not exist.

The most important issue is economic expansion. Above all it must be an economy providing jobs for everyone.

Thank you.

Mr. O'Hara. Mr. Hill, thank you very, very much for your testimony and for drawing much needed attention to the importance of our economic climate to the entire effort.

As long as we are fighting over a few scraps on the economic table no real progress is going to be made. It is only in the context of an expanding, growing gross national product and rising standard of living that anyone is going to have an opportunity.

I think your statement is a very powerful one and I appreciate it. If you would leave a copy with the clerk we will make sure it gets in the hearing record.

[Statement referred to follows:]

Prepared Statement of Norman Hill, Associate Director, A. Philip Randolph Institute

The controversy over affirmative action and quotas has raised a number of important issues for American society. Its critics assert that affirmative action, as currently administered by government, amounts to nothing less than reverse discrimination by forcing employers to give minority group and female applicants preference over better-qualified white males. Its supporters, on the other hand, see opposition to affirmative action as further proof of the dominant society's resistance to racial advancement. Some deny that affirmative action formulas devised by the government, and the courts constitute quotas, others, however, not only acknowledge that quota directives have been issued, but also justify the quota doctrine as a legitimate method for redressing past and present racial inequities.

The A. Philip Randolph Institute believes the affirmative action concept to be a valid and essential contribution to an over-all program designed to ameliorate the current effects of racial bias, and ultimately, to achieve the long-sought goal of racial equality. We do not believe, however, that affirmative action can or should occupy the pivotal role in a strategy for racial progress. Affirmative action, we are convinced, can only succeed when combined with programs which have as their objective a much more fundamental economic transformation than affirmative action could bring about.

We are, furthermore, unalterably opposed to the imposition of quotas or any other form of ratio hiring. Our specific objections will be spelled out later. For now, we would only observe that the implementation of a vigorous affirmative action program, which has on occasion included—and we must be honest here—the institution of quota formulas has totally failed to bring about any measurable improvement in the economic condition of the black community. What the imposition of quotas, and the resulting furor they have generated, *have* accomplished is to exacerbate the differences between blacks and other racial and ethnic groups. And to the degree that these tensions and divisions have been provoked, the time when black people are accepted into American social and economic life as full and equal participants has been that much delayed.

The basic issue raised by the quota controversy has less to do with the behavior of the federal bureaucracy, the role of the court system, or even with the persistence of racial discrimination, than it has to do with a much more basic consideration. That is the issue of how government is to proceed about the task of fully and peacefully integrating all segments of society and, most particularly, how government is to close the sizable gap between the economic status of blacks and whites.

One of the most striking—although almost always overlooked—aspects of the affirmative action debate is the fact that it has arisen during the tenure of a Republican administration which has demonstrated little enthusiasm for many of the traditional strategies of racial change. We do not see this as a contradiction, however. We believe, in fact, that the troubles which the affirmative action program has encountered are due in large part to a lack of interest and absence of policy of the Administration.

We must remember that black people enjoyed steady economic progress in the eight years prior to 1969. There were three basic reasons for this progress. One, obviously, was the passage of laws which laid the legal framework for the abolition of outright discrimination.

A second reason was the decision by the government to intervene on behalf of black people in a broad range of social institutions. Pressure was applied to employers, universities and other institutions to abolish racially discriminatory hiring and admissions practices and to make special efforts to include those groups that had been previously excluded. This early effort at affirmative action, moreover, was combined with a series of manpower training programs established to help those handicapped by inferior educational opportunity to qualify for better-skilled, higher-paying jobs.

An important point is that this program was not the paramount reason for the economic gains achieved by the black community. The affirmative action effort was essential in breaking society's resistance to racial change. But there was a far more basic reason for the broad economic advancement which black Americans experienced in the middle and late 1960's. We are referring to the policies of economic growth and high employment promoted by the Johnson Administration. These policies upgraded the living standards of black and white alike. Jobs were available for the unemployed, and better jobs began to open up for those with special skills and abilities.

For the black community, the consequences of these basic economic policies were profound. To note just a few statistics:

1. The median income of black workers doubled betwen 1960 and 1970.
2. The median income of black families increased from 51 per cent of median white income to 61 per cent between 1959 and 1969. By 1970, black husband-wife families whose head was under 35 years old were earning an income 82 per cent of corresponding white families.
3. The percentage of black families living in poverty declined from 56 per cent in 1962 to 31 per cent in 1969.
4. Unemployment in the black community dropped from 12.4 per cent in 1961 to 6.4 per cent in 1969.

These represent serious changes. They were not produced by persuading a few corporations to hire additional black workers, although the affirmative action effort certainly helped. More important, however, was the availability of jobs, the growing opportunities for higher education, and all the other aspects of an expanding economy.

Today the situation is quite different. The most recent report of the Census Bureau on the social and economic status of the black community reveals that an across-the-board pattern of decline has set in since 1969. Joblessness among black workers has nearly doubled, and the number of blacks living in poverty has increased by nearly 160,000. The earnings gap between black and white workers has once again begun to widen. The real income of black families has failed to keep pace with inflation, while earnings of white families has remained slightly above price increases. Finally, a statistic which relates directly to the problems affecting affirmative action, the number of blacks and other minorities moving into higher-paying jobs has declined significantly during the past five years.

We believe that there is a direct relationship between the economic failures of the past five years and the problems which the affirmative action program has encountered. It seems painfully obvious that an affirmative action program cannot achieve its objectives peacefully and democratically if it must function within the context of scarcity. And we are particularly dismayed by the notion that opportunities can be expanded for some groups at a time when the job market is shrinking for all. You simply cannot elevate significant numbers of blacks or women into better-paying, higher-skilled and more satisfying jobs if those jobs don't exist.

Everyone knows racial discrimination still exists. But the high rate of black unemployment and the reversal of hard won economic gains is not the result of discrimination. All indications, in fact, show that racial prejudice, particularly in the area of employment, is decreasing year-by-year. Black economic decline is a function of much broader economic failures: failures which, moreover, have left their mark on all Americans regardless of race. But as long as inequality is treated as the product of racism, instead of economics, it will seriously divert the attention of society from difficult issues which ultimately must be faced.

An important reason why the affirmative action program has evoked the criticism of those who, on almost every other occasion, would have supported programs which seek the upgrading of minorities, is that its basic function has been changed to meet new economic realities. Originally conceived as a means of discouraging racial and sexual bias, affirmative action has been transformed, by design or otherwise, into a strategy which attempts to deal with the effects of a faltering economy.

Two areas which have drawn the most scrupulous attention of contract compliance officials have been the universities and the construction industry, both of which also happen to be suffering quite seriously from the recessionary economy. To fully integrate the construction and education fields has long been a prime goal of the civil rights movement. But it simply cannot be accomplished when there are less jobs for everyone, or where the industry's growth is insufficiently strong to meet employment demands.

There are those who argue that, on a short term basis, quota hiring schemes represent an effective and expedient means of resolving a difficult social problem. But we are convinced that the inherent dangers of the quota principle far outweigh any temporary gains they might bring.

One of the most serious dangers of the quota doctrine is that it will perpetuate the stereotypical—and profoundly mistaken—view that blacks lack the ability and the will to make it on their own. Should quotas become institutionalized as government policy, society, as black educator Thomas Sowell has warned, would no doubt conclude that Negroes "must be given something in order to have something."

Quotas would further entrench the tendency of society to respond to the call for equal opportunity with tokenism. Quotas, in fact, are tokenism taken to its logical conclusion. Blacks object to the token because it downgrades the dignity and abilities of the individual, cheapening both his or her accomplishments and the accomplishments of other blacks to follow. The same is true of the quota, only to a greater degree. The black who benefits from the quota suffers the uncertainty of never knowing whether he made it on his merits, or was simply hired to meet a government decree. As for the dominant white society, it would automatically question the abilities of all blacks, including the overwhelming majority who have succeeded because of their intelligence, skills, and self discipline.

We also believe that the widespread application of quotas would unquestionably lead to the weakening of the merit principle. We recognize that what has been referred to as "merit" often works to the unfair exclusion of certain racial or sexual groups. Thus one of the affirmative action program's most signal accomplishments is to force society to reevaluate the standards which determine who is hired, admitted to college, and so on.

But we are determinedly opposed to a broad assault on the concept of qualifications and standards. For where legitimate standards are weakened, or abolished altogether, it is those who are most vulnerable to discrimination or whimsy who will suffer the most severe consequences. It should be kept in mind that blacks have entered many skilled trades and professions in significantly large numbers. Very often they won their position precisely because their qualifications were superior to other applicants. That blacks are underrepresented in a particular profession does not by itself constitute racial discrimination. Very often the inability of large numbers of blacks to qualify for a particular job is a function of poor educational background. It is for this reason that we believe it is essential for government to expand its efforts to compensate for the inferior education in the inner cities.

We would like to conclude by offering some conclusions about basic strategies of racial advancement.

1. Affirmative action efforts should be largely directed to instances of racial discrimination. In place of ratio or quota formulas, those institutions that have been found guilty of practicing discrimination should be given stiff fines; in other instances of recalcitrance, such as have been exhibited by southern police departments, government should consider asking the courts to institute racially-blind lotteries to determine hiring procedures. We also favor the cancellation of government contracts in cases where racial or sexual bias has been proven.

2. Federal manpower and education programs should be expanded. In the manpower area, we would like to point to the success of the Recruitment and Training Program, which has helped place over 12,000 minority youths with apprenticeship programs in the building trades as a possible model for other programs.

3. Government should continue to question the standards and qualifications for hiring. But it should keep in mind that standards are most important to those who are the likely victims of discrimination. The reforming of standards should not mean their weakening or abandonment.

4. Finally, there should be a realization that affirmative action, by itself, can do little to help blacks unless it operates in a positive economic framework. An affirmative action program cannot find jobs for the unemployed or help the underemployed into better jobs if those jobs do not exist. The most important issue is an economy of growth and expansion. Above all, it must be an economy providing a job for all.

Mr. O'HARA. Mr. Benitez?

Mr. BENITEZ. I fully agree with the chairman.

I have no questions.

Mr. O'HARA. Thank you very much.

Would you please give our best regards to Mr. Rustin?

Mr. HILL. I surely will.

Mr. O'HARA. Thank you.

The bells are ringing for our attendance at the House.

The subcommittee will stand in adjournment now until 9 on September 19 in this room at which time we will hear from all of the witnesses scheduled for that day and in addition from Mr. Caesar Sereseres of the University of California at Irvine.

He was scheduled for today but will be heard on Thursday in addition to those witnesses already scheduled.

The subcommittee will now stand adjourned.

[Whereupon, at 12:25 p.m., the subcommittee adjourned, to reconvene at 9 a.m., Thursday, September 19, 1974, in room 2175, Rayburn Building.]

CIVIL RIGHTS OBLIGATIONS OF INSTITUTIONS OF POSTSECONDARY EDUCATION

THURSDAY, SEPTEMBER 19, 1974

House of Representatives,
Special Subcommittee on Education of the
Committee on Education and Labor.
Washington, D.C.

The subcommittee met at 9 a.m., pursuant to call, in room 2175, Rayburn House Office Building, Hon. Jaime Benitez, presiding.

Present, Representatives Benitez, Dellenback, O'Hara, and Biaggi.

Staff members present: Jim Harrisson, staff director, Webster Buell, counsel; Ednora Teets; and Robert Andringo, minority staff director.

Mr. Benitez. The committee will now come to order.

This is the second hearing this week on civil rights obligations in universities and institutions of higher learning.

At our first meeting, we had scheduled four distinguished witnesses and one of them—the first witness today, Dr. César Sereseres—was unable to testify then and will be the first witness today.

We are glad to welcome this distinguished professor of political science of the University of California and descendant of Mexican parents who has made a mark of distinction in the academic world of the United States.

He will be our first witness today.

Dr. Sereseres.

STATEMENT OF CÉSAR SERESERES, UNIVERSITY OF CALIFORNIA AT IRVINE

Mr. Sereseres. Thank you very much.

I realize that there are quite a few people who are scheduled today so I will try to make it as brief as possible. Hopefully, on the basis of this presentation some questions can be generated.

Mr. Benitez. In any case, your full text will be included in the record. You may proceed reading from it or summarizing.

Mr. Sereseres. I am by training a political scientist. I obtained both my undergraduate and graduate degrees from the University of California.

I now teach at the University of California at Irvine.

I am concerned, both academically and personally with the public policy questions involving the obligations of institutions of higher education to the Mexican-American community.

Throughout my discussion I will only refer to two institutions that I know fairly well. The University of California system in general and the Irvine campus in particular.

For the last couple of years I have been concerned with two principle questions. First, as a public employer and an educational institution, has the University of California met its legal and moral responsibilities to minorities and women?

Second, is the University of California taking steps to break the cycle of discrimination through the implementation of, and commitment to, a viable affirmative action program?

My contention is that the answer to both questions is an emphatic no.

Further, I believe that there is substantial data to support this conclusion.

Mr. BENITEZ. Excuse me, when you refer to the University of California, are you referring to the whole complex called the University of California or are you referring to the Irvine campus?

Mr. SERESERES. I am referring to both. The University of California system in general and the Irvine campus in particular.

In regards to the Irvine campus, I would like to submit for the record—or at least for informational purposes—a report, a study of one campus, the Irvine campus, that I believe fully documents the disparities in employment, salaries, recruitment of graduate students and the like.

I will leave the subcommittee staff a copy of a report, written by the Chancellor's Minority Affairs Committee, entitled: "The Pattern and Practice of Discrimination Against Minorities at the University of California, Irvine."

Mr. SERESERES. In order to understand the magnitude and seriousness of this statement, consider the following. California is a culturally and racially plural State. Conservative estimates place the minority population at 33 percent; 18 percent Spanish-speaking, 10 percent black, 3 percent Asian-American, 1 percent native-American, and 1 percent other nonwhite.

Second, the University of California is believed to be the State's second largest employer. Only Pacific Telephone is believed to have more employees.

Third, the total amount of Federal money that is awarded the entire University system is unknown. We do know, however, that the millions of Federal dollars play a significant role in the operations and development of this institution.

As an example, the University of California at Irvine obtained 91 percent of its extramural funds for fiscal year 1972–73 from the Federal Government. This amounted to some $12 million.

Mr. BENITEZ. When you say that the total amount of Federal funds accruing to the University of California is unknown, what do you mean that it is unknown?

Mr. SERESERES. My impression, from discussing this question with regional and Washington authorities, is that the two primary monitoring Federal agencies in HEW and the Labor Department have no idea of the total amount and sources of money from the various Federal agencies.

There is no central informational center that tells us how many contracts and grants have been awarded by the Defense Department, NASA, Labor, and a multitude of other Federal agencies to the University of California.

HEW knows how much HEW provides but there are certain limitations that we are aware of as far as total amounts from all Federal agencies.

Mr. BENITEZ. I wanted to have the record clarify that this is not hidden money but it is money that is not centralized.

Mr. SERESERES. Exactly. Now, what I am arguing here is that the State of California, as well as the University of California offers a microcosm of problems confronting minorities in the larger society and in institutions of higher education.

The experiences of minorities at both the Berkeley campus and the Irvine campus are relevant to the interests of this committee. Both campuses provide an insight into the bureaucratic guerrilla warfare that university officials have begun throughout the United States in their efforts to avoid effective monitoring by the Federal Government.

As an example, University of California Berkeley officials since 1972 have had their affirmative action plan rejected on seven different occasions. It is a classic case of how a powerful public institution can make use of its own internal resources in order to protect itself from outside pressures.

To understand the resistance to civil rights laws by institutions of higher education, one has to go beyond the philosophical and legal issues revolving around this public policy debate. One also has to look at the following causes for the resistance to civil rights laws and affirmative action principles.

The first is that these laws—prohibiting discrimination and forbidding Federal agencies from subsidizing such discriminatory practices—become a threat to the institutional character which is overwhelmingly male and Anglo.

Secondly, such laws provide the public for the first time with an insight into the patronage system that exists within such large public institutions as the University of California.

Thirdly, such laws tend to affect the power relationships within these institutions. For example, there is no university chancellor who is willing to risk his $50,000 salary and assortment of benefits by trying to implement civil rights and affirmative action laws.

In short, sanctions from within the university for officials attempting to enforce compliance are far more real than those sanctions from Washington for not complying with those laws.

Mr. BENITEZ. May I interrupt you again to clarify an expression? Since you are extemporaneously covering this subject, perhaps it is easier to inquire about something at this point. You say that the problem with the situation at the University of California is that aside from the law, the persons running the university—the administrators of the university—are out of sympathy with the law and, therefore, find out ways of defeating it.

Do you have or foresee any remedy against that situation, assuming you are right?

Mr. SERESERES. Most definitely. As I will mention in my recommendations, the laws have to be taken seriously. Before the laws will be taken seriosuly by university officials, the U.S. Congress and the Executive have to take the laws seriously. For example, if the Secretary of HEW states that he will not use the ultimate sanction in order to enforce the laws—that is, withhold Federal funds, which the law prescribes—then the law is meaningless because the sanctions are not taken seriously by those institutions which are expected to comply with the law.

As I will mention later, nobody at the University of California, from President Hitch on down, believes that the Federal Government will withheld funds.

Mr. BENITEZ. Thank you.

Mr. SERESERES. As I mentioned, the reality of the situation is that the pervading mood among university officials is that HEW will not really do anything to the U.C. system. They simply don't believe the Federal Government will withhold funds, believing that with a combination of bureaucratic guerrilla warfare and political favors from Washington, the University will be able to withstand the efforts of Federal agencies to follow through with title VI and revised Executive Order 4.

Let me give you an example of what I mean by this. The University of California at Irvine, where I teach, has received several hundred million dollars for construction and for research from the Federal Government. Yet there has never been an onsite inspection or review of the institution's compliance with title VI or Revised Executive Order 4.

When minorities were made aware of this and were told that an HEW review was not forthcoming—not because they didn't want to do it but because they didn't have the manpower—we took it upon ourselves to do it. This is the document I leave with you. The results of that extensive 1-year study—

Mr. BENITEZ. Who is "we"?

Mr. SERESERES. Minority group faculty members and staff, women, minority student organizations, and off-campus community groups.

Mr. BENITEZ. When you say "we" in this sense, it is not an institutionalized structure but a group——

Mr. SERESERES. I am sorry. It took the form of the Chancellor's Minority Affairs Committee, appointed by the chancellor.

The responsibility was not to write the report. It was a cosmetic function that had been performed in the past. This was the first time somebody decided to write a report.

Mr. BENITEZ. But your point is that the report is not cosmetic.

Mr. SERESERES. We believe it is not since it does expose the discrepancies in hiring practices, in salaries, and in the positions that accrue to women and to minorities.

I don't want to prolong my testimony but I would like to provide the subcommittee with a few examples: Out of 1,110 academic employees 3 percent are Mexican/Spanish American, 2.5 percent are black, and 0.3 percent are American Indians. Out of some 231 tenured faculty, 0.4 percent are Mexican/Spanish Americans, 1.3 percent are black, and there are no American Indian faculty.

Out of 376 student assistants, 3.71 are Mexican/Spanish American, 3.1 percent are black. Out of 26 administrators at the University of California, Irvine, there are no Mexican/Spanish Americans and there is only 1 black. Out of 212 professional employees, 5 percent are Mexican/Spanish American and 4.7 percent are black. Of the total number of Mexican/Spanish American staff employees, 70 percent are secretaries, operators, and service workers.

Not only do these figures not reflect the State's minority population, but, minorities are found in the lowest salaried and nonskilled areas. Now, why the gap between the law and the reality of the situation?

I believe there are three reasons for the discrepancy. First is the misuse of the affirmative action plan which is thought to be a tool for removing the inequities and the inequalities of the institution.

Second, we have seen the tactics of what I call paperclip guerrilla warfare as a means of avoiding compliance.

Third is our inability to conceptualize the issue and to make explicit the value preferences of the Federal Government regarding equality and social justice.

Briefly, the affirmative action plan has often turned into a vehicle for bureaucratic stagnation of civil rights laws. The University of California has in fact been able to use affirmative action plans to forestall compliance rather than as a vehicle for insuring the fulfillment of its obligations. The university has been able to accomplish this by deliberately structuring and maintaining a bureaucratic oriented and powerless affirmative action program and by defining affirmative action in academic and in bureaucratic terms rather than in terms of eliminating discrimination.

This has been made possible through what one might call protracted administrative guerrilla warfare.

Now, the official justification for this state of affairs has recently come to light in a statement by the Secretary of HEW. He stated that if funds were withheld in order to force compliance with the law it would only cause more problems and in no way solve the problem of discrimination.

If this is the case, then the law is meaningless because the possibility of sanction for violation is removed.

We thus see protracted periods of administrative guerrilla war between universities and Federal agencies, each escalating the paper war in the hope that the other will finally submit when the volume of paper finally overloads the administration of the other's institutions. In the meantime minorities and women are more important as "body counts" for paper war games than for their actual presence in institutions of higher education.

The numbers game never seems to end.

We are told by university officials of the great advances being made in the numerical presence of minorities and women. Critics add however that affirmative action has disrupted and adversely affected the quality of higher education.

Yet within these last few months we have been confronted with reports that the number of minority and women faculty has increased in insignificant quantity and that the number of minority graduate and professional students has in fact declined.

I conclude that a massive state of confusion exists today regarding the impact and the presence of minorities and women in institutions of higher education.

The third contributing factor that has caused the gap between the law and the reality of the situation is the inability to conceptualize the issue and explicitly state the value preferences of the Federal Government.

The question is: Why should there be a Governmental preference for compensatory programs? Why should reasonable classification be permitted? What justifies remedial programs that make such criteria as sex and ethnic origin important determinants in the employment and education recruitment practices of institutions of higher education?

For the answer, at least from my particular perspective, we must turn to the reality of American society. The reality of American society consists of the following virtues. Equality of opportunity exists in America if you are male and if you are Anglo.

Second, American society is open and competitive if you are male and if you are Anglos.

Third, sharp inequalities exist in American society today. The achievers are overwhelmingly male and Anglo despite the fact that over half the U.S. population is female and that some 20 percent is made up of ethnic and racial minorities.

The male Anglo by far gets the good start in the race for success. Why else do we find 97 percent of the engineers and 85 percent of the lawyers being male Anglos?

If one can see this kind of perspective of American society, then preferential issues become that of: (1) determining how Government power can be used to eliminate the inequalities that are prevalent in American society today, and (2) recognizing, as Prof. S. M. Lipset has suggested, that a fundamental change is taking place in American society—a shift from the rights of individuals to the rights of groups. What this suggests is that the primacy of equality of opportunity must be replaced with the far more important primacy of the equality of results.

From this perspective one can readily see the critical distinctions between defining civil rights obligations of institutions of higher education in terms of individual rights—that is, equality of opportunity—rather than in terms of group rights, equality of results.

I conclude with several recommendations for consideration by this committee.

First, there is no need for new legislation, new laws, or new bureaucracies. There is, however, a need for a decisive decision—arrived at jointly by the Executive, by Congress and by Federal agencies—that the existing laws and sanctions are to be taken seriously.

What can Congress do? The first thing that can be done is to hold oversight hearings in Washington to find out if Government agencies are working together or at cross purposes in the enforcement of civil rights laws. The committee should also hold informational hearings on such campuses as the University of California.

Second, Congress could generate information for the Federal Government so that it would be possible to effectively and fairly carry out compliance.

Third, Congress should encourage the necessary political support from the Executive. When such political support is not forthcoming, the laws are underminded as was the case when the former Director of the Office of Civil Rights was fired in 1970. He had attempted to enforce the law and was rewarded by being fired.

Fourth, Congress can assist in developing the institutional capabilities within the Federal Government. Congress must take a realistic look at the capabilities of such agencies as the Office of Civil Rights of HEW. Its Higher Education Division has a staff of slightly over 100 to monitor 2,700 institutions of higher education. How realistic is that?

Last, Congress can contribute by educating the general public, the Federal bureaucracies and institutions of higher education to the fact that the interests of minorities and women, though in some cases they may be unique, are in fact compatible with the concerns and interests of the greater society.

In the end, one can only reach the conclusion that the laws have not been taken seriously—either by Congress or by the institutions of higher education.

Before completing my testimony I would like to leave this committee with three personal observations.

The first: Given the need to rectify existing inequalities in American society, why do people begrudge special considerations that are mandated for minorities and women by the Civil Rights Act and by Executive orders?

Second, why has the Federal Government tolerated discrimination and inequalities in American institutions of higher education, institutions that are so vital to the future development of American society?

And, third, if so many private citizens and so many public officials are for equality and justice, why is so much inequality and so much injustice remaining in American society today?

Thank you very much.

[Mr. Sereseres' prepared statement follows:]

PREPARED STATEMENT OF PROFESSOR CESAR D. SERESERES, SCHOOL OF SOCIAL SCIENCES, UNIVERSITY OF CALIFORNIA, IRVINE, CALIF.

THE UNIVERSITY OF CALIFORNIA AND AFFIRMATIVE ACTION: EQUALITY OF OPPORTUNITY OR EQUALITY OF RESULTS—WHAT IS AT ISSUE?

I would first like to thank the Committee for allowing me to testify this morning. I would further like to comment that I am pleased that this committee has become interested in the issue of the Civil Rights obligations of institutions of higher education. I hope that these hearings will become the first step in resolving this very delicate and consequential public policy problem.

I am by training a Political Scientists who over the years has become academically and personally interested in the public policy debates related to the status of minorities and women in institutions of higher education. I was born, raised, and educated in California. I obtained my undergraduate and graduate degrees from the University of California and have taught at the State University of New Mexico and I am presently an Assistant Professor of Political Science at the University of California, Irvine. My personal interest in this issue comes from the fact that I am a second generation Mexican-American. I believe that my training, experience, and cultural background provide me with an insight and distinct perspective on the issue that you are concerned with in these hearings.

Throughout my discussion I will refer to the institutions that I know best: the University of California system in general and the Irvine campus of the University of California in particular. In studying the manner in which the University of California has handled its Civil Rights obligations, I have focused on two questions:

> As a public employer and educational institution, has the University of California met its legal and moral responsibilities to minorities and women?
>
> Is the University of California taking steps to break the cycle of discrimination through the implementation of, and commitment to, a viable Affirmative Action program?

I contend that the answer to both of these questions is *no*. Further, I believe that there is substantial data to support this conclusion.

In order to understand the magnitude and seriousness of this statement, consider the following:

> California is strongly a culturally and racially plural state. Conservative estimates place the minority population at 33%—18% Spanish-speaking, 10% Black, 3% Asian-American, 1% Native-American, and 1% "other non-White."
>
> The University of California is believed to be the state's second largest employer—only Pacific Telephone is believed to have more employees.
>
> The total amount of federal money that is awarded to the University of California is unknown. We do know, however, that the millions of dollars play a dominant role in the operations and development of the University of California. As an example, the University of California at Irvine obtained 91.1% of its extramural funds in FY 1972-1973 from the federal government. This amounted to some $12 million.

What I am in effect saying is that the State of California and the University of California provide microcosms through which to obtain a better understanding of the problems and complexities in the attempt to critically assess the Civil Rights obligations of institutions of higher education.

The experiences at the Berkeley and Irvine campuses of the University of California are relevant to this Committee's interests. Both campuses provide an insight into the bureaucratic guerrilla warfare that university officials have begun to wage throughout the United States in their efforts to avoid effective monitoring by the federal government. As an example, UC Berkeley officials, since 1972, have had their Affirmative Action Plan rejected on seven different occasions. It is a classic case of how a powerful public institution can make use of its own internal resources in order to protect itself from outside pressures.

The law is quite explicit regarding what institutions of higher education must do regarding compensatory efforts directed at minorities and women. Why do institutions resist such efforts and why does it appear that federal agencies are ineffective in enforcing compliance with federal laws? Drawing from my own personal experiences I would argue that the philosophical and legalistic arguments for resistance are hollow and misleading. I would suggest that one need also look at the following causes for the resistance to Civil Rights laws and Affirmative Action activities.

> such laws become a threat to the institutional character which is overwhelmingly male and Anglo as well as being class and culture specific
>
> such laws provide the public with an insight into the patronage system that exists within these large institutions as well as exposing the fact that those so-called high standards are in fact discriminatory
>
> such laws tend to affect the power relationships within these institutions, i.e., there is no University of California Chancellor who is willing to risk his $50,000 salary and an assortment of benefits by trying to implement Civil Rights and Affirmative Action laws. *Sanctions from within the University for officials attempting to enforce compliance are far more real than sanctions from Washington for not complying!*

THE OBLIGATIONS OF INSTITUTIONS OF HIGHER EDUCATION UNDER THE CIVIL RIGHTS ACTS AND EXECUTIVE ORDERS:

It seems to me that the laws concerning the obligations of institutions of higher education are quite explicit. The two most important laws relating to minorities are:

> *Title VI of the Civil Rights Act of 1964.*—Title VI states that the federal government may not subsidize discrimination on grounds of race, color, or national origin. Under this prohibition, HEW's responsibility, exercised by the Office for Civil Rights, is to see to it that universities that receive subsidies from the federal government or enter into contracts with it do not discriminate, under penalty of not receiving federal funds.
>
> *Revised Executive Order No. 4 (as amended).*—This Executive Order embodies two concepts:
>
> > *Nondiscrimination*—requires the elimination of all existing discriminatory conditions—whether purposeful or inadvertent.
> >
> > *Affirmative Action*—requires the contractor to do more than ensure employment neutrality with regard to race, color, religion, sex, and national origin. The basic requirement of this Executive Order is that a federal contractor must maintain a written affirmative action plan which explicitly details the manner in which the employer will make

additional efforts to recruit, employ and promote qualified members of groups formerly excluded.

The Reality of the Situation: Non-Compliance and Deception

Unfortunately, there is a tremendous difference between what the law requires and what the institutions of higher education actually comply with. The prevailing mood among University of California officials is that HEW will not really do anything to the UC system. They simply do not believe that the federal government would withhold funds—believing that through a combination of bureaucratic guerrilla warfare and political favors from Washington, the University will be able to withstand the efforts of federal agencies to follow through with Title VI and the Revised Executive Order.

In most cases, if it were not for a handful of minorities and women who are found within institutions of higher education, little would come to light and even less pressure would be forthcoming to enforce the law. Why is this case? Minorities and women become involved in these issues at a risk to their own careers. To become involved in time consuming monitoring not only takes away from one's own academic and administrative responsibilities, but in the process of raising such issues as discrimination and affirmative action one does not make the best of friends among colleagues and least of all among administrators of the institution. But if the federal government will not raise these issues—a responsibility that was legislated by both Title VI and the Revised Executive Order—who will?

The University of California at Irvine has received several hundred million dollars for construction and research from the federal government—yet there has never been an on-sight inspection or review of this institutions hiring practices! When we were made aware of the fact that none would be forthcoming the minorities and women took it upon themselves to initiate their own review. The results of that intensive one year study are to be found in the summary that is appended to this testimony. Because I believe that this study, which is intitled "The Pattern and Practice of Discrimination Against Minorities at the University of California, Irvine," will clearly demonstrate the significant differences between the law and the implementation of the law as it relates to the Civil Rights obligations of institutions of higher education, I would like to respectfully submit a copy of the complete study for the record. I believe that you will find it informative.

The results of the study clearly suggest that a pattern of exclusion exists in all areas of University activity—academic personnel, management positions, skilled positions, graduate education. As has been noted by others, institutions of higher education are microcosmic studies of integration in American society—a growing presence with no power. Decisions regarding curriculum, faculty recruitment and promotion, graduate and undergraduate admissions, the awarding of student loans and fellowships, general employment are made almost exclusively by male Anglos. Federal government and minority pressures have forced universities to have a visible presence of minorities and women: but there is little evidence of upward mobility into positions of power.

Two factors have directly affected the status of minorities in institutions of higher education.

> The pressures of social tensions and conflict generated by campus and off-campus minority groups has diminished. The moral and legal aspects of the Civil Rights movements of the 1960's were institutionalized into legislation; however, the federal government has failed to ensure compliance with these laws.
>
> The effective pressures from the largest minority has turned the focus from minorities *per se* to women, with women being a much more visible and better organized minority.

Why the Gap between the Law and the Reality of the Situations?

There are several reasons for the considerable discrepancy between what the law says are the obligations of institutions of higher education and the actual practices of those institutions. Setting aside the conventional arguments regarding concerns for "equal opportunity," "reverse discrimination," and other philosophical rhetoric, it would be instructive if one were to explore three far more important and relevant areas: (1) the misuse of the Affirmative Action Plan as a tool for removing the inequalities of the instructions, (2) the tactics of "paper-clip" guerrilla warfare as a means of avoiding compliance, and (3) the inability to conceptualize the issue and to make explicit the value preferences of the federal government regarding equality and social justice.

The Affirmative Action plan has turned into a vehicle for the bureaucratic stagnation of Civil Rights laws. In the case of the University of California at Irvine, the plan was purposely designed to be an "Equal Employment Opportunity" statement rather than an "Affirmative Action" statement. Equal Employment Opportunity legislation is basically passive and is intended to *open* employment opportunities to minorities. Affirmative Action, on the other hand, is a positive, *result-oriented* approach to employment opportunity for minorities and women. University officials fail to recognize the legal and moral obligations for developing a practical Affirmative Action plan geared to specific action.

Another way in which an Affirmative Action plan can act as a bureaucratic restraint on Civil Rights laws is the way in which the "available, qualified persons for employment" is defined. In the case of the University of California the available qualified minority manpower in the workforce is severely limited because, among other things, the University of California itself has done little to either develop the minority workforce or to ensure that those that contract with it have integrated workforces.

Furthermore, it is the responsibility of a public, tax-supported educational institution to set goals which reflect the minority population of a State such as California—not the nation as a whole. This is particularly important for Mexican-American and Asian-Americans because they are regional minorities with a heavy concentration in the State of California. To use nation-wide population and education data is to greatly distort the employment and education needs of California's minority population as well as to minimize the Civil Rights obligations of the University of California. This was not the intent of the laws nor the Executive Orders, but the distorting effects of bureaucratization has taken its toll.

The University of California has in fact been able to use Affirmative Action palns to forestall compliance rather than as a vehicle for ensuring the fulfillment of its obligations. *The University has been able to accomplish this by deliberately structuring and maintaining a bureaucratic oriented and powerless Affirmative Action program and by defining Affirmative Action in academic and bureaucratic terms rather than being directed at eliminating discrimination.*

What has permitted this to take place? Over the last few years the institutions of higher education have entered into a protracted "administrative guerrilla warfare" with federal agencies such as the Office of Civil Rights of HEW. Federal agencies such as the latter are funded to monitor and oversee compliance. The laws state that there are penalties for violating existing legislation. Yet, the universities have not shown good faith in their relationship with either federal agencies or minorities and have in fact not complied with the law. So why are institutions of higher education continuing to be funded by the federal government when they are in violation?

The official justification for this state of affairs has recently come from the Secretary of HEW, Caspar Weinberger. He stated that if funds were withheld in order to force compliance with the law, it would only cause more problems and in no way solve the problem of discrimination. If this is the case, then the law is meaningless because the possibility of sanction for violation is removed. We thus see protracted periods of "administrative guerrilla warfare" between universities and federal agencies—each escalating the "paper war" in the hope that the other will finally submit when the volume of paper finally overloads the administration of their institution. In the meantime minorities and women are more important as "body-counts" for paper "war games" than for their actual presence in institutions of higher education—be they as students, instructors, administrators, or employees.

The efficacy and accuracy of "body-count" warfare is far from certain. We are told by university officials of the great advances being made in the numerical presence of minorities and women. We are also told that Affirmative Action has distrupted and affected the quality of education—yet we are confronted with recent reports that in fact the number of minority and women faculty has increased insignificantly and that the number of minority graduate and professional students has in fact declined!

For example, data presented in a recently released Carnegie Commission on Higher Education report indicated that from 1968 to 1972, the number of Blacks on university faculties increased only from 2.2% to 2.9% while the number of women increased from 19.1% to 20%. This could hardly be described as a massive intrusion into institutions of higher education as a result of Affirmative Action programs. Furthermore, a recent study headed by Prof. Madelon Stent of City College of New York, indicates that the enrollment of Blacks and Spanish-surnamed students in professional and graduate schools has gone down.

I suggest that a massive state of confusion exists today regarding the presence of minorities and women in institutions of higher education. However, one thing is certain with the passing of each day: Higher education institutions, such as the University of California, are consciously avoiding compliance with Civil Rights laws and Executive Orders. Senator Proxmire's inquiry into the relationships between the University of California and NASA is an excellent example of the collusion necessary in order to find ways to get around the law. In the case of NASA, a "national security" interest was declared in order to get around Equal Employment Opportunity requirements. Some federal agencies make no effort to make sure that contractors comply with the law. Until federal agencies are also held accountable for violation of the law—few contractors will take the laws seriously.

The third contributing factor to the gap between the law and the reality of non-compliance is the inability ot conceptualize the issue and to explicity state the value preferences. If Affirmative Action is a compensatory program that calls for remedial action in order to overcome past and present discriminatory practices, then it is reasonable to pass laws that distinguish between groups. In legal terms, such *reasonable classification* is permitted *if there is a compelling state interest involved.*

Why should there be a governmental preference for compensatory programs? Why should reasonable classification be permitted? What justifies remedial programs that make such criteria as sex and ethnic origin important determinants in the employment and education recruitment practices of institutions of higher education? For the answer—at least from my particular perspective—we must turn to the reality of American society. The reality of American society consists of the following virtues:

> Equality of opportunity exists in America—if you are male and Anglo.
>
> American society is open and competitive—if you are male and Anglo.
>
> Sharp inequalities exist in American society today. The achievers are overwhelming male and Anglo despite the fact that over half the population is female and that some 20% is made up of minorities. The male Anglo by far gets the good start in the "race for success"—why else do we find 97% of the engineering and 95% of the lawyers being male Anglos?

If one can see this perspective of American society then the preferential issues become that of:

> Determining how government power can be used to eliminate the inequalities that are prevalent in American society?
>
> Recognizing, as the noted political sociologist S. M. Lipset has suggested, that a fundamental change is taking place—*a shift from the rights of individuals to the rights of groups.*

What this suggests for me, again to take from Professor Lipset, is that the primacy of "equality of opportunity" must be replaced with the far more important primacy of the "equality of results." From this perspective one can readily see the critical distinctions between defining the Civil Rights obligations of institutions of higher education in terms of individual rights, *equality of opportunity*, rather than in terms of group rights, *equality of results.*

Recommendations

There are two levels of change needed in order to insure that institutions of higher education comply with their Civil Rights obligations. I will not discuss the needed changes at the institutional level at this time: however, some of these recommendations can be found in the appended portion of the written testimony. At the level of national policy, I would like to make the following suggestions:

> There is no need for new legislation, new laws, nor new bureaucracies.
>
> There is, however, a need for a *decisive decision*—arrived at jointly by the Executive, Congress, and federal agencies—that the existing laws and sanctions are to be taken seriously.

There exists the necessity for a follow-through effort regarding Civil Rights legislation and Executive Orders. Congress could provide a meaningful service by using its power of the purse to give direction in this public policy issue. Congress could articulate and communicate its seriousness about this matter by:

Holding *oversight hearings* in Washington to find out if government agencies are working together or at cross purposes in the enforcement of Civil Rights laws and Executive Orders and by holding informational hearings on such campuses as the University of California so as to personally assess the extent to which institutions of higher education have in fact complied with their Civil Rights obligations.

Generating *information* for the federal government so that it would be possible to effectively and fairly carry out compliance. Someone in the federal government has to find out how much money institutions are getting, from whom they are getting it from, for what purposes the money is being awarded, and under what conditions. How can one monitor the University of California when this data is not available?

Encouraging the necessary *political support* from the Executive. When it is not forthcoming, the laws are undermined as was the case of Leon Panetta—the former Director of HEW's Office for Civil Rights—who was fired by the Administration in early 1970. He is an example of what happens when strong enforcement attitudes prevail within the monitoring agencies, but without the necessary political support from the top decision-makers. Under such circumstances, only lip service can be paid to the laws.

Developing *institutional capabilities* within those federal agencies responsible for monitoring compliance of the law. Congress should realistically assess the small staff in HEW's Office for Civil Rights which is responsible for some 2700 institutions of higher education. Can a staff of that size become actively involved with that many institutions without the fear of being "paper-clipped" to death! At this point the instinct to survive will exceed that of conviction and the requirements of the law.

Educating the general public, the federal bureaucracy, and institutions of higher education to the fact that the interests of minorities and women—though in some cases they may be unique—are compatible with the concerns and interests of the greater society. This would perhaps be the most difficult chore for Congress. We need not look at Affirmative Action, for example, in conflictual terms, but rather in terms of benefits to the entire society.

In all due respect to this Committee, if one takes the perspective of minorities and women it appears that neither Congress nor the Executive are serious about the Civil Rights acts or the Executive Orders. If the United States Congress and the Executive *appear* not to take these laws seriously, then why should institutions of higher education take these laws seriously? I would contend that until Congress gets serious about insuring full compliance with Civil Rights laws and Executive Orders by institutions of higher education—we will just be kidding ourselves about equality and social justice in American society.

This completes my testimony. I would like to thank the Committee for its time and for the considerations given my testimony. I would, however, like to leave the Committee with three last thoughts—three very troubling thoughts for me. I do not know if anybody can satisfactorily answer them, but they continually need to be raised.

Why do people begrude the special considerations that are mandated for minorities and women by the Civil Rights Act and by Executive Orders—given the need to rectify existing inequalities in American society?

Why has the federal government tolerated the discrimination and inequities in America's institutions of higher education—institutions that are so vital to the future development of American society?

If so many private citizens and public officials are for equality—Why is there so much inequality in American society today?

THE PATTERN AND PRACTICE OF DISCRIMINATION AGAINST MINORITIES AT THE UNIVERSITY OF CALIFORNIA, IRVINE—INTERIM REPORT

(Chancellor's Minority Affairs Committee)

MAY 27, 1974.

To: Chancellor Aldrich.
From: Chancellor's Minority Affairs Committee.
Re: Report on "The Pattern and Practice of Discrimination Against Minorities at the University of California, Irvine."

As Chairperson of your Minority Affairs Committee, I am forwarding you a copy of the Committee's report on *The Pattern and Practice of Discrimination Against Minorities at UCI*. The Committee's limited time and resources have not permitted a full-fledge inquiry into the problems confronting minority faculty, staff, and students. However, our *preliminary* findings, as presented in this report, strongly suggest that a complete HEW/Office of Civil Rights investigation is necessary in order to help eliminate the discriminatory practices in employment and student recruitment/support services.

The Committee has distributed the report to interested public officials, governmental agencies, and members of the community. Hopefully, a constructive and meaningful dialogue will develop between UCI and the minority community. The Committee's goal is to help rectify the problems that have been identified and documented in this report, according to the needs of the minority community and the requirements of the law.

I request that you meet with the Committee and representatives of the minority community in early June. We hope that at this time productive discussion will take place in order to help solve UCI's most serious problem—*providing for the employment and educational needs of minorities and women on campus and in the community.*

FRED FLORES,
Chairperson, Minority Affairs Committee.

SUMMARY

This *interim report* by the Chancellor's Minority Affairs Committee (MAC) represents an effort to inform University officials, faculty, students, and the community about the status of minorities at the University of California, Irvine (UCI). Since October 1973, members of the Committee have gathered data, spoken to University officials, and interviewed faculty, staff, and students on the UCI campus. The MAC sought to answer a fundamental question: *As a public employer and educational institution, has UCI met its legal and moral responsibilities to the minorities of California?* In addition, this Committee believes the primary issue to be whether UCI is taking steps to break the cycle of discrimination through the implementation of, and commitment to, a viable Affirmative Action program.

THE AFFIRMATIVE ACTION PLAN

The Committee found the University's Affirmative Action Plan totally inadequate for several reasons. First: *The Plan is inadequate because it is essentially an "Equal Employment Opportunity" statement rather than an "Affirmative Action" statement.* Equal Employment Opportunity legislation is basically passive and is intended to open employment opportunities for minorities. *Affirmative Action is a positive, result-oriented approach to employment opportunity for minorities and women.* Chancellor Aldrich should recognize the legal and moral obligation of developing a practical Affirmative Action Plan geared for specific action.

Secondly: The Chancellor notes in his "Policy Statement" on Affirmative Action that UCI will be concerned with the "available, qualified persons for employment." This means that UCI will base its Affirmative Action analysis on the availability of qualified persons in the work force. The available qualified minority manpower is, however, severely limited mainly because the University of California has done little to either develop the minority work force or to insure that those agencies which contract with it have integrated work forces.

Thirdly: The Committee believes that it is the responsibility of a public, tax-supported educational institution like UCI to set goals which reflect the minority populations of California, not the nation as a whole. This is particularly important for Chicanos and Asian-Americans because they are regional minorities with a heavy concentration in the state of California. *To use nation-wide population and educational data is to greatly distort the employment and educational needs of California's minority population as well as to minimize the responsibilities of the University of California.*

Specifically, UCI's Affirmative Action Plan is unacceptable because of the following weaknesses:

No analysis was provided to identify employment problems in such areas as recruitment, selection, placement, promotion, salary, tenure, and training.

Utilization analysis was inadequate because it was not broken down by department and professional schools.

The Plan failed to clearly delineate the status of the Affirmative Action officer.

Job categories by Federal Occupation Code were not divided into groupings with common skill requirements and earning ranges.

Goals and timetables were calculated on the most conservative estimate of availability which reflected the discrimination of outside employment and educational practices—thus insuring minimal results.

PATTERN OF EMPLOYMENT DISCRIMINATION

UCI's academic year 1973/74 employment records reflect the following pattern of minority employment:

out of 1110 academic employees, 33 or 3% are Mexican/Spanish American and 28 or 2.5% are Black, and there are 3 or .3% American Indians;

out of 231 tenured faculty members, 1 or 0.4% are Mexican/Spanish American and 3 or 1.3% are Black, and there are no American Indian faculty;

out of 376 student assistants, 14 or 3.7% are Mexican/Spanish American, 12 or 3.1% are Black, and 2 or .5% are American Indian; and

out of 41 Librarians, there is no Mexican/Spanish American, and only one Black.

There are a total of 1217 staff career employees at UCI. In this latter area, 96 or 7.9% are Mexican/Spanish American and 70 or 5.8% are Black. The breakdown within this category is as follows:

out of 26 administrators, there are no Mexican/Spanish Americans and 1 or 3.8% Black;

out of 212 professional employees, 11 or 5.2% are Mexican/Spanish American and 10 or 4.7% are Black; and

out of 81 craftsmen, 4 or 4.9% are Mexican/Spanish American and 3 or 3.7% are Black.

By going beyond the aggregate figures on minorities, underrepresentation and employment clustering becomes evident. Some 70% of all Mexican/Spanish American staff employees are either secretaries, operators, or service workers—over 50% of the Mexican/Spanish American staff employees are clerks and secretaries. Some 60% of all Black staff are secretaries, operators, laborers, or service workers.

Further detailed analysis by the MAC concludes that minorities in the Physical Plant and other University units are overwhelmingly in the non-skill areas of maintenance, grounds, and service. And, where they are concentrated, such as in Housing and Physical Plant, there are no minority foremen or supervisors even though many of these minorities have been working at UCI since the school opened. The following examples will help to explain the status of minorities in the staff career and staff casual areas of employment at UCI:

56 of 64 Mexican/Spanish American women employed as staff career employees are in the office/clerical/service job categories;

21 of 32 Mexican/Spanish American men employed as staff career employees are in the clerical/operator/labor/service worker job categories;

42 of 45 Blacks employed as staff casual employees are in the clerk/labor/service worker job categories; and

42 of 42 Mexican/Spanish Americans employed as staff casual employees are in the clerk/labor/service worker job categories.

WAGE DIFFERENTIATIONS BETWEEN MINORITY AND ANGLO EMPLOYEES

It is clear that UCI's minority employees are paid less than Anglo employees. The monthly income pattern is as follows:

Academic Black employees average $1049 a month, while Mexican/Spanish American employees average $1041 a month and Anglo academic employees earn $1318 a month.

Black staff employees earn $752 a month, Mexican/Spanish American staff employees earn $706 a month while Anglos average $862 a month.

Black staff casual employees average $449 a month, Mexican/Spanish American staff casual employees average $480 a month while Anglos in this category average $536 a month.

The University's own salary records help to illustrate the disparity in employment and promotional practices for minorities at UCI. In examining employment categories where comparable salary data was available, the following pattern of disparity was discovered:

The overall campus summaries point out that 325 minority employees earn an average of $809 per month as compared to Anglo averages of $999, a difference of $2280 per year.

The academic staff had only 83 minorities while the Anglo employee staff numbered 709; average wages for minorities came to $1105 a month compared to Anglo monthly salaries of $1318, a difference of $2556 a year.

Regular career staff positions showed 178 minority employees compared to 931 Anglo staff, average salaries for minorities was $729 compared to Anglo figures of $862, a difference of $1596 a year.

Casual staff minority employee positions numbered 33 compared to 214 Anglos; average wage for minorities $488 compared to $536 a month for Anglos, a difference of $576 a year.

There were 15 minority student instructional assistants with an average salary of $856 compared to 94 Anglos with an average salary of $889, a difference of $300 a year.

There were 6 minority librarians with an average salary of $964 compared to 33 Anglos with an average salary of $1173, a difference of $1308 a year.

MINORITY STAFF: CAREERS AS CLERKS, GROUNDSMEN, AND CUSTODIANS

There are four basic determinants affecting the status of minority staff on the UCI campus: (1) their fears and frustrations, (2) the ineptness of the Personnel Department, (3) the inaccessability to training programs, and (4) an ineffective and unresponsive Affirmative Action Coordinator. All of these factors have contributed to the concentration of minority staff in the lower pay categories and limited-skill employment areas, the absence of minority foreman and supervisory personnel, and job stereotyping of minorities. In general, *minority staff employees have been subjected to discrimination with respect to compensations, conditions, privileges, and opportunities of employment.*

The Personnel Department has not: (1) communicated the rights of workers to minority employees, (2) made a concerted effort to inform minorities about new positions or traineeships, and (3) been effective in recruitment of *qualified* minorities. As one lawyer has noted after a brief investigation of UCI hiring practices:

> jobs are "gifts" from department heads;
>
> open competition for jobs is very rare;
>
> the Personnel Department does not approve jobs in most instances, but gives its *imprimatur* at the department head's request.

Of principal concern to minority staff employees is the way in which individual University units and the Personnel Department classify staff positions. It appears certain classifications and job titles are directed at minorities; in this manner, UCI officials make sure that there are the needed "number" of "visible minorities" in order to comply with federal laws. For these reasons, minority staff are convinced that a tacit system of "Black girl desks" and "Chicano desks" exists in order to insure the continual presence of minorities—a presence limited to specific job categories and to certain numbers.

These positions have no future or likelihood of meaningful advancement. Curiously, University officials argue that quotas are illegal when it comes to hiring of faculty, but UCI's unofficial quota of hiring minorities in menial jobs is perfectly acceptable. *Hiring minorities only in certain type of job categories in order to produce a "visible minority" is not a policy of Affirmative Action.*

MINORITY STUDENTS AT UCI

The University administration has noted with pride that it has vastly increased the number of minority students on campus: some 1,299 minority graduate and undergraduate students, or 15% of the total number of students attending UCI. However, the MAC takes direct issue with the figures as well as with the significance of the "Ethnic Survey Data." What the University fails to mention is that there are qualifications to the aggregate data on minority student enrollment. These qualifications (especially for the Mexican/Spanish American student category) include: (1) "minority/disadvantaged" status (EOP), (2) part-time status, and (3) foreign-national status. These considerations significantly reduce the minority presence at UCI. This report stresses the fact that the concept "minority" is a very subjective term, and it can be defined to suit anybody's purpose. Several examples will suffice to explain the distorted image given by UCI's data on minority students:

the largest bloc of "minority" students at UCI is the Asian-American (321) but only 20% identify with EOP/Special Services—as compared to 80% for Black and 90% for the Chicano.

of the 358 undergraduate Mexican/Spanish American students, only 296 are regular, full-time students.

What is disturbing is that of the 296 Mexican/Spanish American students, some 268 have come via the Educational Opportunity Program (EOP). Thus, from facts such as these, *the Committee concluded that UCI's "Ethnic Survey Data" is misleading and distorts the true picture of the minority students' presence.*

Perhaps the most important issue that the Committee had to deal with in regard to students is that *Affirmative Action has to be seen as a comprehensive program which not only deals with the recruitment, hiring, and promotion of minority and women staff and faculty, but also deals with students.* In January 1969, President Hitch, in a letter to all Chancellors, stated that ". . . affirmative action in admissions and in hiring at all levels is national policy and is University policy." Further elaboration of this policy came from UC Vice President for Administration, Robert L. Johnson, who in August 1970, stated that ". . . the Uninversity of California states its concern for equal opportunity for women today as *students*, faculty, and staff personnel." *It is only reasonable that the concept of equal opportunity is applicable to minority students.*

If Affirmative Action is applicable to students, and the Minority Affairs Committee believes that the above statements verify that this is the case, then policy issues involving EOP and "minority students" in general come under the purview of Affirmative Action laws and the Affirmative Action Plan. Furthermore, if Affirmative Action applies to students then *there must also be goals and timetables for their admission—at both the undergraduate and graduate levels—in proportion to California's total minority population.*

CONCLUSIONS

UCI's "pattern and practice of exclusion of, and discrimination against, minorities is in violation of Title VI and VII of the Civil Rights Act of 1964 and in violation of the Equal Protection Clause of the Fourteenth Amendment. The "pattern and practice" of discrimination is sophisticated and subtle. The Minority Affairs Committee after eight months of inquiry, concludes that University of California at Irvine officials—namely the Chancellor and others named in this report—are responsible for:

deliberately structuring and maintaining a bureaucratic oriented and powerless Affirmative Action program;

encouraging that Affirmative Action be defined in academic and bureaucratic terms rather than being directed at eliminating discrimination;

refusing to enforce compliance of Affirmative Action principles and granting unit heads, with a history of exclusionary practices, authority over hiring and promotions;

refusing to discipline personnel who discriminate against minorities;

refusing to set Affirmative Action guidelines based upon the minority population of California;

utilizing the most conservative method of estimating work force availability for minorities;

clustering data that has the effect of misrepresenting the presence of minority faculty, staff, and students.

RECOMMENDATIONS

In order to reverse the pattern and practice of discrimination at UCI, the Minority Affairs Committee recommends that:

the position of Vice Chancellor for Affirmative Action be created for the implementation of the Affirmative Action Plan and specifically for the treatment, hiring, promotion, reclassification, admission, and recruitment of minority faculty, staff, and students—both present and prospective;

the Affirmative Action Plan establish the coordination of goals, procedures, FTE distribution, and a scholar/teacher training program to prepare minorities in accordance with UCI's responsibilities as a Ph. D. granting institution;

fifty percent (50%) of new faculty FTE's allocated to UCI be set aside for the exclusive recruiting of minorities;

the Affirmative Action Plan include provisions for regular, EOP, or Special Action minority students that will include goals and timetables as well as a provision that UCI will be responsible for tutorial and counseling services, academic advice, and financial aid for these students;

University officials conduct a review of graduate and undergraduate applications for admission, fellowships, teaching and research assistantships, and other forms of aid to determine whether there is discrimination against minorities;

a job training program for minorities be established to qualify them for skilled and supervisory positions;

on campus minorities—especially those in Physical Plant and Housing—be *immediately* selected for foreman and supervisory positions;

there be a *complete investigation* of the procedures and policies of the Personnel Department—especially those policies and procedures that affect the Department's practices in reporting the necessary information for Affirmative Action monitoring and the recruiting, training, and promoting of minorities.

Mr. Benitez. Thank you very much.

I would like to add one or two questions more to the ones we already raised.

The first one pertains to the gap that you have referred to between the population and—the percentage of minorities within the population and then the smallness vis-a-vis that size of the members of the faculty or of the administration.

The first question that is always raised in this context, which I would like to again bring up with you, deals with the supply. This is with the availability of adequate personnel, which is not being utilized.

Do you have any information or any approach that you would like to make on that issue?

Mr. Sereseres. Two comments here. One, I am not convinced there is not the availability—and I can give you some very specific examples.

Why would a Spanish surnamed Ph. D. political scientist—let me remind you that I am 1 of 15 Spanish-speaking political scientists in the United States out of 12,000—go unhired this academic year? This individual was a congressional fellow—the first time a Spanish surname was ever awarded this. He worked for Senator Joseph Montoya. He has already presented two papers at the most prestigious political science associations in the United States. Yet, he could not get a job in the University of California system. Why is the University of California at Irvine firing three qualified women at the same time they hire others? They get the publicity for hiring women and forget the fact they fired three.

One of those fired was an Asian female who has obtained national recognition in manpower studies. She was working within a department totally dominated by male Anglos. She had served the university and the community as well, yet she was not protected when her tenure came up. She was considered unqualified to continue teaching in the university system. It was inferred that she didn't deal with "academically relevant subjects," meaning her research dealt primarily with women and minority problems.

So, I am not convinced the available manpower is not there. Furthermore, when the courts have enforced quotas—not goals but quotas—institutions have seemed to find the qualified minorities and women. That effort only came after a court order. Such has not come from HEW or from the Labor Department.

Second, affirmative action must apply also to graduate education.

If the University of California can't find the qualified available Ph. D.'s, it has the responsibility to train them.

Mr. DELLENBACK. I have read your testimony, and I have listened to the dialog between you and my colleague. Yet, I am not sure that I get the full flavor of what it is you really think should be done.

You say on page 9 there is no need for new legislation, new laws or new bureaucracies. Then you go on and talk in general about conducting oversight hearings, encouraging political support, developing institutional capabilities, and educating the general public.

I am interested in the specific area in which our subcommittee is examining this. Not the broad problem, but rather what it is that is being done, or should be done, in both secondary and higher education.

I am troubled with what looks and sounds to me like an inconsistency based on having had a great many witnesses testify before us. The inconsistency to which I refer does not deal with those aspects of affirmative action that focus on broadening the area under examination, and insisting that they deal with more than the network and really search out all possible sources of new employees. This inconsistency does not deal with the question of once one is within the mass of those who are part of the faculty, being sure that salary increases, promotions, tenure, and so on, are equitably applied.

Instead, this inconsistency focuses on how one can both nondiscriminate in the increment that is added each year to the mass and, at the same time, bring about any sort of accelerated change in the mass so far as total distribution.

Would you have anything to say to us about that point of distinction?

Mr. SERESERES. I hope I get to your point this way. On Tuesday of this week, this notion of reverse discrimination was brought up. I would answer your question by looking at that concept and then looking at what I have mentioned in the text regarding preference. That is, are we more concerned with the quality of opportunity or with the quality of results?

Now, on the concept of reverse discrimination, it seems to me——

Mr. DELLENBACK. Let me break in for a moment.

I understand the distinction you make between quality of opportunity and the quality of result, but that is not quite on all fours with what I am talking about as the point of trouble.

You can talk about equality of result in terms of those who are going to be added to a faculty in a given year as opposed to equality of opportunity for such addition. And I see that point of distinction.

For the moment, let's zero in on equality of result. Let's assume we have a faculty with 2,000 people in it, and the mix is unrepresentative both as far as minorities and women are concerned. In fact, let's assume there are none—zero. They are all male and they are all Anglo. You are going to add, because you have approximately a 20-year-average turnover, approximately 100 new people in a given year.

Now, if you want to change the total composition of the 2,000 in less than 20 years to achieve a balance, you will have to alter the selection process for the incremental 100 for the next few years. You will have to hire those on a disproportionate basis in order that the mix of the mass be accelerated and changed.

Can you do that—stay with your concept of result rather than just opportunity—can you do it without discriminating within the incremental additions in a given year?

Mr. SERESERES. I think I was on the right track here. Let me answer by giving you an example. I am not sure that I have, and I am not sure if the subcommittee here has any information regarding the attrition rate of faculty and other university personnel. I know for a fact that at the University of California at Irvine we had 70 new positions. We hired one black, one Spanish surname and one native-American out of 70. OK?

I am not sure what the nationwide turnover rate is.

Mr. DELLENBACK. But you are not on target with my question yet. You are talking only about the additions. I am asking you to tell me first, before you talk about discrimination in a given situation, which are you going to talk about? Are you going to say that our concern should be with the increment that is added each year—in your instance, 70 new employees—or the general mass of employees. Should we be sure that that 70 is balanced in both opportunity and result, or should we say you have to go way beyond balance in the 70 in order to bring about an accelerated balance of the mass to which the 70 is added?

Consequently, let's not focus at this point on the discrimination within the 70. That is another issue which I am also interested in. But, at present, I am talking about the distinction between the 70, and the mass to which the 70 is added.

Where do we turn to bring about true equality?

Mr. SERESERES. I am afraid I can't follow that. When you say mass, are you referring to the population——

Mr. DELLENBACK. What is the total number of faculty at Irvine to which the 70 vacancies were to be added?

Mr. SERESERES. Probably about 500 full time.

Mr. DELLENBACK. You have 500 in total. Does it have any sort of balance, or is it predominantly male Anglo?

Mr. SERESERES. It is predominantly male Anglo.

Mr. DELLENBACK. In a given year you have 70 additions.

Mr. SERESERES. Correct.

Mr. DELLENBACK. Let's assume——

Mr. SERESERES. Which was unusual for this year but that is what we had.

Mr. DELLENBACK. Let's assume, for the moment, that that is an average figure. Thus, you have a 10-year turnover. Let's assume the 500 had no female and no minority—they were 100-percent male Anglo.

Focusing now on this situation, we see two different things. We see that, measured by results, the 500 apparently reflect discrimination. We want to bring about a change in that pattern, and you can't do so without adding new employees. This year we will add 70. Now, when we talk about what we shall try to do with an affirmative action program, or anything else, should we be concentrating on this year's 70 to be sure that within that 70, there is both equality of opportunity and, if you will, equality of result. Or, on the other hand, should we be saying our real target is the 500, and, therefore, we must do whatever we need to do with the 70—make the 70 completely minority or completely female, et cetera, or whatever needs to be done—because our target is the 500.

Now, is my question clear? What is your target group? The 70 incremental additions, to be sure there is no discrimination practiced in that 70, or is the target the 500, and you do whatever you need to do with those additions to the group in order to bring about a balance within that 500?

Mr. **Sereseres**. If you are saying something has to be done with those people who already have jobs, I say no. If it means hiring disproportionately, that is more women and more minorities than anybody else in that 70, I say yes.

Title VI and Executive order call for this kind of mandate. Over a period of time you are affecting the total faculty profile of that educational institution.

Mr. **Dellenback**. But are you not violating revised Executive Order No. 4 if you discriminate on a preferential basis in the 70?

Mr. **Sereseres**. No; you are not.

Mr. **Dellenback**. I see. So your comment to us is that one cannot worry about what one does with the increment. One can be preferential. One does not need to be nondiscriminatory in the increment.

Mr. **Sereseres**. That is the point I was going to get at. First, at the base of all this is the Constitution which forbids discrimination of any kind. However, if past and ongoing selection procedures in education and employment are in themselves unlawful because of their exclusionary results, there can therefore be no constitutionally protected right to educational opportunity or employment vested in those who would qualify from such practices.

In other words, until the selection procedures on hiring and educational opportunity in institutions of higher education have been properly evaluated—which has not been done—it is illogical to argue that affirmative action procedures result in unconstitutional discrimination or the lowering of employment standards or quality of education. I would contend that the burden of proof lies with the institution to prove it is not engaged in discriminatory practices. It doesn't lie with me or anybody else, women or minorities, to prove that affirmative action is not, in fact, "reverse discrimination."

Mr. **Dellenback**. I am not putting any burden on you. I am asking you a philosophical question. I thought you had answered that question, but now I am not sure.

In the situation at Irvine or anywhere else, 70 people are to be added to a faculty in a given year. Under title VI or revised Executive Order No. 4, should any discriminatory practices whatsoever—either to favor minorities or to give advantage to minorities, or to favor women or to give special disadvantage to women—should any discriminatory practices be used in connection with that incremental 70? Or should those 70 be dealt with in a vacuum to be absolutely sure that in practice there is no discrimination in any way so far as those 70 are concerned? A minute ago, I thought you said that you can favor minorities and women within that additional 70 because of something else you are trying to do with the group to which those 70 are to be added.

Should there be any discrimination whatsoever in any direction practiced in that illustrative 70 of which we are speaking?

Mr. SERESERES. You have already loaded the question by throwing in the word "discrimination." I am not prepared to say that because you hire or give preferential hiring to women and minorities that that is, by fact, discriminatory. I don't think the question should be worded that way.

Mr. DELLENBACK. So there can be preferential practices, and those preferential hiring practices that operate in favor of women or minorities would not be discriminatory, in your opinion.

Mr. SERESERES. I do not believe that it is productive to develop a dialog regarding affirmative action on the basis of it being discriminatory or not. I am saying that: (1) It is a value preference of mine and (2) it has been stated in Federal law and in Executive orders, that an effort has to be made to resolve the injustices and inequalities that prevail in institutions of higher education.

I will not label affirmative action as discriminatory or as nondiscriminatory, but as a value preference. We must increase the presence of minorities and women as employees, as administrators, or graduate students, and as faculty members in institutions of higher education. I do not believe that charges of reverse discrimination, that is, that Anglo males are being discriminated against because preferential treatment is given to women and minorities, should be the focus of the debate. I don't think that is the issue. The issue is: Do we want to resolve the inequalities and injustices that prevail in schools of higher education? To me, that is the vital question.

Mr. DELLENBACK. Thank you very much.

Thank you, Mr. Chairman.

Mr. O'HARA. Thank you very much. We appreciate your coming before the committee.

Mr. O'HARA. Our next witness is Bernice Sandler, director of the Project on the Status and Education of Women, Association of American Colleges.

We would like very much to have the benefit of your testimony.

STATEMENT OF BERNICE SANDLER, DIRECTOR, PROJECT ON THE STATUS AND EDUCATION OF WOMEN, ASSOCIATION OF AMERICAN COLLEGES

Ms. SANDLER. I have submitted a statement for the record; and rather than read the whole statement, I will summarize it.

Mr. O'HARA. Without objection, your testimony will be printed in full in the record and you may proceed in whatever manner you choose.

Ms. SANDLER. Thank you.

I am Dr. Bernice Sandler. I have a long history of working in women's rights in a variety of roles. In 1970, I worked for this very committee.

I was an educational specialist where I worked on the hearings on sex discrimination that laid the foundation work for title IX and other legisation.

I have also taught at the University of Maryland and I have testified before numerous congressional committees on the issue of sex discrimination in education.

Until recently, sex discrimination on the campus whether against faculty, staff, or students was largely unnoticed, unchallenged, and unchecked. Indeed, such discrimination against most women in the academic community was legal. Educational institutions without Federal contracts could legally discriminate against faculty women and students.

The 92d Congress, in a little-noticed legislative explosion, articulated a national policy to end sex discrimination on the campus. Title VII of the Civil Rights Act was extended to cover all educational institutions whether or not they receive Federal moneys; the Equal Pay Act was extended to cover faculty, and title IX of the Education Amendments Act of 1972 was enacted to forbid sex discrimination against students and employees in federally assisted education programs.

There was virtually no opposition to the passage of these laws by either the educational community or the public at large.

Discrimination, once only a philosophical or moral issue, is now a legal issue as well. These laws are not merely employment laws: they are civil rights laws with a different legislative and judicial history.

Prior to this, many institutions holding Federal contracts had already felt the sting of the Federal Government under Executive Order 11246 as amended, which requires all Federal contractors to end discrimination in employment and to have a written plan of affirmative action.

More charges of sex discrimination have been filed against institutions of higher learning than against any other industry in the country. More than 500 institutions have been charged under the Executive Order 11246, about 1,600 have been charged under title VII and perhaps as many as a thousand under the Equal Pay Act.

Of all the areas in our society that have come under criticism for its treatment of women, the most frequent target has been higher education.

I could tell you of women who earn less than the equally qualified men they work alongside. I can tell you of some women who have received raises of $1,000, $6,000, $10,000, and $13,000 when their institutions were required, under the Executive order, to examine their salaries.

I could tell you of women who in a time of budget cuts, are terminated because they are "married and don't need the job." I could tell you, despite the changes in the law, of lives that have been damaged, and careers that have been stunted.

The stories of discrimination against women in academia have been documented all too often, and most notably in the 1970 hearings heard before this committee.

Let me summarize how affirmative action works.

Executive Order 11246 as amended by Executive Order 11375 covers only those institutions which hold Federal contracts. It prohibits discrimination in employment. It is not law, but a series of rules and regulations which contractors agree to follow when they voluntarily accept a Federal contract.

The main provision of the Executive order is that the contractor have a written plan of affirmative action to "remedy the effects of past discrimination" and to prevent the continuation of current discrimination.

The Department of Labor is responsible for all policy matters under the Executive order; the Department of Health, Education, and Welfare, however, does the actual review and enforcement in universities and colleges.

Institutions which voluntarily agree to provide a service to the Government by way of a contract, are required to undertake affirmative action, regardless of whether or not there has been a finding of discrimination. Such action includes, but is not limited to numerical goals. In contrast, moneys having the purpose of assisting the institution—rather than providing a service to the Government—carry no affirmative action requirement.

Under other Federal laws, affirmative action can be required but only after a finding of discrimination. The basic body of legal principles applying to employment discrimination have been developed in title VII litigation and in cases involving the fifth and 14th amendments of the Constitution.

Thus, institutions can become involved with affirmative action in a variety of ways.

An institution can voluntarily on its own decide to develop a plan. Second, an institution which voluntarily agrees to accept a Government contract is required to develop affirmative action plans including numerical goals.

A third way is that an institution charged with discrimination under title VII, the 14th and fifth amendments, title IX and possibly the Civil Rights Act of 1966 and 1971 may also be required to develop an affirmative action plan as a result of conciliation or as private settlement of a suit or charge brought under those acts.

The fourth way is directly through the courts: If conciliation or private settlement of a suit has failed, the court may order numerical goals.

The legal precedents and concepts of affirmative action and numerical goals are not based on an "industrial" model, but derive from statutes, legislative histories, judicial decisions, the principal of equity, and the Constitution.

Civil rights legislation and court decisions are intimately related to the concept of equty: "setting things right." This is the guiding principle that underlies numerical goals.

The Supreme Court has stated that the Court:

> May order such affirmative relief as may be appropriate. [It] has not merely the power, but the duty to render a decree which so far as possible [will] eliminate the discriminatory effects of the past as well as bar like discrimination in the future. (*Louisiana* v. *United States*, 380 U.S. 145 (1965).)

The opponents of affirmative action often use the term loosely and sometimes erroneously to describe a variety of actions. Broadly speaking, affirmative action are efforts aimed to end discrimination and to remedy the effects of past discrimination.

It includes a great many activities which are not controversial, such as notifying women's and minority groups about job openings; advertising job openings rather than relying on word-of-mouth notification; developing recruiting procedures aimed at women and minorities as well as at other qualified applicants, et cetera.

Of all the areas involved in affirmative action, the concept of numerical goals and timetables is perhaps the most controversial. Numerical goals are often confused with quotas.

However, the Government and the courts have made a clear distinction between the two: goals are legal; quotas clearly violate the Constitution and numerous Federal statutes. Quotas keep people out; goals are targets for inclusion of people previously excluded. Goals are an attempt to estimate what the employer's work force would look like if there were no illegal discrimination based on race or sex.

Goals are alined with the number of percentage of qualified women and minorities available and not in terms of their general representation in the population.

Under the Executive order, the institution does its own analysis of its work force and determines if their is underutilization of women and/or minorities. For example, women receive about 23 percent of the doctorates awarded in psychology, and studies indicate that 91 percent of women with doctorates work.

Thus, if there were no women, or substantially less than 23 percent women, in the department of psychology, underutilization would exist.

Underutilization, under existing case law, raises a presumption of discrimination under the Executive order and title VII. When statistical evidence indicates that there has been a pattern of discrimination, the burden of proof is then shifted to the employer, who must then demonstrate that there is and has been no discrimination, that the job criteria are indeed job related and that employment practices do not and have not had a discriminatory effect.

Goals have been upheld in the courts as relief for a substantiated pattern of discrimination.

The courts have indicated that affirmative action in employment is legal and does not constitute preference when undertaken to remedy past discriminatory practices. Indeed, preference is clearly illegal under the Executive order, title VII, and all other laws requiring nondiscrimination. No institution is required to hire women or minorities on the basis of sexual or racial preference. Affirmative action is not aimed at creating preference but at ending the preference for white males which has always existed in academia.

What the Executive order and title VII do require is the obligation of fair recruiting and hiring. If an institution fails to meet the goals, it then has to show that it made a good-faith effort to recruit, hire, and promote qualified women and minorities, and it has to be able to produce records documenting those efforts.

For example, the department head may show that he or she has contacted women's groups, such as the women's caucuses relevant to the discipline, has contacted individual women scholars for referral of candidates, has advertised openly, et cetera.

If, after doing all this, it turns out that all women were poorly qualified, and the man hired was indeed the best-qualified applicant, the employer can document a good-faith effort an affirmative action and thus can justify the decision to hire the white male. If so, the employer has discharged the obligation under Executive order; the obligation to meet the goal is not absolute.

There is no requirement whatsoever that would force academicians to hire lesser qualified women or minorities. If the best qualified person is white and male, then that person can be hired.

In some instances, the courts have imposed a kind of limited preference, more stringent numerical goals than those required by institutions under the Executive order.

Court-ordered goals have occurred only in public employment and individual settings and not in academia. The difference between court-ordered goals and those required under the Executive ordered are critical. Under the Executive order, goals are set by the institution after it does its own analysis.

In a court situation the Federal Government does the analysis and sets the goal. Under the Executive order, the best qualified person may be hired. Only in a court situation can a lesser qualified person be hired.

This limited preference has been allowed in our courts only after a finding of discrimination and for a limited time only.

The affirmative action requirements that institutions voluntarily assume when they accept a contract, however, do not in any way allow or compel institutions to give preference to the lesser qualified person on the basis of race, color, national origin, and sex.

Is preference required by law? Is preference being given to women and minorities in academia?

Recently there have been substantial questions raised about affirmative action and its implications for academia.

Richard Lester's report for the Carnegie Commission on Higher Education, and which, incidentally, the commission does not endorse, is typical of the objections raised.

Lester claims that institutions are being "forced" to hire less qualified women and minorities, and that innumerable institutions are giving sexual and racial preference in hiring.

He gives no data whatsoever to support this claim.

Any institution that gives preference in hiring on the basis of sex or race or ethnic origin is violating the law.

Those that claim that they have been forced to give preference to lesser qualified women and minorities had sadly misunderstood the law and their rights under it.

The data concerning the increase in the hiring of women and minorities in academia simply do not uphold the academic myth that women and minorities are being hired in any great numbers by the academic community.

Many institutions after a year or two of affirmative action programs report a drop in women faculty, even though the number and percentage of male faculty increased during that period.

Studies conducted within particular disciplines show a similar pattern. The fear that unqualified women are invading the tenured ranks seems to have little basis in fact.

For example, of nearly 200 institutions with graduate programs in chemistry—which is virtually all of the institutions which have such programs—between 1971 and 1973, the increase in the number of women at the full professionship level was exactly one. At the associate professor level, a net gain of seven for the entire country was reported.

While it is true that the pool of women chemists is not very deep, there have been approximately 1,500 women who received Ph. D.'s in chemistry since 1960. Were there really only eight that were qualified in the entire country to become associate or full professors in a 2-year period?

It is of course true that in a time of restricted budgets and a contracted economy it is harder for anyone, male or female, to find academic employment, but that is not reverse discrimination.

Some of the complaints have been specious; several white men have complained of reverse discrimination simply because a woman was hired and they were not.

On occasion, some administrators have used affirmative action as an excuse for turning down applicants they did not want to hire. One department head at a large western university wrote four of the five applicants for a position that he could not hire them because HEW insisted he hire a woman or minority person. However, the fifth candidate, the one who got the job, was neither female or minority; it was a white male. Needless to say, practices such as this violate the law, as well as generating inaccurate complaints of reverse discrimination.

On the other hand, some complaints of reverse discrimination have been justified. Some administrators have misunderstood the Federal requirements and have erroneously believed that only women and minorities, including minority women, could be hired.

HEW has played a major role in such misconceptions, and criticism of HEW for inefficiency, incompetency and inconsistent interpretations is more than justified.

However, to confuse the incompetence of HEW with defects in the law itself would be tragic. It would be like saying that because some police are inefficient and incompetent, we should therefore abolish the laws that they are supposed to enforce.

No one wants the Government to watch over their shoulder, but on the other hand, it is difficult to justify why academia alone should be exempt from the same rules and regulations that apply to every other industry in the country.

Any attempt to exempt academia from the Federal regulations and statutes that prohibit discrimination would deprive women and minority faculty of the fundamental civil rights now enjoyed by all citizens of this country. It would be the first step backward in civil rights legislation, and it would set a dangerous precedent for other segments of society seeking exemption from these laws.

Administrators are understandably concerned about Federal "interference" in hiring and promotion decisions. If you have never had to justify a hiring or promotion decision, the threat of having to put it in writing can be quite upsetting.

On the other hand, if an administrator cannot justify a decision, then either someone is in the wrong job or getting the wrong salary, or else you have a very poor administrator.

Now, instead of being able to justify a candidate merely by saying, "Dr. X is a fine fellow with a good reputation who has published a good deal," department heads will have to demonstrate that the candidate is the very best person recruited from the largest possible pool, a pool which will include qualified women or minorities. The demands of affirmative action, far from diminishing academic quality, are likely to increase it by requiring that hiring and promotion policies be truly based on merit without discrimination. The Government is not asking that the merit system be abolished, but only that it be opened to a larger pool of qualified persons.

HEW, incidentally, does not set criteria for hiring and promotion; rightfully, that is a prerogative of the institution and its departments. What the Government does ask is that the criteria be related to the job, and that institutions specify what the criteria are, and how they are evaluated.

No one is questioning the right and responsibility of the tenured faculty to recommend new appointments, reappointments, promotions, and salary increases. The Government does not disturb this arrangement other than to ask that the persons making decisions be able to justify that those decisions were indeed made on the basis of quality and individual merit, and not based on any discriminatory factors.

The justification of such decisions should not hamper the governance and decisionmaking traditions of academia; indeed, it is far more likely to improve the quality of such decisions.

Some people argue the Executive order will destroy "academic freedom." Academic freedom has traditionally meant the right to publish, to teach, and work with controversial ideas both in and out of the classroom. Academic freedom has never meant the denial of equal opportunity. How does it violate academic freedom to ask an end to preferences that have always existed: the preference for males, the preference for members of the "old boy" club?

Many persons feel that the principles developed by the courts should not be applied to academia. While it is indeed true that academia is unique in many ways, it is nevertheless difficult to justify that employment in academia—other than in its decentralization—is markedly different from any other professional employment.

If the principles developed under our statutes and constitution are not applicable to academia, then what indeed would apply? Certainly the time-honored academic principle of hiring the best qualified on the basis of merit is not threatened by regulations which require exactly that: hiring the best qualified person on the basis of merit.

Shall we exempt institutions from having to justify a hiring decision? Shall we exempt academic institutions from having criteria that are related to the job at hand and are not biased? Shall we exempt institutions from Executive order requirements to do a self-study to uncover discrimination?

There are many persons who are now promulgating binding arbitration as a way of handling academic discrimination. Such a procedure would have disastrous effects on the rights of women and minorities, for typically, arbitration is not concerned with the principles of redress of grievances and inequities, but with working out a compromise position between two adversaries. The rights of the individual and due process are not essential to arbitration procedures; arbitrators are not required to follow Federal standards or court derived principles concerning discrimination.

Nor is it clear how the arbitration process would be better than the conciliation process already available under title VII. The Equal Employment Opportunity Commission requires that all complaints, upon a finding of discrimination, be conciliated. Should either party be unhappy with the conciliation proceedings, the courts are available.

In contrast, any kind of binding arbitration would almost wholly bypass our court system, and would probably rule out all class complaints as well as complaints concerning patterns of discrimination.

The mediation-arbitration procedure would create a separate class of citizens; those with discrimination complaints in academia would have one set of remedies and the rest of the country would have another.

In effect, academic women and minorities, as well as academic men claiming reverse discrimination, would have less protection under arbitration than they do now. There would be no right of appeal nor any body of previous decisions to fall back upon.

Moreover, as well as individuals giving up their statutory rights, arbitration might also conflict with collective bargaining procedures: individuals who were involved in union contracts would have to choose between their own required arbitration procedures and those set up for discrimination problems.

Any type of binding arbitration procedure written into law to cover academics could open up a new series of court cases involving its relationship to title IX of the Educational Amendments of 1972, title VII of the Civil Rights Act, the Equal Pay Act, Executive Order 11246, the Civil Rights Acts of 1866 and 1871—sections 1981, 1983 and 1985—the 5th and 14th amendments.

Would the rights of individuals under those acts be suspended? Would women and minorities choosing an academic career have less or different rights from citizens choosing other types of employment?

In summary, affirmative action is coming under a good deal of criticism, partly because it has been badly administered, and partly because some administrators have misunderstood the Federal requirements. It would be tragic for the rights of citizens in this country if we confuse poor administration with imperfections in the law itself.

As a Jewish woman I am concerned and dismayed at the opposition to affirmation action that many Jewish groups have given. I want to point out that many Jewish women feel that these groups are concerned about Jewish men and, and they are not speaking for the Jewish women in academia who suffer far more in academia because of their sex than their religion.

Despite all the complaints and criticisms, it is interesting to note that not one institution has ever had funds withdrawn or terminated because of discrimination. Not one institution has ever had new contracts delayed because of discrimination, although some institutions have had delays because of a lack of an affirmative action plan. Not one institution has ever requested a hearing under the Executive order. Not one institution has ever had funds terminated, withdrawn, or delayed because of its failure to meet numerical goals. Not one charge of a pattern of discrimination filed with HEW has ever been refuted.

The academic community is one of the most powerful in this country—not because of money or direct power, but because it is responsible for training the youth and leaders of America.

If women and minorities are to have the birthright that is that of their white brothers they must have the opportunity to partake in the fruits of higher education as students, as staff, as faculty, as administrators. To weaken any of the laws that protect them from discrimination, particularly those that affect education, would be a serious abrogation and denial of the rights of women and minorities.

The legislation that prohibits discrimination on the campus is very new. We had all hoped that with the passage of these laws a new era had begun. But already, within a few short years the backlash has begun, and attempts to weaken existing laws and regulations are well underway.

Should any specific legislation be introduced which would in any way abrogate their current rights in academia, I would hope that this committee would invite testimony from national women's groups as well as those on the campus before such legislation was voted upon.

Women are the fastest growing, and potentially the largest advocacy group on the campus, and indeed, in the Nation. No longer will they weep if they are denied the rights that are those of their brothers. For women have something else to do. They are learning the politics of change. They are learning that the hand that rocks the cradle can indeed rock the boat. And the campus and the Nation will never be the same again.

Mr. O'Hara. Thank you, Mrs. Sandler.

I gather it would be a fair summary of your testimony to say that though you don't advocate reverse discrimination, you deny that it is occurring.

Ms. Sandler. Yes; there is very little of it compared to "real" discrimination. Reverse discrimination under our current laws and statutes is illegal in employment.

In terms of preference or reverse discrimiation involving students, it is not clear whether it is illegal. We had the DeFunis case which came to the Supreme Court and that was declared moot.

Mr. O'Hara. You say that if it had occurred it is only in a very few cases where administrators have misunderstood the application of affirmative action and so on?

Ms. Sandler. Yes.

Mr. O'Hara. Then you would have no objection to carefully worded legislation by this committee to make sure that such reverse discrimination as may have occurred can be eliminated?

Ms. Sandler. I would see no need for such additional legislation. I would think what may be more necessary is that HEW be given money and staff and a thorough shaking up so they can enforce the regulations that they are supposed to. They have already contacted institutions where cases of reverse discrimination occurred and said this was illegal.

I would be concerned about statutory provision in the sense that to some degree some limited preference is allowed in the courts.

I would be worried about disturbing the rights of the courts in the case of extreme discrimination to allow a limited amount of preference in those very limited instances.

Mr. O'Hara. In other words, you think there are circumstances under which preference can be justified on the basis of sex?

Ms. Sandler. Our courts have upheld a limited kind of preference, but those have been only upon a finding of discrimination. For example, the "X" police department has never hired blacks though 50 percent of the population is black. A court in that instance might impose a goal such as ratio hiring for a very limited time. There is another real constraint on that goal that says only qualified persons can be hired.

There is no compulsion to hire unqualified persons. That kind of goal has been upheld in the courts. The few goals that the courts have overturned occurred when there was no provision that qualified persons be hired.

Mr. O'Hara. I am not asking you what the courts have done. I am asking you what your view is of the matter. Do you believe that preference on the basis of race or sex is justified under those circumstances you described?

Ms. Sandler. In those very limited instances for a limited amount of time and under court supervision, yes. The Supreme Court has not ruled directly on that issue but it has denied certiorari to a number of cases. It hasn't ruled directly on the issue itself.

Mr. O'Hara. You don't see any significance to denial of certiorari?

Ms. Sandler. I am not sure what the Court thinks when they deny cert; I always feel better when they make a decision I can read.

Mr. O'Hara. The fact that they deny certiorari may mean one of a number of things.

Ms. Sandler. Yes. I think it is important to point out for the record that no educational institution has ever been ordered by a court to have numerical goals or limited preference. It is probably unlikely a court in that instance would order that kind of numerical goal.

Mr. O'Hara. In response to your testimony, let me suggest first I think it is a mistake to order preference on the basis of race or sex in a situation, even in a situation where a pattern of discrimination has been found because I think the more appropriate order—I would disagree with the court decisions to this extent—the more appropriate order would be the adoption of a hiring system that ignored racial or sex factors.

Ms. Sandler. This is exactly what the courts in essence has said. What they have said, though, is, "OK for the next 10 positions, half of those will be reserved for blacks, but from then on all hiring will be on a racially neutral basis." They allowed these in very limited instances and not with any great numbers.

I think the courts may allow this partly for symbolic reasons. It has been allowed in cases where the discrimination has been extremely gross. I am thinking of some of the police departments where minorities have not been hired at all. In that kind of instance the courts have felt it would be necessary to allow a small amount of limited preference for a limited time.

Mr. O'Hara. The distinction between goals and quotas, while you make it very clear—certainly the distinction you make is a valid one—I suspect in practice it doesn't work out to be a great deal different.

If the employer knows or suspects that he will be called down to justify hiring decisions that don't lead him toward a numerical goal and that he will not be called upon to justify decisions that do lead towards numerical goals, many employers—I think wrongfully—find it the easier way to sacrifice someone else's rights in order to avoid trouble for themselves.

It really doesn't matter much to the hiring authority if somebody who doesn't comply with the hiring goal is denied the job. It doesn't cost the personnel director anything. His job is still secure. I think he is more concerned about his job than he is about the applicant's job.

So, it is the easier way. Once they have the numerical goals before this, the easy way is to do whatever they have to represent those goals. Very few would stand up to it.

Ms. SANDLER. I think what you say can happen. I think the way to deal with it is that we need to be sure that people who are making hiring decisions know they are violating the law and are subject to penalty if they do this.

In academia I have every faith—I don't always have faith in my academic brethren—but I do have faith that they have the good sense to know that they can find qualified people to hire people on the basis of qualifications.

I can't quite see people saying, well, I will hire one woman and one black to get HEW off my back when they know that is clearly illegal. Many of them are simply unaware of the illegalities of actions like that.

Mr. O'HARA. I guess you have more faith in them than I do.

Ms. SANDLER. I have faith only if they knew that it was illegal and that there were penalties for violation. The difficulty I find is that administrators and presidents generally know that reverse discrimination is illegal, but the department heads very often don't. Many of the faculty who serve on academic research committees have absolutely no idea of what the Executive order requires, what title VII requires, and what it allows them and what it forbids.

I suspect if we had more education in the educational institutions on these issues we would be better off.

Mr. O'HARA. I am sure that is always the case. We very much appreciate your analysis of just how the various laws and Executive orders applied to institutions of higher education. I think it was a very well done, understandable brief analysis of the situation and I appreciate that

Ms. Sandler, I would like to talk to you longer but I have to go to the Rules Committee sometime this morning to testify on a matter pending before the committee. It is very difficult to round up members of the subcommittee. They have other matters, too.

will have to move on, but thank you very much.

Ms. SANDLER. Thank you very much.

[The complete statement referred to follows:]

PREPARED STATEMENT OF BERNICE SANDLER, DIRECTOR, PROJECT ON THE STATUS AND EDUCATION OF WOMEN, ASSOCIATION OF AMERICAN COLLEGES

I am Dr. Bernice Sandler, Executive Associate and Director of the Project on the Status and Education of Women at the Association of American Colleges. Formerly I was head of the Action Committee of the Women's Equity Action League (WEAL) which was instrumental in bringing about federal enforcement of Executive Order 11246 regarding sex discrimination in universities and colleges. I serve on the Board of numerous women's organizations, including WEAL, and also served as a member of the Advisory Committee on the Economic Role of Women to the President's Council of Economic Advisors. In 1970 I was an Education Specialist on the staff of this Sub-Committee, where I worked on the hearings on sex discrimination that laid the groundwork for Title IX and other legislation. I have also taught at the University of Maryland, and have testified before numerous Congressional Committees concerning sex discrimination in higher education.

Until very recently, sex discrimination on the campus whether against faculty, staff, or students was largely unnoticed, unchallenged and unchecked. Indeed, such discrimination against most women in the academic community was legal; only an Executive Order forbidding discrimination in employment by federal contractors applied: educational institutions without federal contracts could legally discriminate against faculty women and students. Prior to 1970, however, the Executive Order was not enforced with regard to sex or racial discrimination in universities. *The 92nd Congress*, in a little-noticed legislative explosion, *articulated a national policy to end sex discrimination on the campus.* Title VII of the Civil Rights Act of 1964, which forbids discrimination in employment, was extended to cover *all* educational institutions whether or not they receive federal monies; the Equal Pay Act was extended to cover all administrative, executive and professional employees, so that faculty are now covered; and Title IX of the Education Amendments Act of 1972 was enacted to forbid sex discrimination against students *and* employees in federally assisted education programs. There was virtually no opposition to the passage of these laws by either the educational community or the public at large. Discrimination, once only a philosophical or moral issue, is now a legal issue as well. These laws are not merely employment laws; they are *civil rights laws* with a different legislative and judicial history.

Academics have been puzzled and somewhat bewildered by the impact of these new laws. Prior to this, many institutions holding federal contracts had already felt the sting of the federal government under Executive Order 11246 as amended, which required all federal contractors to end discrimination in employment and to have a written plan of affirmative action. The application of the Executive Order coupled with the new legislation[1] has raised new questions and concerns within the academic community as to how federal law impacts upon the traditional employment practices of academia. *More charges of sex discrimination have been filed against institutions of higher learning than against any other industry in the country.* More than 500 institutions have been charged under the Executive Order 11246, about 1600 have been charged under Title VII and perhaps as many as a thousand under the Equal Pay Act.

Of all the areas in our society that have come under criticism for its treatment of women, the most frequent target has been higher education. I do not want to imply that discrimination in education is worse than the rest of society, but certainly the anger and discontent of women is sharpest in academia. Discrimination in academia is so widespread that many persons say it is a national scandal. I could tell you of women who earn less than the equally qualified men they work alongside. I can tell you of some women who have received raises of $1,000, $6,000, $10,000 and $13,000 when their institutions were required, under the Executive Order, to examine their salaries. I could tell you of women who in a time of budget cuts are terminated because they are "married and don't need the job." I could tell you, despite the changes in the law, of lives that have been damaged, and careers that have been stunted.

Sex discrimination on the campus is not a myth; it is real, and it hurts our nation by depriving it of the resources of half of our talented persons, those who were born female. The stories of discrimination against women in academia have been documented all too often, and most notably in the 1970 hearings heard before this Committee.

The problems of academia and sex discriminaiton, however, have not been solved with the passage of laws that those hearings spearheaded. Hearings held just a few months ago before a Committee of the California legislature documents that the same massive pattern of discrimination against women still exists. Not enough time has yet elapsed, and too often, the laws have been unenforced, or enforced badly. But without this legislation, there would have been little change, if any. When the 1970 hearings were held, not one member of the educational establishment accepted the offer to testify. "There is no sex discrimination on the campus," they said, "and besides, it's not a problem."

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[1] A chart entitled "Federal Laws and Regulations Concerning Sex Discrimination in Educational Institutions" prepared by the Project on the Status and Education of Women, Association of American Colleges, is available at no cost from the Office for Civil Rights, Department of Health, Education and Welfare, Washington, D.C. 20201.

Today, four years later, there is indeed acknowledgment of the problem, and institutions are slowly but surely beginning to respond. But all of the responses have not been positive; there is a good deal of resistance to change and backlash. Let me summarize briefly the legislation that covers discrimination against employees in education, particularly in terms of affirmative action.

EXECUTIVE ORDER 11246 AS AMENDED BY EXECUTIVE ORDER 11375

The Executive Order covers *only* those institutions which hold federal contracts. It prohibits discrimination in employment. It is not law, but a series of rules and regulations which contractors *agree* to follow when they accept a federal contract. Its main provision is that the contractor must have a written plan of affirmative action to "remedy the effects of past discrimination" and to prevent the continuation of current discrimination. The Department of Labor through its Office of Federal Contract Compliance is responsible for all policy matters under the Executive Order; the Department of Health, Education and Welfare, however, does the actual review and enforcement in universities and colleges.

Institutions which *voluntarily* agree to provide a service to the government by way of a contract, are required to undertake affirmative action, regardless of whether or not there has been a finding of discrimination. Such action includes, but is not limited to numerical goals. (In contrast, monies having the purpose of *assisting the institution*—rather than *providing a service* to the government—carry no affirmative action requirement.)

Should an institution fail to follow the requirements of the Executive Order, contracts can be delayed, suspended, or terminated.

THE EQUAL PAY ACT OF 1963, AS AMENDED BY TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

In the Educational Amendments Act of 1972 there is a little-noted section that extends the coverage of the Equal Pay Act of 1963 to executive, administrative and professional employees, including all faculty. It is enforced by the Wage and Hour Division of the Employment Standards Administration of the Department of Labor. Like the Executive Order, but unlike Title VII, reviews can be conducted without prior complaint. The Equal Pay Act was the first sex discrimination legislation enacted and has been successful in getting non-professional women *millions of dollars* in back pay.

After a review is conducted, if a violation is found, the employer is asked to settle on the spot, i.e., raise the wages and pay back pay to the underpaid workers. Should the employer refuse (and most don't, as 95% of the cases are settled without recourse to litigation), the Department of Labor is authorized to go to court. No affirmative action is required other than back pay.

TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 (HIGHER EDUCATION ACT)

Title IX forbids discrimination on the basis of sex in all federally assisted education programs. Both students *and* employees are covered. All institutions, whether public or private, that receive federal monies by way of a grant, loan or contract are covered. Title IX is patterned after Title VI of the Civil Rights Act of 1964 which forbids discrimination on the basis of race, color and national origin in all federally assisted programs. The Department of Health, Education and Welfare is the enforcement agency.

Affirmative action is *not* required but can be imposed after a finding of discrimination.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED BY THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972

Title VII was amended on March 24, 1972, to cover educational institutions and forbids discrimination on the basis of race, color, national origin, religion and sex in employment by unions and by employers. It applies to all institutions, public or private, whether or not they receive any federal funds. Title VII is enforced by the Equal Employment Opportunity Commission, which is appointed by the President. However, unlike the Executive Order, no affirmative action is required; employers are required merely to note discrimination in employment. A conciliation agreement or court order *may* require affirmative action, but this would be *after* a finding of discrimination. Should conciliation fail, the Equal Employment Opportunity Commission can take an employer to court.

The basic body of legal principles applying to employment discrimination have been developed in Title VII litigation and in cases involving the Fifth and Fourteenth Amendments of the Constitution.

WHEN IS AFFIRMATIVE ACTION REQUIRED?

Institutions can become involved with affirmative action in any of the following manners:

1. Any institution can voluntarily develop an affirmative action plan.
2. Institutions which voluntarily accept a government contract are required to develop affirmative action plans, including numerical goals.
3. An institution which has been charged with discrimination under Title VII, the Fourteenth Amendment, the Fifth Amendment, Title IX, and possibly the Civil Rights Acts of 1866 and 1871, may be required to develop affirmative action procedures as a result of conciliation or as a private settlement of a suit under these laws. Numerical goals may be included.
4. If conciliation or private settlement of a suit has failed, the court may impose affirmative action requirements, including numerical goals.

DISCRIMINATORY PRACTICES AND POLICIES: A VIEW FROM THE COURTS

Despite some overlapping coverage, the principles utilized by the separate federal agencies to determine policies regarding discrimination are remarkably similar. EEOC, the Department of Labor and HEW continually examine court decisions concerning discrimination and use these decisions as a solid base for determining policy.

Many of the issues now being debated somewhat ex post facto in the Halls of Ivy have already been decided in the courts.

Court decisions that were previously applicable to discrimination in nonacademic settings now extend to the educational world. Most of these decisions have occurred in cases involving race, but the principles essentially extend to other minority groups, including women.

Thus the policies of affirmative action and numerical goals were not "diabolical" plans developed "conspiratorily" by HEW and other federal agencies. *These concepts and precedents,* however, *are not based on an "industrial" model, but derive from statutes, legislative histories, judicial decisions, the principal of equity, and the Constitution.*

Civil rights legislation and court decisions are intimately related to the concept of *equity:* "setting things right." This is the guiding principle that underlies numerical goals. The Supreme Court has stated that the Court:

> . . . may order such affirmative relief as may be appropriate. [It] has not merely the power, but the *duty* to render a decree which so far as possible [will] eliminate the discriminatory effects of the past as well as bar like discrimination in the future. [*Louisiana* v. *United States,* 380 U.S. 145 (1965). Emphasis added.

The opponents of affirmative action often use the term loosely and sometimes erroneously to describe a variety of actions. Broadly speaking, affirmative actions are efforts aimed to end discrimination and to remedy the effects of past discrimination. It includes a great many activities which are not controversial, such as notifying women's and minority groups about job openings; advertising job openings rather than relying on word-of-mouth notification; developing recruiting procedures aimed at women and minorities as well as at other qualified applicants, etc.

Of all the areas involved in affirmative action, the concept of numerical goals and timetables is perhaps the most controversial. Numerical goals are often confused with quotas; the terms are often erroneously used interchangeable. However, the government and the courts have made a clear distinction between the two: goals are legal; quotas clearly violate the Constitution and numerous federal statutes. Quota systems keep people out; goals are *targets* for inclusion of people previously excluded. *Goals are an attempt to estimate what the employer's work force would look like if there was no illegal discrimination based on race or sex.* Goals are aligned, with the number or percentage of qualified women and minorities available and *not* in terms of their general representation in the population.

Under the Executive Order, the institution does its *own* analysis of its work force and determines if there is underutilization of women and/or minorities.

For example, women receive about 23% of the doctorates awarded in psychology, and studies indicate that 91% of women with doctorates work. Furthermore, approximately 23% of the psychologists listed with the National Register of Scientific and Technological Personnel are female. Thus if there were no women or substantially less than 23% women in a department of psychology, "underultilization" would exist. Such a presumption, based on statistical analysis, has been upheld in the courts. Indeed, statistics such as these can be used as *prima facie* evidence of discrimination. "Statistics often tell much, and the courts listen . . ." [*States of Alabama* v. *United States*, 304 F. 2d 853 (5th Circuit, 1962), *aff'd mem.*, 371 U.S. 37 (1962)].[2]

The courts have not hesitated to use statistics both as a measure of discrimination and as a measure of compliance. Institutions cannot rebut statistical evidence on the basis that no women or minorities applied. (An institution may have a reputation as discriminatory, and that may have had a "chilling" effect on employment applications.[3] Underutilization, under existing case law, raises a presumption of discrimination under the Executive Order and Title VII. When statistical evidence indicates that there has been a pattern of discrimination, the burden of proof is then shifted to the employer, who must then demonstrate that there is and has been no discrimination, that the job criteria are indeed job-related and that employment practices do not and have not had a discriminatory effect.

Under the Executive Order, after an institution does its own analysis it sets its own goals, based on that analysis and subject to approval by HEW. Under Title VII, when a charge has been filed, EEOC does the analysis, and EEOC and/or the courts may set a goal upon a finding of discrimination.

Goals have been upheld in the courts as relief for a substantiated *pattern* of discrimination.[4] The aim is not punitive; no one is required to be fired. Goals are simply an attempt to remedy the continued effect of discrimination in the present and to give relief to a specific class that has been discriminated against in the past.

The goal is tailor-made to a specific situation, in terms of anticipated employee turnover rate, new vacancies, promotion and upgrading, and the availability of qualified women and minorities. The goal varies for different job classifications; it could be as general as one for "psychologists" or it could be more specific, such as one for "clinical psychologists." It will obviously vary for different job classifications; and within institutions, it will vary from department to department.

GOALS AND PREFERENTIAL TREATMENT

Many people believe that goals and qaotas are identical and that goals require preferential treatment. However, the courts have indicated that affirmative action in employment is legal and does not constitute preference when undertaken to remedy past discriminatory practices. Indeed, preference is clearly illegal under the Executive Order, Title VII [see section 703(j)], and all other laws requiring non-discrimination. *No institution is required to hire women or minorities on the basis of sexual or racial preference.* To do so would clearly be illegal. Affirmative action is not aimed at creating preference but at *ending* the preference for white males which has always existed in academia.

What the Executive Order and Title VII do require is the *obligation of fair recruiting and hiring.* If an institution fails to meet the goals, it then has to show that it made a good faith effort to recruit, hire and promote qualified women and minorities, and it has to be able to produce records documenting those efforts. For example, the Department Head may show that he or she has contacted women's groups (such as the women's caucuses relevant to the discipline), has contacted individual women scholars for referral of candidates, has included in letters to colleagues and in job advertisements statements like

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[2] See also: *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245 (10th Cir. 1970, *cert. denied*, 401 U.S. 423 (1971) *rehearing denied*, 401 U.S. 1014 (1971); *Carter* v. *Gallagher*, 452 F. 2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 (8th Cir. 1970).

[3] *Lea* v. *Cone Mills*, 301 F. Supp. 97 (M.C.N.C. 1969); *Cypress* v. *Newport News General and Non-Secretarian Hospital Assoc.* 375 F. 2d 648 (4th Cir. 1967).

[4] For a lengthy but only partial listing of cases, see *Technical Comment #1*, International Association of Official Human Rights Agencies. 1625 K St., N.W., Washington, D.C. 20006, September 7, 1972. When appealed to the Supreme Court, the Court has let these decisions stand by denying certiorari.

"women and minorities, including minority women, are welcome to apply" and has also evaluated those already in the department who might qualify for the opening. If, after doing all this, it turns out that all the women were poorly qualified, and the man hired was indeed the best qualified applicant, the employer can document a good faith effort at affirmative action and thus can justify the decision to hire the white male. If so, the employer has discharged the obligation under Executive Order; *the obligation to meet the goal is not absolute.*

There is no requirement whatsoever that would force academicians to hire lesser qualified women or minorities. If the best qualified person is white and male, then that person can be hired. What the employer must be able to demonstrate is three-fold:

1. A genuine good faith effort to recruit women and minorities (good faith does *not* mean calling one's white male colleague, asking if he knows a good *man*, and then after the hiring is completed, saying, "Certainly I'd have been glad to hire a 'qualified' woman or minority person if I could have found one. Unfortunately, none applied.");
2. Specification of job-related objective criteria, *before* the hiring process. The criteria for professional jobs are often complex and difficult to assess; nevertheless, they are subject to the same requirements as other jobs. Subjective, intuitive judgments are not acceptable criteria for hiring. For example, the courts have already held that promotional policies for executives are subject to standards of objectivity and must be job related.[5]
3. Equal application of criteria. Whatever standards or criteria are set for white men must be applied equally to women and minorities.

In some instances, the *courts* have imposed a kind of limited preference—more stringent numerical goals than those required by institutions under the Executive Order. Court ordered goals have occurred only in public employment and industrial settings, and not in academia.

The differences between court ordered goals and those required under the Executive Order are critical:

1. Under the Executive Order, goals are set *by the institution*, after it does its own analysis. In a court situation, the federal government does the analysis and sets the goal.

2. Under the Executive Order, the *best-qualified* person may be hired. *Only in a court* situation, can a lesser qualified person be hired. This limited preference has been allowed in 6 courts *only* after a finding of discrimination, and for a limited time only. The affirmative action requirements that institutions *voluntarily* assume when they accept a contract, however, do not in any way *allow or compel* institutions to give preference to lesser qualified persons on the basis of race, color, national origin or sex.

In the few cases where goals have been overturned by the courts,[6] it was because the goal was not a goal but a quota, and because there was no provision to insure that qualified persons were hired.

IS PREFERENCE REQUIRED BY LAW? IS PREFERENCE BEING GIVEN TO WOMEN AND MINORITIES IN ACADEMIA?

Recently there have been substantial questions raised about affirmative action and its implications for academia. Richard Lester's Report for the Carnegie Commission on Higher Education[7] (and which, incidentally, the Commission does *not* endorse) is typical of the objections raised.

Lester claims that institutions are being "forced" to hire less qualified women and minorities, and that institutions are giving sexual and racial preference in hiring. He gives no data whatsoever to support this claim.

Any institution that gives preference in hiring on the basis of sex or race or ethnic origin is violating the law. Those that claim that they have been *forced* to give preference to lesser qualified women and minorities have sadly misunderstood the law and their rights under it.

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[5] *Marquez v. Ford Motor Co.*, Omaha District Sales Office, 440 F. 2d 1157 (8th Cir. 1971).

[6] See, e.g., the 3rd Circuit decision overturning part of the order by the United States District Court in the Eastern District of Pennsylvania involving the hiring of policemen. *Commonwealth of Philadelphia v. O'Neill*, 5 EPD 1974: "This order does not, certainly on its face, limit the pool from which applicants are to be chosen to those necessarily qualified to be policemen."

[7] *Antibias Regulations of Universities*, by Richard Lester, McGraw-Hill, 1974.

The data concerning the increase in the hiring of women and minorities in academia simply do not uphold the academic myth that women and minorities are being hired in any great numbers by the academic community. Lester himself quotes the ACE study which reports that over the five year period from 1968 to 1973, minority faculty employment increased .7% to 2.9% of the total faculty, and women increased all of .9%, from 19.1 to 20% of the total faculty. Many institutions after a year or two of affirmative action programs report a *drop* in women faculty, even though the number and percentage of male faculty increased during that period.

The National Academy of Sciences reports that the unemployment of women with doctorates in science, engineering and social sciences is more than four times as high as the unemployment rate of their male colleagues: 3.9% compared to .9%.[8] A study at the University of Michigan[9] of recent doctoral recipients showed that women doctorates were unemployed or under-employed at three times the rate of their male counterparts. In the biological and medical sciences, about 50% of the men who were in teaching institutions were in schools regarded as comparable to the University of Michigan; for the women, only 16% were comparably placed.

Similar studies conducted within particular disciplines show the same pattern. The fear that unqualified women are invading the tenured ranks seems to have little basis in fact. Of nearly 200 institutions[10] with graduate programs in chemistry (which is virtually all of the institutions which have such programs), between 1971 and 1973, the increase in the number of women at the full professorship level was exactly *one*. At the associate professor level, a net gain of seven was reported. While it is true that the pool of women chemists is not very deep, there have been approximately *1,500* women who received Ph.D.'s in chemistry since 1960. Were there really only eight that were qualified to become associate or full professors in a two-year period? Somehow, women who are qualified to receive Ph.D.'s at our major institutions are "unqualified" to teach at those same institutions.

While it is true that academic hiring has indeed slowed down, many institutions are still increasing their faculty, although at a far slower rate than previously. But few women and minorities are being hired, and when they are hired it is almost always at the lower ranks. The University of Minnesota, for example, reported that about half of its increase in academic staff consisted of white males. The women and minorities were hired in *low* positions, part-time, one year contracts, instructorships and the like. Only *three* of the fifty-three associate professor appointments were to women, and all three were either part-time or visiting appointments.

Lester's argument that academic quality will decrease is partly based on an inaccurate reading of Revised Order #4 of the Executive Order 11246. He quotes from the Order as follows: "Neither minority nor female employees should be required to possess higher qualifications than those of the lowest qualified incumbent.[11] He neglects to mention, however, that this is *not a requirement* of Revised Order #4 but *merely a suggestion*. More importantly, he does not mention that HEW has stated innumerable times that the particular suggestion does *not* apply to academic positions.

Some academicians argue that the government only looks at *job content* and not at individual contributions and qualifications. For example, Lester claims the Equal Pay Act makes job content the controlling factor, and thus it "is difficult to apply to variations in the quality of intellectual performance and creativity." [12] If that were true, of course academia would suffer. Fortunately, however, the good professor is in error again.[13] The Equal Pay Act, Title VII and the Executive

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[8] *Doctoral Scientists and Engineers in the United States, 1973 Profile.* National Academy of Sciences, Washington, D.C. 20418, March 1974.

[9] *The Higher, the Fewer.* Report and Recommendations of the Committee to Study the Status of Women in Graduate Education and Later Careers. School of Graduate Study, University of Michigan, Ann Arbor, Michigan [illegible]8104, March 1974.

[10] *Women on the Chemistry Faculties of Institutions Granting the Ph.D. in Chemistry.* Unpublished report by the Women Chemists Committee, compiled by Dr. Agnes Ann Green, Immaculate Heart College, Los Angeles, CA 90027, July 1974.

[11] Lester, p. 27, 99.

[12] Lester, p. 130.

[13] Numerous technical errors abound in his book. For example, Lester is in error when he talks about the *five* years of academic experience with affirmative action when in fact the Executive Order has only been enforced for *four* years. (The first antibias investigation occurred in the spring of 1970, making a total of *four* years between the first investigation and the publication of Lester's book in mid-1974.) Several dates and laws are incorrectly stated.

Order all specifically *allow differences in pay and rank to be based on seniority and merit*, provided that the seniority and merit systems are not based on sex or any other impermissable classification.

The myth is that reverse discrimination is endemic, and that white males are having difficulty because preference is being given to women and minorities. It is of course true that in a time of restricted budgets and a contracted economy it is harder for *anyone*, male or female, to find academic employment, but that is *not* reverse discrimination.

Some of the complaints have been specious; several white men have complained of reverse discrimination simply because a woman was hired and they were not. The mere hiring of a woman, no matter how qualified, is assumed by some to be *prima facie* evidence of "reverse discrimination." In fact, the few women that have been hired have generally been superbly qualified. Our Project has seen no date to confirm, nor does Lester or anyone else offer data indicating that institutions have given preference in any large way on the basis of race or sex and indeed hired unqualified or lesser qualified women and minorities. Such preference, if it existed, would violate the law.

On occasion, some administrators have used affirmative action as an excuse for turning down applicants they did not want to hire. One department head at a large Western university wrote four of the five applicants for a position that he could not hire them because HEW "insisted" he hire a woman or minority. However, the fifth candidate—the one who got the job—was neither female nor minority; it was a white male. Needless to say, practices such as this violate the law, as well as generating inaccurate complaints of reverse discrimination.

Academics are not worried about women wanting good jobs *outside* of academia. They are worried about competing with women for the same jobs that they want. Women, like minorities, are an economic threat to white males. As more women and minorities are treated more fairly, white males will have to compete with them for the limited number of jobs. Some of these men who would have been hired if women and minorities were kept out, will now be turned down because they were not as well qualified as the women and minorities hired. But that isnot reverse discrimination.

On the other hand, some complaints of reverse discrimination have been justified. Some administrators have misunderstood the federal requirements and have erroneously believed that only women and minorities, including minority women, could be hired. HEW has played a major role in such misconceptions, and criticism of HEW for inefficiency, incompetancy and inconsistent interpretations is more than justified.

However, to confuse the incompetance of HEW with defects in the law itself would be tragic. It would be like saying that because *some* police are inefficient and incompetant, we should therefore abolish the laws they are supposed to enforce. Too often, there has been a vast difference between what the law actually requires and the lack of clear policies at HEW.

Certainly HEW's OCR has been one of the worst-run agencies in the government. The Women's Equity Action League (WEAL) and several other women's groups are planning to sue HEW for its poor enforcement. Also, the General Accounting Office (GAO), the investigative arm of the Congress, is currently reviewing OCR's activities.

What some administrators object to most is the federal interference with the "traditional" methods of employment decisions in academia. No one wants the government to watch over their shoulder; but, on the other hand, it is difficult to ju[illegible] why academia alone should be exempt from the same rules and regulations that apply to every other industry in the country.

Any attempt to exempt academia from the federal regulations and statutes that prohibit discrimination would deprive women and minority faculty of the fundamental civil rights now enjoyed by all citizens of this country. It would be the first step backward in civil rights legislation, and it would set a dangerous precedent for other segments of society seeking exemption from these laws. Moreover, the Congress specifically rejected the notion that academic institutions should be treated separately from the rest of the country when it amended in 1972, Title VII of the Civil Rights Act of 1964 by deleting the exemption for educational institutions.

Administrators are understandably concerned about Federal "interference" in hiring and promotion decisions. If you have never had to justify a hiring or promotion decision, the threat of having to put it in writing can be quite upsetting. On the other hand, if an administrator or committee *cannot* justify a decision, then either someone is in the wrong job or getting the wrong salary, or else you have a very poor administrator or committee. Despite claims of an objective merit system, academic judgments in the past have too often been intuitive and subjective. Now instead of being able to justify a candidate merely by saying, "Dr. X is a fine fellow with a good reputation who has published a good deal," department heads will have to develop specific, objective criteria and be able to demonstrate that the candidate is the *very best* person recruited from the largest possible pool, a pool which will include qualified women and minorities. The demands of affirmative action, far from diminishing academic quality, are likely to *increase* it by requiring that hiring and promotion policies be truly based on merit without discrimination.

Institutions are upset because they have generally relied on the "old boy" method of recruiting and hiring—the vast informal network of old school chums, colleagues and drinking buddies, etc.—a network to which women and minorities rarely have access. The merit system has always been a closed merit system, for large portions of the available, qualified pool have been excluded. The government is not asking that the merit system be abolished, but only that it be opened to a larger pool of qualified persons. To recruit in a different manner means change, and change is never easy, particularly if it means women and minorities coming in to challenge the power base.

HEW, incidentally, *does not set criteria* for hiring and promotion; rightfully, that is a prerogative of the institution and its departments. What the government does ask is that the criteria be related to the job, and that institutions specify what the criteria are and how they are evaluated.

No one is questioning the right and responsibility of the tenured faculty to recommend new appointments, reappointments, promotions and salary increases. The government does not disturb this arrangement other than to ask that the persons making decisions be able to *justify* that those decisions were indeed made on the basis of quality and individual merit, and not based on any discriminatory factors. The justification of such decisions should not hamper the governance and decision making traditions of academia; indeed it is far more likely to improve the quality of such decisions.

Just as there are those in the private sector of the economy who argue that federal prohibitions against discrimination will destroy the "free enterprise system," there are those in the academic sector who argue that the same federal prohibitions will destroy "academic freedom." Yet academic freedom has traditionally meant the right to publish, to teach and work with controversial ideas both in and out of the classroom. Academic freedom has never meant the denial of equal opportunity. How does it violate academic freedom to ask an end to preferences that have always existed: the preference of males, the preference for members of the "old boy" club? In one sense, the words "academic freedom" have become a smokescreen to obscure the basic issues. Women's groups claim that the term is analogous to the cry of "states' rights" and "quality education."

Many persons feel that the principles developed by the courts in industrial settings should not be applied to academia. While it is indeed true that academia is unique in many ways, it is indeed difficult to justify that employment in academia—other than in its decentralization—is markedly different from any other professional employment. Certainly hospital clinics, law firms, top management in industry, etc. also want to hire the best qualified persons judged on the basis of professional competence. If the principles developed under our statutes and constitution are not applicable to academia, then what indeed would apply? Certainly the time-honored academic principle of hiring the *best* qualified on the basis of merit is not threatened by regulations which require exactly that: hiring the best qualified person on the basis of merit. Shall we exempt institutions from having to justify a hiring decision? Shall we exempt academic institutions from having criteria that are related to the job at hand and are not biased? Shall we exempt institutions from Executive Order requirements to do a self-study to uncover discrimination?

THE DANGERS OF ARBITRATION AS A PROPOSED SOLUTION

There are many persons, who are now promulgating binding arbitration as a way of handling academic discrimination. Such a procedure would have disastrous effects on the rights of women and minorities, for typically, arbitration is not concerned with the principles of redress of grievances or inequities, but with working out a compromise position between two adversaries. The rights of the individual and due process are not essential to arbitration procedures; arbitrators are not required to follow federal standards or court derived principles in working out solutions. Thus an arbitration panel would not need to follow the definition of discrimination articulated by the Supreme Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). How would remedies be determined if the concept of equity is abandoned? What would be the standard of proof if there is no body of past decisions to fall back upon? Constitutional due process which is now assured in all forums involving discrimination would not be assured under arbitration. If, on the other hand, such concepts were incorporated by law, into a binding arbitration process, then it is not clear how the arbitration process would be better than the conciliation process already available under Title VII. The Equal Employment Opportunity Commission requires that all complaints, upon a finding of discrimination, be conciliated. Should either party be unhappy with the conciliation proceedings, the courts are available. In contrast, any kind of binding arbitration would almost wholly bypass our court system, and would probably rule out all class complaints and complaints concerning *patterns* of discrimination.

Although Lester's proposal for binding arbitration would allow the complainant to insist that the mediator or arbitrator have the same power to levy remedies as a federal or state agency or the courts, he is not in favor of using court-developed principles in the mediation: the procedures and decisions would be "more flexible and better adapted" to the circumstances than decisions "based on precedents developed in previous cases on the basis of industrial employment." Thus the "principles" utilized by the mediator-arbitrator would not be those that have been developed by our courts. New principles would have to be developed, and there is no assurance as to what direction these might go.

If the mediation-arbitration procedure was required of all academic discrimination complaints, it might well create a separate class of citizens: those with discrimination complaints in academia would have one set of procedures, and the rest of the country would have another. In effect, academic women and minorities, as well as academic men claiming reverse discrimination, would have *less* protection under arbitration than they do now. There would be *no right of appeal* nor *any body of previous decisions to fall back upon*. Moreover, unless the procedure was required *by law*, it might not be binding on women and minorities, for as the Supreme Court recently ruled in *Alexander* v. *Gardner-Denver Co.*, —— U.S. —— (1974), a union contract requiring arbitration does *not* bar an employee from using Title VII machinery. Employees are not prohibited from filing charges of discrimination against their employer (or union) *even if an arbitrator has rejected their claim*. Thus, an employee is not bound to use the contract grievance machinery in instances involving discrimination, nor is the employee (in contrast to the employer) bound by an adverse findings of an arbitrator. Justice Powell, who delivered the unanimous decision, stated that while the arbitrators' opinion may be entitled to some weight as evidence in the worker's Title VII claim, it was the federal courts and not the arbitrator that would have the last word.

Whether universities would agree to a procedure that is binding upon them but not on the grievant is questionable. Unless the grievant felt that he or she would get fairer treatment from the panel than from the courts, there might be little incentive to use it, particularly if the principles on which it would base its decision are unknown and likely not to be as beneficial (from the grievant's standpoint) as those that could be obtained by EEOC and the courts. While there might be economic incentives for a grievant to use the panel in preference to taking one's own suit to court, grievants now have the option of allowing EEOC to handle the complaint, with its power of requesting an injunction and using its own attorneys at no expense to the grievant in a court case. The large backlog in EEOC cases, however, might make the panel more attractive in terms of no backlog. (However, with 1,600 institutions charged under EEOC between 1972–1974, the panel might quickly run into the same backlog problem.)

Moreover, as well as individuals giving up their statutory rights, arbitration might also conflict with collective bargaining procedures: individuals who were involved in union contracts would have to choose between their own required arbitration procedures and those set up for discrimination problems, or perhaps a person who simultaneously claimed discrimination *and* violation of union procedures would have two sets of arbitration proceedings to follow.

Among the advantages Lester sees for the arbitration process is that lawyers are less likely to be involved and also that the confidentiality of records would be maintained. If the panel had any teeth, such as the power to grant tenure or back pay as a remedy, it is highly doubtful that either party would care to present their case without legal aid. Moreover, the issue of confidentiality, while understandably of great concern to institutions, is perhaps somewhat of a red herring. EEOC, under Title VII, is prohibited *by law* from releasing any information whatsoever concerning any case before them, including the names of either party to the complaint.[14] Should the case go to court, records can be made public, although either side could ask that the records be heard *in camera*. The Equal Pay Act is enforced with similar requirements of confidentiality; names and records are not released unless the case goes to court. Although the Executive Order has no such restrictions, HEW will not release any confidential records concerning individuals and is allowed to withhold these records under the Freedom of Information Act.

Institutions cannot on their won withhold such records from any government enforcement agency,[15] but these records as mentioned above are indeed protected from public scrutiny.

Any type of binding arbitration procedure written into law to cover academics could open up a new series of court cases involving its relationship to Title IX, Title VII, The Equal Pay Act, Executive Order 11246, the Civil Rights Acts of 1866 and 1871 (Sections 1981, 1983 and 1985), the Fifth and Fourteenth Amendments. Would the rights of individuals under these acts be suspended? Would women and minorities choosing an academic career have *less* or *different* rights from citizens choosing other types of employment?

CONCLUSION

In summary, affirmative action is coming under a good deal of criticism, partly because it has been badly administered, and partly because some administrators have misunderstood the federal requirements. It would be tragic for the rights of citizens in this country if we confuse poor administration with imperfections in the law itself.

Yet at the same time that many people are critical of HEW as being inconsistent and unable to understand academia, the same persons are recommending that there be only one single agency to deal with discrimination in academia and that that agency be HEW. Some women's groups interpret this as an indication that institutions would prefer HEW because it is most likely to be the weakest of all the enforcement agencies. Whether this is true or not is unclear; however, of all the agencies involved, HEW is most prone to respond to pressure from academic institutions, so women's groups are somewhat concerned about the rights of individuals in those circumstances. It is also important to note in this connection that the Congress in 1972 rejected the notion of any single mammoth enforcement agency for all discrimination complaints.[16] A *single* enforcement agency would likely be far more rigid in requirements for institutions than is currently the case.

Moreover, the basic policies of the several agencies are remarkably similar: there are no conflicts, although the EEOC is somewhat stricter in its guidelines than those of the Departments of Labor and HEW in terms of pensions and maternity leave. However, any institution conforming to EEOC guidelines will be in compliance with those of the other departments.

Data collection is gradually being unified, with the preparation of the new EEOC 6 form for educational institutions. Despite complaints, the collection of data is one of the unexpected benefits of government regulation: for the first time many institutions are collecting data that is not only necessary for affirmative action but is essential for effective fiscal planning and management. (For example, one of the most prestigious institutions in New York could not provide a simple list of all its personnel when asked to do so by HEW.) Such data, although sometimes expensive to collect initially, will repay its costs[17] as a result of better evaluation and planning on the part of institutions.

Despite all the complaints and criticisms, it is interesting to note that *not one institution has ever had funds withdrawn or terminated because of dis-*

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[14] The parties of the complaint, however, are not bound by this requirement.

[15] *EEOC v. University of New Mexico*, 7 EPD 9118, (D.C., N.M., November 2, 1973).

[16] The charge that the Executive Order has no Congressional approval is somewhat specious; the Congress has specifically *authorized* the budgets for various federal agencies to enforce the Executive Order.

[17] According to testimony before this Committee, the University of California at Berkeley will spend $3 million on affirmative action this coming year. The New York Times (Sept. 15, 1974) reports that Berkeley's budget for the year is $493 million. Thus, the amount spent on affirmative action represents 6/10 of 1% of the total budget for that campus.

criminaion. Not one institution has ever had new contracts delayed because of discrimination, although some institutions have had delays because of a lack of an affirmative action plan. *Not one institution has ever requested a hearing* under the Executive Order. *Not one institution has ever had funds terminated, withdrawn, or delayed because of its failure to meet numerical goals. Not one charge of a pattern of discrimination filed with HEW has ever been refuted.*

The academic community is one of the most powerful in this country—not because of money or direct power, but because it is responsible for training the youth and leaders of America. If women and minorities are to have the birthright that is that of their white brothers they must have the opportunity to partake in the fruits of higher education as students, as staff, as faculty, as administrators. To weaken *any* of the laws that protect them from discrimination, particularly those that affect education, would be a serious abrogation and denial of the rights of women and minorities.

The legislation that prohibits discrimination on the campus is very new. We had all hoped that with the passage of these laws that prohibited discrimination on the campus a new era had begun. But already, within a few short years the backlash has begun and attempts to weaken existing laws and regulations are well underway. Should any specific legislation be introduced which would in any way abrogate their current rights in academia, I would hope that this Committee would invite testimony from national women's groups as well as those on the campus *before* such legislation was voted upon. Women are the fastest growing, and potentially the largest advocacy group on the campus, and indeed, in the nation. No longer will they weep if they are denied the rights that are those of their brothers. For women have something else to do. They are learning the politics of change. They are learning that the hand that rocks the cradle can indeed rock the boat. And the campus, and the nation, will never be the same again.

WOMEN IN HIGHER EDUCATION—A PROGRESS REPORT

(By Bernice Sandler)[1]

Three years ago, if you asked almost any administrator about sex discrimination on his campus (and most administrators are "he's"), the answer you would have gotten would have been something like this: "There is no sex discrimination on our campus; it's not a problem." That was precisely what Rep. Edith Green's Special Subcommittee on Education was told in 1970, when she tried to get someone from the educational establishment to testify on sex discrimination for her massive hearings on the problems of campus women. She was unable to get any male administrator to testify on the subject. Fortunately, women on the campus were not as shy or reticent, as they were able to produce more than 1,200 pages of testimony documenting a massive pattern of discrimination against women faculty, students and staff.

A few months before the hearings began, a little known and small women's civil rights group, the Women's Equity Action League (WEAL), had begun a massive campaign to end campus sex discrimination. At that time, there were no laws whatsoever that prohibited sex discrimination against women students or women faculty. The only thing that applied was a little noticed Executive Order (11246, as amended) that prohibited all Federal contractors from discriminating in employment on the basis of race, color, religion, national origin and sex. It had been used mainly for minority blue collar workers in the construction industry; it had not been applied to universities and colleges nor in regard to sex discrimination. More than 500 charges of a pattern of discrimination have now been filed by WEAL and other groups. Not one of these charges investigated by HEW has yet been refuted. Reports show some of our finest institutions were accused. Certainly, of all the areas in our society that have come under criticism for their treatment of women, the most frequent target has been higher education. Perhaps because education holds out the promise of equality and equal opportunity, women on the campuses of this country are most angry. They have discovered that the promise for them is broken, and that the myth of equality is just that. They were told that education is a woman's field, and they have now seen study after study, report after report which clearly indicate that women are second class citizens on the campus.

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Despite the academic myth that things have been getting better for women, the position of women on the campus is not very different from what it was 20 or 30 years ago, and in some ways it is worse. The percentage of women graduate students is smaller *now* than it was in 1930. Expansion of faculty in the postwar period was largely one of male expansion: The proportion of women faculty has dropped continuously over the past 100 years, from a third of the positions in 1870 to less than a fourth today. In many of the most prestigious institutions, women faculty are less than 10 percent. Likewise, many institutions have a lower proportion of women faculty now than they did in 1930. Even worse, at least one very prestigious institution has a lower proportion of women on its faculty today than it did in 1899!

WHAT HAPPENS TO WOMEN ON CAMPUS

The pattern of discrimination on the campus mirrors that of the rest of society. Women are far more likely to be hired by lower paying, less well known institutions and when they are hired, they are likely to be promoted far more slowly than men. The higher the rank, the fewer the women. Women are 43 percent of the instructors, 23 percent of the assistant professors, 15 percent of the associate professors, 9 percent of the full professors and very few of the departmental chairmen. Study after study has documented the fact that women with the same qualifications as men are hired less frequently and receive less pay than their male colleagues. Ninety percent of the men with doctorates and 20 years of experience will be full professors; for women with identical qualifications, barely half will attain that rank.

SALARY DIFFERENCES

Salary differences are the rule rather than the exception. At one western state university, for example, women earned an average of 15 to 20 percent less than their male colleagues. At some others the difference is far greater. Sometimes it is said that women receive less pay and do not get promoted simply because they are not as well qualified; studies indicate this is not true. However, because of government pressure, many institutions have begun to examine women's salaries, and in virtually every case, salaries of women faculty and staff have been substantially raised. For example, the University of Wisconsin gave 870 women "equity adjustment increases" ranging from $20 to over $6,000. The University of Nebraska raised the salaries of 289 women employees at a cost of some $400,000 and the University of South Florida has given salary increases totaling $151,000 to 100 women.

I could tell you of women who have been temporary employees, without fringe benefits or chance of promotion, for more than 10 years; of women who have been assistant professors for more than 20 years, even of women who have worked for years with no pay at all. I can tell you of women students who are told that what their department is looking for is "bright young men." I can tell you of students who entered undergraduate work with hopes of becoming physicians and who settled for medical technician, of others, who wanted to become scientists but who teach high school science instead, because professors tell them that these are not suitable fields for women. I can tell you of professors who still feel that "women shouldn't be professionals," and who believe that education is wasted on women, despite the fact that the more education a women has the more likely she is to work, and despite the fact that 91 percent of women with doctorates work.

THE "QUALIFIED WOMAN" MYTH

I could tell you of the myth of the shortage of "qualified women." Of course, if there were no discrimination in admissions, there would be more women on the campus. But still, on too many campuses, women are not hired in any number approaching the actual number of doctorates awarded to women by those institutions. Let me give you an example. In 1970–71 the percentage of women faculty in psychology at Columbia University was zero percent, despite the fact that Columbia awarded about 36 percent of its doctorates in psychology to women. Many other similar statistics at other universities could be mentioned.

WOMEN IN ADMINISTRATION

In administration, women are virtually nonexistent. Few women head departments other than the strictly "female" fields such as home economics and nursing.

The number and percentage of women in administrative positions are less now than they were 25 or even 10 years ago. Of the 50 largest academic libraries, only one is headed by a woman. Women college presidents are decreasing; even women's colleges openly look for male presidents. If you know any young woman who would like to be a college president—and why shouldn't a young woman aim for this?—the best advice would be "get thee to a nunnery," for almost all of the women presidents are at the Catholic institutions. In fact, if it were not for the Sisters, the number of women college presidents would be *less than the number of whooping cranes*. Less than one percent of our college presidents are women; perhaps we ought to declare women presidents an endangered species.

POLICIES AND PRACTICES

Academic policies are often discriminatory in their effect. Nepotism rules—written or unwritten—almost always limit the wife's ability to hold a comparable job at the same institution as her husband. Often the rules are circumvented to allow her to be hired but at a lower rate of pay, with no possibility of tenure and often with no fringe benefits. Recently, Stanford, Oberlin and the Universities of Michigan, Maine and Minnesota have revised or abolished their nepotism rules so that husbands and wives can work in the same institution and in the same department, provided that both meet the standards of employment and that neither is involved in making employment decisions about the other. Nepotism rules which have the effect of keeping women out of faculty jobs violate the law but still exist.

Fringe benefits also penalize women. On some campuses, *wives* of faculty members can get maternity coverage on their health insurance, but women *faculty* members cannot get the same benefit. In other places, women cannot use sick leave for childbirth, nor do they retain their job if they leave for childbirth or childrearing, even for a short period. (Young men often spend two years away from *their* jobs in military service.) Title VII and the Executive Order require maternity leave for childbirth and childrearing.

Similarly, TIAA and other retirement benefits, based on actuarial tables, pay women less (about 10–16 percent) even though they have contributed the same amount as the men they have worked with. The rationale is that women live longer. However, the mortality gap between whites and blacks is far greater than that between men and women, yet we would all be up in arms if insurance companies were to have differential benefits based on race. Such differential benefits are a violation of Title VII.

Women on part-time appointments are often not considered eligible for full-time appointments, even though they may be as well or better qualified than the males who hold those positions. Part-time female faculty are not eligible for tenure in most schools, although men who work part-time in *two* departments may be given a different title, a *joint appointment*, carrying the salary and status of a full-time employee.

A few schools (Harvard, Princeton and Stanford, for example) have recently changed their policy: Part-time faculty can ascend the tenure ladder, albeit at a slower rate. Curiously enough, many schools have a substantial portion of part-time faculty in the law and medical schools, with tenure and prorated salaries for these males.

On some campuses, there is no way for a woman to fight through university or college channels if she feels she has been discriminated against on the basis of sex. Numerous women who have been actively fighting sex discrimination have lost their jobs and literally have no means of redress on the campus.

Most hiring at the professional level occurs by word-of-mouth recruiting. Women call this the "old boy network" whereby a man asks a male colleague, "Charlie, do you know a good man for the job?" Charlie does indeed know a good person for the job, and he is almost always white and male. Women and minorities are outside this informal network of old school chums, drinking buddies, etc. The merit system has always been a *closed* merit system, for large portions of the available qualified pool are excluded.

A word-of-mouth recruiting system that excludes large portions of the available pool is a violation of the law. The 1971 Griggs decisions, with the majority opinion written by Chief Justice Burger, enunciates the principle that any policy or practice which is *fair on its face yet cannot be justified by business necessity*, and which *has a disproportionate effect on a protected class*, e.g., women and minorities, is discriminatory. Title VII and the Executive Order impose a *duty* of fair recruitment upon the employer.

CRITERIA FOR HIRING AND PROMOTION

Formerly, employers in universities and colleges have never had to specify criteria for hiring and promotion. Federal law now requires that institutions, like all employers, develop objective, job related criteria. The govenment can ask why Mr. X is a full professor and Ms. Y is only a lecturer, particularly when X has not published since he rewrote his thesis and is a terror to the students, while Ms. Y has a string of publications and is continually given the "best teacher" award, etc. The government will not set criteria for hiring and promotion; rightfully the institution and/or department heads should do this. What the government *does* ask is why someone was hired or not hired, and what the criteria were. Administrators who have previously justified hiring decisions on a very limited basis ("He has a Ph.D. from Harvard and is a well known respected scholar"), are understandably upset when asked for more specific criteria. Admittedly, professional employment decisions are complex but they are not exempt from law. The courts have ruled in Title VII cases that subjective opinion of supervisors is not sufficient; positive empirical or objective job related criteria are necessary.

Too often in academia, when criteria have been spelled out they have been hand-tailored to a particular candidate *after* a preliminary and unofficial decision to hire has been made. Thus, if John Doe's specialty is some abstruse area and the department wants to hire him, the department then *ex post facto* "needs" someone in that particular area. Others who then apply for that opening cannot meet the criteria specifically tailored for the preselected individual.

DISCRIMINATION AGAINST STUDENTS

Until the June 1972 passage of Title IX of the Education Amendments Act, discrimination against students on the basis of sex was legal. Such discrimination in all federally assisted education programs is now forbidden. Although all private undergraduate institutions are exempt from the admissions provisions of Title IX, those institutions are *not* exempt from the antidiscrimination provisions concerning students once they are admitted.

Girls need higher grades and higher test scores to get into many colleges. Although the percentage of women undergraduates has increased since the 1950s to 42 percent, it is still *less* than the percentage of women undergraduates in 1920, when women were 47 percent of the undergraduates, or in 1899, when 53 percent of all undergraduate degrees went to women. Many institutions maintain artificial quotas such as 2½ men to every woman, or 60 percent men and 40 percent women.

The proportion of boys who make it to college despite high school grades of C or lower is double that for girls, 40 percent to 20 percent. At the undergraduate level the exceptionally gifted woman will not face very much discrimination in admission. But since most students are not exceptionally gifted, and indeed more students are in the "low ability" group, it is clear that many women are discriminated against in admission.

"We'd love to have more girls but we just don't have the room for them" is a common remark. Yet dormitories, like hotels, apartments and houses, are not built any differently for one sex or the other. Women's groups note that some institutions claiming dormitory shortages do not sanction women students living off campus, although men students may.

On too many campuses, women students are treated differently, with far more restrictions regarding hours and freedom to live off campus. Gynecological services are not available to women students, although urological services are for men. Many students are denied leave for pregnancy and childbirth. Honorary societies are often segregated by sex, with the men's honoraries being far more prestigious than the women's.

Many young women are actively or subtly discouraged from considering serious academic or professional endeavor. Professors are not exempt from believing erroneous stereotyped notions about women students. Women are sometimes denied admission to graduate school because of logic like this: "If she's *not* married, she'll get married. If she *is* married, then she'll probably have children. If she has children, she can't possibly be committed to study. If her children are older, then she's too old to begin training, and what a pity it is that she didn't start sooner."

Supposedly, education is wasted on women, for they marry and give up their careers. Yet the truth is that 70 percent of women college graduates work. The average working woman today is married. More than half the mothers of school age children work. Women are nearly half of the labor force, about 40 percent. At age 35, women with husbands can expect to work fully 24 years. At the same age, 35, women who are widowed, separated or divorced have a worklife expectancy of 28 years.

Many of the most ardent supporters of civil rights for blacks, Indians, Spanish-speaking Americans and other minorities simply do not view sex discrimination as "real" discrimination. They fail to notice that half of each minority group are women. Too often helping minorities has meant helping minority males only, and helping women has meant white women only. It helps minority women little to say that the reason we keep them out of a program is not because of their race but just because of their sex.

SOME GOOD NEWS

All of this, of course, is the bad news. Now let me give you some of the good news.

Since 1970, there has been a legislative explosion, as Congress recognized the necessity to end sex discrimination in education. Title VII of the Civil Rights Act of 1964, which covers employment, was amended in March 1972 to cover all educational institutions, public or private, regardless of whether or not they receive Federal monies. Title VI of the same Act prohibits discrimination against the beneficiaries, e.g. students, in federally assisted programs, but it only applies to discrimination on the basis of race, color and national origin, not sex; however, with the June 1972 passage of the Education Amendments Act, Title IX now prohibits discrimination on the basis of sex in all federally assisted education programs.

Congress also extended the Equal Pay Act to cover executive, administrative and professional women (e.g. faculty) in June 1972, and in October 1972 sex discrimination was added to the jurisdiction of the U.S. Commission on Civil Rights. However, although Congress now has clearly mandated a national policy against sex discrimination on the campus, it still exists.

On campus after campus, women students, staff and faculty are banding together to examine their status. One of the most interesting aspects of the women's movement is that there is a good deal of interchange and working together between diverse kinds of people. I have seen older conservative women working with young radicals on women's issues, white women with minority women, secretaries with Ph.D.s—for the women's movement cuts across class, race and social lines. This cross-fertilization of ideas has given added strength, flexibility and breadth to women's groups. More and more women are becoming aware of the discrimination they face on campus, and they are pressing actively for change, using the law to its fullest extent. Besides the charges filed with HEW, women have begun to use the courts. Some of these suits may involve millions of dollars in damages and back pay. At the same time women are also filing charges with the Equal Employment Opportunity Commission which enforces Title VII and are calling in the Equal Pay Division of the Department of Labor.

Equally important is the fact that some men on the campus have finally recognized sex discrimination as a legitimate problem of academia. We are getting a good deal more lip service than we ever did and, of course, recognition of the problem is indeed the very first step in solving it. Sometimes we even get tokenism, which may lead to more genuine affirmative action.

As to the kinds of progress that have taken place on the campus as a result of pressure from women's groups and from government, it is somewhat difficult to assess. Many institutions now have some sort of committee on the status of women which is examining and compiling data on the problems that exist. They are evaluating virtually every policy on the campus for its impact on women and are making recommendations.

Government enforcement, however, has been slow. There is an enormous backlog of cases with HEW and with the Equal Employment Opportunity Commission HEW particularly has often been accused of incompetence and inefficiency. Occasionally new contracts have been delayed when an affirmative action plan has been inadequate, but HEW has never used its power to withhold funds from an institution when the institution has been found to discriminate. Negotiations have often dragged on for years.

WOMEN TERMINATED AT FASTER RATE

Despite a good deal of affirmative recruiting on the campus, the position of women does not seem to have improved noticeably. What has happened has been spotty. The general contraction of academic hiring due to budgetary constraints has undoubtedly played a role in that there are fewer new positions available. On some campuses, the number and percentage of women has actually dropped in the last year or two, despite affirmative action, and the number and percentage of men has increased. Women are apparently being terminated at a faster rate than men, partly because having been denied tenure in the past, they are most vulnerable to budget cuts. It is of course illegal to perpetuate the current effects of past discrimination, but too many department heads and faculty committees are simply unaware of the law and its implications. Moreover, retaliation against women who do file (or even raise the question of discrimination) is not unusual; even faculty husbands have been told to get their wives to "shut up" if the husband wants to be promoted. Numerous women who have taken an active part in the struggle against discrimination have lost their jobs.

A few institutions, such as Wesleyan University in Connecticut, have vigorously recruited *and* hired a substantial number of women, but on many campuses the hiring of a woman has taken place mainly in some departments that never had a woman before, such as the psychology department at University of California at Berkeley, which hired two women last year, the first since 1924. In some schools promotions for women are beginning to occur. Many departments are "recruiting" women in order to fulfill their affirmative action requirements; many women are being interviewed, but few are hired. Many departments are going through the motions without a genuine effort to hire fairly.

Hardest of all to change will be the *attitudes* toward women. Academic myths, like other myths, die slowly. There are indeed many men on the campuses who are fair-minded and sympathetic, but there are also some who cannot or will not relate to women as equal colleagues. We are going to see more polarization on the campus, and the backlash will get worse. Every time a woman gets hired, it does mean that some man is not getting hired.

If I have painted a somewhat discouraging picture, it is because the road ahead is far from easy, and there is much that needs to be done. We are talking about a profound social change on our campuses—nothing less than the full integration of women at all levels of the institution and a revision of policies and practices that have a negative impact on women. We are talking about changing an institution that is still rooted in a history going back to medieval days.

For the first time we have laws and a national policy to end discrimination on the campus. The laws alone are extremely helpful, but they are not enough. We are talking also about changing attitudes and myths—myths such as "all women belong at home," despite the fact that they are leaving it in droves.

For the first time, women themselves are organizing on the campus and pressing for change. Women are actively challenging policies and practices that hurt women and, indeed, often hurt men too, for they also have been hurt—perhaps in different ways—by the same rigid social stereotypes that limit the opportunities of both sexes.

The potential for humanizing the university is enormous; women are the fastest growing and potentially the largest advocacy group on the campus. Change comes slowly, too slowly, and is both hard and exhilirating. It will not come simply because it is right or long overdue, or because the law says it must be done. It will come because women take an active role in pointing out inequities and in pressing for change.

We will need compassion for those women who act with impatience borne out of bitterness and despair; for those who tell us there is not discrimination and who cannot yet reach out to help their sisters; and for those men who tell us their wives are "perfectly happy." The women's movement is not going to go away, because too many women care, and because so many men care too. For what women have learned is that the hand that rocks the cradle can indeed rock the boat.

SEX DISCRIMINATION, EDUCATIONAL INSTITUTIONS, AND THE LAW: A NEW ISSUE ON CAMPUS

(By Bernice Sandler)

One of the most remarkable, but little noted, achievements of the 92nd Congress during 1971–72 was the shaping of a new national policy to end sex discrimination in all educational institutions at all levels, including students, staff and faculty, from nursery school to post graduate education.

The speed with which the Congress extended Title VII of the Civil Rights Act of 1964 to include all educational institutions;[1]—amended the Equal Pay Act of 1963 to cover executive, administrative and professional employment;[2]—amended the Public Health Service Act to cover admissions to all health profession training programs;[3]—enacted Title IX of the Education Amendments Act of 1972 to cover all phases of student treatment,—including admissions[4]; and added sex discrimination to the jurisdiction of the United States Commission on Civil Rights[5]—indicates that Congress was acutely aware of discrimination against females in our educational institutions. There was virtually no opposition to the passage of these laws by either the educational community or the public at large. Sex discrimination, once only a philosophical or moral issue, is now a legal issue as well. These laws are not merely employment laws; they are civil rights laws with a different legislative and judicial history.

EXECUTIVE ORDER 11246 AS AMENDED BY 11375

7. The definition of "contract" is very broad and is interpreted to cover all government contracts (even if nominally entitled "grants") which involve a benefit to the federal government.

8. As of January 19, 1973, all covered educational institutions, both public and private, must have *written* affirmative action plans.

TITLE VIII OF THE CIVIL RIGHTS ACT OF 1964 AS AMENDED BY THE EQUAL EMPLOYMENT OPPORTUNITY ACT

9. In certain states that have fair employment laws with prohibitions similar to those of Title VIII, EEOC automatically defers investigations of charges to the state agency for 60 days. (At the end of this period, EEOC will handle the charges unless the state is actively pursuing the case. About 85 per cent of deferred cases return to EEOC for processing after deferral.)

10. Due to an ambiguity in the law as it relates to public institutions, it is not yet clear whether EEOC *or* the Attorney General will file suit in all situations which involve public institutions.

EQUAL PAY ACT OF 1963 AS AMENDED BY THE EDUCATION AMENDMENTS OF 1972—HIGHER EDUCATION ACT

11. Over 95 per cent of all Equal Pay Act investigations are resolved through voluntary compliance.

12. Unless court action is necessary, the name of the parties need not be revealed. The identity of a complaint or a person furnishing information is never revealed without that person's knowledge and consent.

TITLE IX OF THE EDUCATION AMENDMENTS OF 1972—HIGHER EDUCATION ACT

(Minority women are also protected from discrimination on the basis of their race or color by Title VI of the Civil Rights Act of 1964.)

13. Final regulations and guidelines for Title IX of the Education Amendments of 1972 have not yet been published. This chart includes information which is

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[1] Pub. L. No. 92–261 § 2. 86 Stat. 103. *amending* 42 U.S.C. § 2000e–1 (1970).

[2] Pub. L. No. 92–318, Title IX. § 906(b)(1), 86 Stat. 373, June 23, 1972.

[3] Pub. L. No. 92–157 § 110, 85 Stat. 431, *amending* 42 U.S.C.A. § 295h–9.

[4] Pub. L. No. 92–318, Title IX, § 901, 86 Stat. 373, June 23, 1972. Private undergraduate institutions and public single-sex schools are exempt from the non-discriminatory admissions provisions. However there can be no discrimination on the basis of sex against students in such institutions once they have been admitted.

[5] Pub. L. No. 92–496, § 3, 86 Stat. 813, *amending* 42 U.S.C.A. § 1975c (a) (1957).

explicitly stated in the law, as well as how the law is likely to be interpreted in light of other precedents and developments.

14. The sex discrimination provision of Title IX is patterned after Title VI of the Civil Rights Act of 1964, which forbids discrimination on the basis of race, color and national origin in all federally assisted programs. By specific exemption, the prohibitions of Title VI do not cover employment practices (except where the primary objective of the federal aid is to provide employment). However, there is no similar exemption for employment in Title IX.

15. Title IX states that: "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance. . . "

16. The following are exempted from the *admissions* provision:

Private undergraduate institutions.

Elementary and secondary schools other than vocational schools.

Single-sex public undergraduate institutions. (If public single-sex undergraduate institutions decide to admit both sexes, they will have 7 years to admit female and male students on a nondiscriminatory basis, provided their plans are approved by the Commissioner of Education.)

Note 1. *These exemptions apply to admissions only.* Such institutions are still subject to all other anti-discrimination provisions of the Act.

Note 2. Single-sex professional, graduate and vocational schools at all levels have until July, 1979, to achieve nondiscriminatory admissions, provided their plans are approved by the Commissioner of Education.

17. Under Title VI of the 1964 Civil Rights Act, which Title IX of the Education Amendments closely parallels, federal agencies which extend aid to educational institutions have delegated their enforcement powers to HEW. A similar delegation of enforcement power is expected under Title IX.

TITLE VII & TITLE VIII OF THE PUBLIC HEALTH SERVICE ACT AS AMENDED BY THE COMPREHENSIVE HEALTH MANPOWER ACT & THE NURSE TRAINING AMENDMENTS ACT OF 1971

18. Final regulations and guidelines for Title VII and VIII of the Public Health Service Act have not yet been published. This chart includes information which is explicitly stated in the law, as well as how the law is likely to be interpreted in light of other precedents and developments.

19. Schools of medicine, osteopathy, dentistry, veterinary medicine, optometry, pharmacy, podiatry, public health, allied public health personnel and nursing are specifically mentioned in Titles VII and VIII. Regulations issued June 1, 1972, by the Secretary of HEW specify that *all* entities applying for awards under Titles VII or VIII are subject to the nondiscrimination requirements of the act.

20. HEW regulations state: "Nondiscrimination in admission to a training program includes nondiscrimination in all practices relating to applicants to and students in the program; nondiscrimination in the enjoyment of every right, privilege and opportunity secured by admission to the program; and nondiscrimination in all employment practices relating to employees working directly with applicants to or students in the program."

FEDERAL LAWS[1] AND REGULATIONS CONCERNING SEX DISCRIMINATION IN EDUCATIONAL INSTITUTIONS,[2] OCTOBER 1972

[Compiled by Project on the Status and Education of Women, Association of American Colleges]

	Executive Order 11246 as amended by 11375	Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972	Equal Pay Act of 1963 as amended by the Education Amendments of 1972 (Higher Education Act)	Title IX of the Education Amendments of 1972 (Higher Education Act)[13]	Title VII (sec. 799A) and Title VIII (sec. 845) of the Public Health Service Act as amended by the Comprehensive Health Manpower Act and the Nurse Training Amendments Act of 1971[18]
Effective date	Oct. 13, 1968	March 24, 1972 (July 1965 for nonprofessional workers.) (Institutions with 15–24 employees are not covered until March 24, 1973.)	July 1, 1972 (June, 1964, for nonprofessional workers.)	July 1, 1972 (Admissions provisions effective July 1, 1973.)	Nov. 18, 1971.
Which institutions are covered	All institutions with federal contracts of over $10,000[7]	All institutions with 15 or more employees.	All institutions	All institutions receiving federal monies by way of a grant, loan or contract (other than a contract of insurance or guaranty).	All institutions receiving or benefiting from a grant, loan guarantee, or interest subsidy to health personnel training programs or receiving a contract under Title VII or VIII the Public Health Service Act.[19]
prohibited[3]	Discrimination in employment (including hiring, upgrading, salaries, fringe benefits, training, and other conditions of employment) on the basis of race, color, religion, national origin or sex. Covers all employees.	Discrimination in employment (including hiring, upgrading, salaries, fringe benefits, training and other conditions of employment) on the basis of race, color, religion, national origin or sex. Covers all employees.	Discrimination in salaries (including almost all fringe benefits) on the basis of sex. Covers all employees.	Discrimination against students or others[14] on the basis of sex.[15]	Discrimination in admission of students on the basis of sex and against some employees[20]
Exemptions from coverage	None	Religious institutions are exempt with respect to the employment of individuals of a particular religion or religious order (including those limited to one sex) to perform work for that institution. (Such institutions are not exempt from the prohibition of discrimination based on sex, color and national origin).	None	Religious institutions are exempt if the application of the [illegible] discrimination provisions are not consistent with the religious tenets of such organizations. Military schools are exempt if their primary purpose is to train individuals for the military services of the United States or the merchant marine. Discrimination only in vocational institutions in admissions[16] is prohibited (including vocational high schools), graduate and professional institutions, and public undergraduate coeducational institutions.	None.

Who enforces the provisions	Office of Federal Contract Compliance (OFCC) of the Department of Labor has policy responsibility and oversees federal agency enforcement programs. OFCC has designated HEW as the compliance agency responsible for all contracts with educational institutions. HEW's Office for Civil Rights (Division of Higher Education) conducts of the reviews and investigations.	Equal Employment Opportunity Commission (EEOC).	Wage and Hour Division of the Employment Standards Administration of the Department of Labor.	Federal departments and agencies which are empowered to extend financial aid to educational programs and activities. HEW's Office for Civil Rights (Division of Higher Education) is expected to have primary enforcement powers to conduct the reviews and investigations.[17]	HEW's Office for Civil Rights (Division of Higher Education) conducts the reviews and investigations.
How is a complaint made	By the letter to OFCC or Secretary of HEW.	By a sworn complaint form, obtainable from EEOC.	By letter, telephone call, or in person, to the nearest Wage and Hour Division office.	Procedure not yet specified. A letter to Secretary of HEW is acceptable.	Procedure not yet specified. A letter to Secretary of HEW is acceptable.
Can complaints of a pattern of discrimination be made as well as individual complaints?	Yes. However, individual complaints are referred to EEOC.	Yes	Yes	Yes	Yes.
Who can make a complaint [4]	Individuals and/or organizations on own behalf or on behalf of aggrieved employee(s) or applicant(s).	Individuals and/or organizations on own behalf or on behalf of aggrieved employee(s) or applicant(s). Members of the commission may also file charges.	Individuals and/or organizations on own behalf or on behalf of aggrieved employee(s).	Individuals and/or organizations on own behalf or on behalf of aggrieved party.	Individuals and/or organizations on own behalf or on behalf of aggrieved party.
Time limit for filing complaints [5]	180 days	180 days	No official limit, but recovery of back wages is limited by statute of limitations to 2 years for a nonwillful violation and 3 years for a willful violation.	Procedure not yet determined	Procedure not yet determined.
Can investigations be made without complaints.	Yes. Government can conduct periodic reviews without a reported violation, as well as in response to complaints. Preaward reviews are mandatory for contracts over $1,000,000.	No. Government can conduct investigations only if charges have been filed.	Yes. Government can conduct periodic reviews without a reported violation as well as in response to complaints.	Yes. Government can conduct periodic reviews without a reported violation, as well as in response to complaints.	Yes. Government can conduct periodic reviews without a reported violation, as well as in response to complaints.
Can the entire institution be reviewed.	Yes. HEW may investigate part or all of an institution.	Yes. EEOC may investigate part or all of an establishment.	Yes. Usually the Wage-Hour Division reviews the entire establishment.	Yes. HEW may investigate those parts of an institution which receive federal assistance (as well as other parts of the institution related to the program, whether or not they receive direct Federal assistance). If the institution receives general institutional aid, the entire institution may be reviewed.	Yes. HEW may investigate those parts of an institution which receive Federal assistance under title VII and VIII (as well as other parts of the institution related to the program, whether or not they receive assistance under these titles).

Footnotes at end of table.

FEDERAL LAWS[1] AND REGULATIONS CONCERNING SEX DISCRIMINATION IN EDUCATIONAL INSTITUTIONS,[2] OCTOBER 1972—Continued

[Compiled by Project on the Status and Education of Women, Association of American Colleges]

	Executive Order 11246 as amended by 11375	Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972	Equal Pay Act of 1963 as amended by the Education Amendments of 1972 (Higher Education Act)	Title IX of the Education Amendments of 1972 (Higher Education Act)[13]	Title VII (sec. 799A) and Title VIII (sec. 845) of the Public Health Service Act as amended by the Comprehensive Health Manpower Act and the Nurse Training Amendments Act of 1971[14]
Recordkeeping requirements and Government access to records.	Institution must keep and preserve specified records relevant to the determination of whether violations have occurred. Government is empowered to review all relevant records.	Institution must keep and preserve specified records relevant to the determination of whether violations have occurred. Government is empowered to review all relevant records.	Institution must keep and preserve specified records relevant to the determination of whether violations have occurred. Government is empowered to review all relevant records.	Institution must keep and preserve specified records relevant to the determination of whether violations have occurred. Government is empowered to review all relevant records.	Institution must keep and preserve specified records relevant to the determination of whether violations have occurred. Government is empowered to review all relevant records.
Enforcement power and sanctions..	Government may delay new contracts, revoke current contracts, and debar institutions from eligibility for future contracts.	If attempts at conciliation fail, EEOC or the U.S. Attorney General may file suit.[10] Aggrieved individuals may also initiate suits. Court may enjoin respondent from engaging in unlawful behavior, order appropriate affirmative action, order reinstatement of employees, and award back pay.	If voluntary compliance fails,[11] Secretary of Labor may file suit. Aggrieved individuals may initiate suits when Department of Labor has not done so. Court may enjoin respondent from engaging in unlawful behavior, and order salary raises, back pay and assess interest.	Government may delay new awards, revoke current awards, and debar institution from eligibility for future awards. Department of Justice may also bring suit at HEW's request.	Government may delay new awards, revoke current awards, and debar institution from eligibility for future awards. Department of Justice may also bring suit at HEW's request.
Can back pay be awarded[8]........	Yes. HEW will seek back pay only for employees who were not previously protected by other laws allowing back pay.	Yes. For up to two years prior to filing charges with EEOC.	Yes. For up to two years for a nonwillful violation and three years for a willful violation.	Probably, to the extent that employees are covered	Probably, to the extent that employees are covered.
Affirmative action requirements (There are no restrictions against action which is nonpreferential).	Affirmative action plans (including numerical goals and timetables) are required of all contractors with contracts of $50,000 or more and 50 or more employees[9].	Affirmative action is not required unless charges have been filed, in which case it may be included in conciliation agreement or be ordered by the court.	Affirmative action, other than salary increases and back pay, is not required.	Affirmative action may be required after discrimination is found.	Affirmative action may be required after discrimination is found.
Coverage of labor organizations...	Any agreement the contractor may have with a labor organization can not be in conflict with the contractor's affirmative action commitment.	Labor organizations are subject to the same requirements and sanctions as employers.	Labor organizations are prohibited from causing or attempting to cause an employer to discriminate on the basis of sex. Complaints may be made and suits brought against these organizations.	Procedure not yet clear. Any agreement the institution may have with a labor organization can not be in conflict with the nondiscrimination provisions of the legislation.	Procedure not yet clear. Any agreement the institution may have with a labor organization can not be in conflict with the nondiscrimination provisions of the legislation.

Is harassment prohibited	Institutions are prohibited from discharging or discriminating against any employee or applicant for employment because he/she has made a complaint, assisted with an investigation or instituted proceedings.	Institutions are prohibited from discharging or discriminating against any employee or applicant for employment because he/she has made a complaint, assisted with an investigation or instituted proceedings.	Institutions are prohibited from discharging or discriminating against any employee because he/she has made a complaint, assisted with an investigation or instituted proceedings.	Institutions will be prohibited from discharging or discriminating against any participant or potential participant because he/she has made a complaint, assisted with an investigation or instituted proceedings.	Institutions will be prohibited from discharging or discriminating against any participant or potential participant because he/she has made a complaint, assisted with an investigation or instituted proceedings.
Notification of complaints	Notification of complaints has been erratic in the past. HEW is proposing notifying institutions of complaints within 10 days. HEW notifies institutions a few weeks prior to investigation.	EEOC notifies institutions of complaints within 10 days.	Complaint procedure is very informal. Employer under review may or may not know that a violation has been reported.	Procedure not yet determined	Procedure not yet determined.
Confidentiality of names	Individual complainant's name is usually given to the institution. Investigation findings are kept confidential by Government, but can be revealed by the institution. Policy concerning Government disclosure concerning investigations and complaints has not yet been issued. The aggrieved party and respondent are not bound by the confidentiality requirement.	Individual complainant's name is divulged when an investigation is made. Charges are not made public by EEOC, nor can any of its efforts during the conciliation process be made public by the Commission or its employees. If court action becomes necessary, the identity of the parties involved becomes a matter of public record. The aggrieved party and respondent are not bound by the confidentiality requirement.	The identity of a complainant, as well as the employer (and union, if involved), is kept in strict confidence.[12] If court action becomes necessary, the identity of the parties involved becomes a matter of public record. The aggrieved party and respondent are not bound by the confidentiality requirement.	Identity of complainant is kept confidential if possible. If court action becomes necessary, the identity of the parties involved becomes a matter of public record. The aggrieved party and respondent are not bound by the confidentiality requirement.	Identity of complainant is kept confidential if possible. If court action becomes necessary, the identity of the parties involved, becomes a matter of public record. The aggrieved party and respondent are not bound by the confidentiality requirement.

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[1] State employment and/or human relations laws may also apply to educational institutions. The Equal Rights Amendment to the U.S. Constitution, passed by the Congress and now in the process of ratification would, when ratified, forbid discrimination in publicly supported schools at all levels, including students and faculty.

[2] Unless otherwise specified, "institution" includes public and private colleges and universities, elementary and secondary schools, and preschools.

[3] A bona fide seniority or merit system is permitted under all legislation, provided the system is not discriminatory on the basis of sex or any other prohibited ground.

[4] There are no restrictions against making a complaint under more than one anti-discrimination law at the same time.

[5] This time limit refers to the time between an alleged discriminatory act and when a complaint is made. In general, however, the time limit is interpreted liberally when a continuing practice of discrimination is being challenged, rather than a single, isolated discrimnatory act.

[6] Back pay cannot be awarded prior to the effective date of the legislation.

Academics have been puzzled and somewhat bewildered by the impact of these new laws. Prior to this, many institutions holding federal contracts had already felt the sting of the federal government under Executive Order 11246 as amended, which requires all federal contractors to end discrimination in employment and to have a written plan of affirmative action. This order, coupled with the new legislation, has raised new questions and concerns as the academic community seeks to understand the implications of federal law and regulations. The chart details these laws and regulations.

EXECUTIVE ORDER 11246 AS AMENDED BY EXECUTIVE ORDER 11375

The Executive Order covers only those institutions which hold federal contracts. It prohibits discrimination in employment, and does not cover students, except insofar as they are employed by the institution. The Executive Order is not law, but a series of rules and regulations which contractors agree to follow when they accept a federal contract. Its main provision is that the contractor must have a written plan of affirmative action[6] to "remedy the effects of past discrimination" and to prevent the continuation of current discrimination. It is not enough to agree to cease discriminating. Employers who do not have a written plan (or who fail to follow it) may lose their federal contracts. The Department of Labor through its Office of Federal Contract Compliance is responsible for all policy matters under the Executive Order; the Department of Health, Education and Welfare, however, does the actual review and enforcement in universities and colleges.

Revised Order No. 4 details the requirements for affirmative action plans. As a minimum, institutions must do the following:

1. develop a data base on all job classifications;
2. have a policy statement forbidding discrimination;
3. appoint an individual to be in charge of the program;
4. examine recruiting, hiring, promotion policies, salaries and all other conditions of employment;
5. identify areas of under-utilization and develop specific plans to overcome these areas;
6. develop numerical goals and timetables.

Affirmative action and the issue of numerical goals are controversial. Affirmative action is not only required by federal contractors, but can also be required under Title VII of the Civil Rights Act of 1964 if a finding of discrimination has been made. The United States Commission on Civil Rights has defined affirmative action to be: ". . . steps taken to remedy the grossly disparate staffing and recruitment patterns that are the present consequence of past discrimination and to prevent the occurrence of employment discrimination in the future."[7]

Plans must be based on an analysis of all conditions of employment: policies and practices affecting (but not limited to) recruiting, hiring, job classification, salaries, fringe benefits, promotion, terminations, etc. All job classifications for all employees must be analyzed by race, sex, and ethnicity by organizational unit and pay grade. Where underutilization occurs, numerical goals must be developed.

Numerical goals are often confused with quotas; the terms are often erroneously used interchangeably. However, the government and the courts have made a clear distinction between the two: goals are legal; quotas clearly violate the Constitution and numerous federal statutes. Quota systems keep people out; goals are targets for inclusion of people previously excluded. Goals are an attempt to estimate what the employer's work force would look like if no illegal discrimination based on race or sex had ever existed. The institution develops the goals when "underutilization" occurs, and they are aligned with the number or percentage of qualified women and minorities available, not in terms of general representation in the population. If an employer fails to meet the goals, he[8] then has to show that he made a good faith effort to recruit, hire and promote women, and has to produce records documenting those efforts. For example, the Department Chairperson may show that he or she has contacted women's groups (such as the women's caucuses relevant to the discipline), has contacted individual women scholars for referral of candidates, has included in letters to colleagues and in job advertisements statements like "women and minorities, including minority women, are welcome to apply" and has also evaluated the women already in the department who might qualify for the opening. If after doing all this it turns out that all the women who were considered were poorly qualified and the man hired was indeed the best qualified applicant, the employer can document a good faith effort at affirmative action and thus can justify his decision to hire the white male. If so, the employer has discharged his obligation under Executive Order; the obligation to meet the goal is not absolute.

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[6] Contractors with $50,000 worth of contracts and 50 employees must have a written affirmative action plan. Public institutions were previously exempted from the requirement of having a written plan; in January 1973, that exemption was deleted.

[7] *Statement of Affirmative Action for Equal Employment Opportunities by the United States Commission on Civil Rights*, U.S. Commission on Civil Rights, p. 14 (1973).

[8] In most instances, the academic employer is a "he."

There is no requirement whatsoever that would force academicians to hire lesser qualified women or minorities.[9] If the best qualified person is white and male, then that person can be hired. What the employer must be able to demonstrate is three-fold:

1. A genuine good faith effort to recruit women and minorities (Good faith does *not* mean calling one's white male colleague, asking if he knows a good man, and then after the hiring is completed, saying, "Certainly I'd have been glad to hire a qualified woman or minority person if I could have found one. Unfortunately, none applied.")

2. Specification of job-related objective criteria, before the hiring process. The criteria for professional jobs are often complex and difficult to assess; nevertheless, they are subject to the same requirements as other jobs. Subjective, intuitive judgments are not acceptable criteria. For example, the courts have held that promotional policies for executives are subject to standards of objectivity and must be job related.[10]

3. Equal application of criteria. Whatever standards or criteria are set for white men must be applied equally to women and minorities.

AUTONOMY AND "PREFERENCE"

Some administrators claim that an institution's autonomy is threatened by having numerical goals, and that acedemic freedom will be violated because they will be "forced" to give "preference" to unqualified women and minorities. Traditionally, academic freedom has meant the right to publish, to teach and to work with controversial ideas. The aim of numerical goals is not to give preference, but to end preference, the existing preference for males, the existing preference for members of the "old boy" club. Academia has traditionally operated with an unwritten, but functionally effective "affirmative action" plan for white males. That preference system is now illegal. In one sense, the words "academic freedom" have become a rallying cry and smokescreen to obscure basic issues. Some women's groups claim that they are analogous to the cry of "states rights" and "quality education."

Academia has generally relied on the "old boy" method of recruiting and hiring the vast, informal network of old school chums, colleagues, drinking buddies, etc.—a network to which women and minorities rarely have had access. The merit system has always been a closed merit system, for large portions of the available qualified pool have been excluded. The government is not asking that the merit system be abolished, but only that it be opened up to a larger pool of qualified persons. To recruit in a different manner means additional work and effort, and more importantly, it means change. Change is never easy, particularly when it is perceived as a threat to the power base.

Employers in academic institutions have never had to specify criteria for hiring and promotion. Now, when evidence of discrimination is found, the government is asking for an explanation why Mr. X is a full professor and Ms. Y is only a lecturer but has been continually awarded the "best teacher" award, and has a string of publications, awards, etc.[11] The government does not set the criteria for hiring and promotion; rightfully, academic freedom would be violated if the government attempted to do so. Institutions and/or department heads should develop their own criteria. What the government does ask is *why* someone was hired or not hired; and are the criteria objective and job related. Some administrators who have never had to specify criteria understandably feel threatened when asked to do this, however, an administrator who cannot justify an employment decision is very likely either to have made a wrong decision or is an incompetent administrator.

It is quite likely that universities, under numerical goals and affirmative action, will find that the quality of academic appointments will actually improve.[12]

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[9] There often is a covert assumption that women and minorities are by definition "not qualified."

[10] Marquez v. Ford Motor Co., Omaha District Sales Office, 440 F. 2d 1157 (8th Cir. 1971).

[11] This example is based on an actual incident in an HEW review. The source is confidential.

[12] Women's groups contend that most of the deadwood that exists on the campus is predominantly white and male.

Despite claims of an unbiased and "glorious" objective merit system, academic judgments have too often been intuitive and subjective. Now, instead of being able to justify a candidate merely by saying "he's a well known and respected scholar," department heads will not only have to develop specific criteria, but will have to be able to demonstrate that the candidate is the very best person recruited from the largest pool possible, one which will include qualified women and minorities.

Some institutions mistakenly feel that they are now forced to hire women and minorities in order to "get HEW off their back." Decisions based on such a gross misinterpretation of the law are tragic. If institutions give preference to a less qualified woman or minority person over a better qualified white male, then such institutions are violating the very laws and regulations they are seeking to observe because such preferences are clearly prohibited by law. Institutions cannot discriminate against qualified members of any group based on race, color, religion,[13] national origin or sex and this includes discrimination against white males.

What is not at stake is the hiring of lesser qualified persons or "reverse discrimination" but rather a very real economic threat is present: for every woman or minority person that is hired, it means that one less white male is hired. If more women are paid commensurately with their positions then some men may get raises more slowly or perhaps not at all. It will be harder for qualified white males to get jobs when they compete with qualified women or minorities, but it cannot be termed "reverse discrimination."

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII was amended on March 24, 1972, to cover educational institutions and forbids discrimination in employment and applies to all institutions, public or private, whether or not they receive any federal funds. Title VII is enforced by the Equal Employment Opportunity Commission, which is appointed by the President. Like the Executive Order, individual charges, as well as charges of a pattern of discrimination, can be filed. However, unlike the Executive Order, no affirmative action is required; employers are required merely to not discriminate in employment. A conciliation agreement or court order *may* require affirmative action, but this would be after charges are filed. Unlike under the Executive Order, Title VII investigations will generally be conducted only if charges have been filed.

Should conciliation fail, the Equal Employment Opportunity Commission can take an employer to court.[14] This new provision strengthens EEOC's position and should speed up the conciliation process considerably. Currently, EEOC has a backlog of several thousand cases, and it sometimes takes a year or two before an investigation is started. (HEW is also backlogged and a similar time may elapse before a case is investigated.) Recently HEW and EEOC agreed that all individual cases filed with HEW under the Executive Order after March 24, 1972, will be forwarded to EEOC for investigation and action.

EEOC's sex discrimination guidelines issued on April 5, 1972, are in many ways similar to those issued by the Office of Federal Contract Compliance and HEW, but have stricter provisions in some instances. For example, EEOC requires that the part of maternity leave where a woman is temporarily disabled and cannot work for medical reasons (*i.e.*, childbirth and complications of pregnancy, in contrast to childrearing) must be treated like any other temporary disability such as heart attack, gall bladder or prostate surgery. The same guidelines call for equal benefits, including retirement benefits. The TIAA retirement plans to which many institutions subscribe, and which now give women who have made identical contributions lower monthly retirement benefits than men are in violation of EEOC's guidelines.

Title VII also contains an exemption called a "bona fide occupational qualification." ("b.f.o.q.") whereby an employer may legally limit particular jobs to one sex. The courts have interpreted this very narrowly; *e.g.*, actress, lingerie fitter and restroom attendant. In one case involving a woman who was refused a job because she had a preschool child, the Court held that being a mother of a preschooler was not a bona fide occupational qualification, and that the employer would have to prove that all or substantially all women with preschool children could not do the job.[15]

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[13] However, Title VII of the Civil Rights Act allows *religious* institutions to give preference to members of their religion in employment. 42 U.S.C. § 2000e–1 (1970).

[14] *Supra*, note 5.

[15] Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971). Although the woman involved was a white woman, the NAACP took on the case because they saw the implications for black women as well.

THE EQUAL PAY ACT OF 1963

In the Educational Amendments Act of 1972 there is a little noted section that extends the coverage of the Equity Pay Act of 1963 to executive, administrative and professional employees, including all faculty.[16] Unequal pay on the basis of sex is also forbidden by the Executive Order and by Title VII; the Equal Pay Act takes on unique importance because its procedures differ markedly from those of the Executive Order and Title VII. First, it is enforced by the Wage and Hour Division of the Employment Standards Administration of the Department of Labor and like the Executive Order, but unlike Title VII, reviews can be conducted without prior complaint. The Equal Pay Act was the first sex discrimination legislation enacted and has been successful in getting women millions of dollars in back pay.

One of the major advantages for complainants under the Equal Pay Act is that the complaint procedure is very informal; unlike Title VII, which requires a notarized complaint, the Wage and Hour Division will investigate an establishment on the basis of a letter or even a telephone call. Unlike Title VII and the Executive Order, where generally the individual complainant's name is revealed to the employer, the complainant's name is not revealed to the employer under the Equal Pay Act. In fact, an employer may not even know that this establishment has been reported and when a review is conducted, it is almost always of the entire establishment. (Occasionally, this is true of EEOC investigations, and is also true of pattern and practice reviews under the Executive Order.) After a review is conducted, if a violation is found, the employer is asked to settle on the spot—*i.e.,* raise the wages and pay backpay to the underpaid workers (the statute of limitations is two years for a non-willful violation, three years for a willful violation). Should the employer refuse (and most don't as 95% of the cases are settled without recourse to litigation), the Department of Labor is authorized to go to court. Often employers settle not only because they are clearly in violation of the law, but, in addition, court cases involve public disclosure of the findings and if the case is settled without litigation, the employer's name is not revealed publicly. Currently, there is little backlog in equal pay cases, although this is expected to change as word reaches women in academic circles.

DISCRIMINATION AGAINST STUDENTS

The Comprehensive Manpower Act of October 1971 (amending the Public Health Service Act) was the first law to affect sex discrimination against students. It forbids discriminatory admissions to schools of medicine, veterinary medicine, pharmacy, optometry, dentistry, and other health professions such as medical technician, X-ray technician, etc. Similar provisions in the Nurse Training Amendments Act will also help men gain access to nursing programs. Title IX of the Educational Amendments of 1972[17] (Higher Education Act) is more extensive. It's basic provision is: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal Financial assistance. . . ."[18] These sex discrimination provisions are patterned after Title VI[19] of the Civil Rights Act which forbids discrimination on the basis of race, color, and national origin in all federally assisted programs.

All institutions[20] whether public or private, that receive federal monies by way of a grant, loan, or contract (other than a contract of insurance or guaranty) are covered. There is an admissions exemption for private undergraduate colleges (as well as a single sex public undergraduate institutions) but these institutions are not exempt from the prohibitions forbidding other kinds of discrimination against students because of sex. Discrimination in admissions is specifically prohibited in vocational institutions, professional and graduate institutions and all public undergraduate co-educational institutions and also forbids discriminatory practices in athletics, financial aid, parietal rules, etc.

Individuals and organizations can challenge any discriminatory practice in a federal program or activity by writing the Secretary of HEW, being assured that during the review process, names of complainants are kept confidential, if possible. If violations are found, informal conciliation and persuasion are first used to eliminate the discriminatory practices and should this fail, formal hearings are then conducted and then federal assistance can be terminated. HEW's Office for Civil Rights will be the enforcement agency for these provisions. Implementing regulations will detail the procedures for the Act.[21]

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[16] *Supra,* note 2.

[17] *Id.*

[18] *Id.*

[19] Title VI, however, specifically exempts employment from coverage. Title IX has no such exemption. Discrimination against employees on the basis of sex is therefore covered by Title IX.

[20] Including preschools, elementary and secondary schools.

SIMULTANEOUS FILING

The application of the Equal Pay Act and Title VII to faculty, as well as Title IX to employees and students, is, of course, very new. Some women's groups have begun to file complaints under Equal Pay, Title VII, the Executive Order, and Title IX simultaneously. At this point, under the Executive Order alone, the number of sex discrimination complaints against universities and colleges exceeds that of those filed by all minorities.

COURT DECISIONS

Despite some overlapping coverage, the principles utilized by the separate federal agencies to determine policies regarding discrimination are similar. The Office of Federal Contract Compliance, as well as the other agencies, continually examine court decisions concerning discrimination, and use these decisions as a solid base for determining policy.[22]

Many of the issues now being debated, somewhat ex post facto in the Halls of Ivy, have already been decided in the courts.

Court decisions that were previously applicable to discrimination in nonacademic settings now extend to the educatonal world. Most of these decisions have occurred in cases involving race, but the principles essentially extend to other minority groups, including women. Among those likely to have the most impact, are the following:

The existence of intent to discriminate is irrelevant: The effect of a policy or practice is what counts, rather than intent, or lack of intent.[23] (Even the best intentioned may often unknowingly act in a discriminatory manner.)

Statistics can be used to document a pattern of discrimination: Indeed, statistics can be used as *prima facie* evidence of discriminaton. "Statistics often tell much, and courts listen . . ."[24] The courts have not hesitated to use statistics both as a measure of discrimination and as a measure of compliance. Institutions cannot rebut statistical evidence on the basis that no women or minorities applied. (An institution may have a reputation as discriminatory, and that may have had a "chilling" effect on employment applications.)[25] When statistical evidence indicates that there has been a pattern of discrimination, the burden of proof is then shifted to the employer who must then demonstrate that there is and has been no discrimination,[26] that the job criteria are indeed job-related, and that employment practices do not and have not had a discriminatory effect.

Any individual, including a third party, has standing to raise class allegations, and charge a pattern of discrimination, using statistics as evidence.[27] Persons can make a general allegation of discrimination without having to name names and incidents.[28] The appropriate federal agency then investigates to see if the charges are substantiated.

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[21] As of August 15, 1973, these regulations had not been issued.

[22] With the exception of maternity and retirement benefits, federal policy is remarkably uniform among the several agencies. Differences in investigative and administrative procedures are far greater and more likely to cause difficulties with regard to institutions. Section 715 of the Equal Employment Act of 1972 created a committee composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, and Chairman of the U.S. Commission on Civil Rights which is authorized to develop "agreements, policies, and procedures designed to maximize effort, promote efficiency and eliminate conflict, competition, duplication and inconsistency . . ."

[23] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[24] State of Alabama v. U.S., 304 F. 2d 583 (5th Cir. 1962), *aff'd mem.*, 371 U.S. 37 (1962). *See also*, Jones v. Lee Way Motor Freight, Inc., 431 F. 2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 423 (1971) *rehearing denied* 401 U.S. 1014 (1971); Carter v. Gallagher, 452 F. 2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); Parham v. Southwestern Bell Telephone Co., 433 F. 2d 421 (8th Cir. 1970).

[25] Lea v. Cone Mills, 301 F. Supp. 97 (M.D.N.C. 1969); Cypress v. Newport News General and Non-Secretarian Hospital Assoc., 375 F. 2d 648 (4th Cir. 1967).

[26] United States v. United Brotherhood of Carpenters and Joiners, Local 169, 457 F. 2d 210, 214 (7th Cir. 1972).

[27] Jenkins v. United Gas Corp. 400 F. 2d 28 (5th Cir. 1968); Bowe v. Colgate-Palmolive, 416 F. 2d 711 (7th Cir. 1969).

[28] Graniteville Co., Sibley Div., v. EEOC, 438 F. 2d 32 (4th Cir. 1971).

All hiring and promotion policies must be based on objective, job-related criteria.[29] For example, a promotion policy which is not job-related, and which is implemented by predominantly white males, can be held to be discriminatory.[30] Positive empirical evidence, and not the subjective opinion of supervisors is necessary in order to establish a good defense against a charge of discrimination.[31]

Professional employment is not exempt from the requirement of having objective and job-related criteria.[32] Employers also have a duty of fair recruitment.[33] If an administrator ends up with only white males, when there is a pool of qualified women and minorities available, the institution may well be discriminating and may be called upon to prove that it is not.

Any policy or practice that has an adverse or disparate effect on a protected class (*e.g.*, women and minorities), and cannot be justified by business necessity is considered discriminatory. The United States Supreme Court, with the majority opinion written by Chief Justice Burger, enunciated this principle in the landmark decision in *Griggs v. Duke Power Co.*[34]

The *Griggs* doctrine suggests word-of-mouth hiring as a policy which appears to be fair on its face, but is nevertheless discriminatory in its impact because women and minorities are largely excluded from the "old boy" network. Similarly, policies of nepotism or practices which apply to "spouse" may also appear to be fair in form, but when their effect is predominantly felt by women, they violate the law. Age requirements, and restrictions on part-time employment and on part-time studies will probably come under increasing scrutiny because they also tend to have a disparate effect on women.

Motherhood by itself is not a rational basis for exclusion[35] and marital status must not be considered in employment decisions.[36] Whether a woman is married or not cannot enter into a job decision, unless the same criteria is applied equally to men. A woman cannot be paid less because she is or is not married.

Seniority systems, such as tenure, which have been previously discriminatory, may come under review if they perpetuate the effects of prior discriminatory hiring and promotion practices because they have the effect of "freezing an entire generation".[37] Termination of women who do not have tenure because of prior discrimination may well be illegal.

Attorneys fees are authorized for complainants under Title VII and have also been awarded in at least one HEW case arising under Executive Order 11246 as amended.

Punitive damages have also been awarded in numerous civil rights cases and in at least one case under Title VII.[38]

Back pay can also be awarded under numerous federal laws and regulations[39] prohibiting discrimination and may include interest as well.

Preference of employees for white or male coworkers or supervisors is not relevant for hiring decisions. Such practices might have a disparate effect on women and minorities and would be difficult to justify either as a bona fide occupational qualification or on the basis of business necessity.[40]

Equal pay for equal work does not necessarily mean identical work, but only substantially equal work. Insubstantial differences are to be ignored; what is considered important are the job requirements as a whole[41] and not paying women less simply because they often command a lower market value.[42]

The law does not prohibit bona fide differences in pay based on merit or seniority; however such a system cannot be based on either sex or race.

Numerical goals have been upheld and ordered by the courts in numerous discrimination cases.[43] Individuals must also be considered on the basis of individual capacities and not on the basis of any characteristics attributed to the group.[44] The fact that some or even many women are thought to be unable to do a particular job is not a justification for excluding all women; it is not a justification for a bona fide occupational qualification.

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[29] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[30] Rowe v. General Motors Corp. 457 F. 2d 348 (5th Cir. 1972).

[31] U.S. v. Jacksonville Terminal 451 F. 2d 418 (5th Cir. 1971).

[32] Mrquez v. Ford Motor Co., Omaha District Sales Office, 440 F. 2d 1157 (8th Cir. 1971).

[33] U.S. v. Plumbers, Local 73, 314 F. Supp. 160 (S.D. Ind. 1969); Asbestos Workers, Local 53 v. Vogler, 407 F. 2d 1047 (5th Cir. 1969); Parham v. Southwestern Bell, 433 F. 2d 421 (8th Cir. 1970); Lea v. Cone Mills, 301 F. Supp. 97 (M.D.N.C., 1969).

[34] 401 U.S. 424 (1971).

[35] *See* discussion *supra.*, Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971).

[36] Sprogis v. United Airlines, 444 F. 2d 1194 (7th Cir. 1971); Doe v. Osteopathic Hospital of Wichita, Inc., 333 F. Supp. 1357 (D. Kan. 1971).

[37] Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968); Hicks v. Crown Zellerbach Corp. 319 F. Supp. 314 (E.D.La. 1970); Local 189, United Paperworkers v. U.S., 416 F. 2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[38] Evans v. Sheraton Park Hotel, 5 F.E.P. 393 (D.D.C. 1972).

[39] Title VII of the Civil Rights Act and the Equal Pay Act of 1964. Back pay has also been awarded in at least one HEW case under Executive Order 11246 as amended.

[40] Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See also* Diaz v. Pan American Airways, Inc., 442 F. 2d 385 (5th Cir. 1971).

[41] Shultz v. Brookhaven General Hospital, 305 F. Supp. 424 (N.D.Tex., 1969).

[42] *Id.*

GOALS V. QUOTAS

The courts have clearly distinguished between numerical goals and preference in numerous cases, and have upheld goals as a permissible method of redressing past inequities.[45] Civil rights legislation is intimately related to the equitable concept of "setting things right" which is the guiding principle that underlies numerical goals. The courts ". . . may order such affirmatve relief as may be appropriate. [It] has not merely the power, but the *duty* to render a decree which so far as possible [will] eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[46] (emphasis added)

The courts have consistently established the principle that when the proportion of minorities is less than would be expected on the basis of qualified minority members available, there is a presumption of discrimiantion. The burden is then shifted to the employer to demonstrate that such underutilization is not a product of discrimination.[47] Underutilization, under existing case law, raises a presumption of discrimination under both the Executive Order, Title VII and other legislation.

Goals are set only after there has been a finding of discrimination, and they have been upheld in the courts as relief for a substantiated pattern of discrimination. The aim is not punitive; no one is required to be fired. Goals are simply an attempt to remedy the continued effect of discrimination in the present, and to give relief to a specific class that has been discriminated against in the past.

Under the Executive Order, the contractor does its own self-analysis of underutilization and develops its own goals. In contrast, under Title VII, (as well as in cases under the Fifth or Fourteenth Amendments) it is the government that does the analysis; and upon a finding of discrimination, it is the government and/or the courts which set the numerical or percentage goals. The goal is tailormade to a particular discriminatory situation. If it was not, it would violate the equal protection of white males. The goal is generally developed in terms of anticipated employe turnover rate, rate of new hires, promotion and upgrading, and the availability of qualified women and minorities, not the number of proportion of women and minorities in the population. The numerical goal often varies for different job classifications, and within institutions it could vary from department to department. The courts have also clearly maintained that affirmative action and goals are not preferential treatments when undertaken to remedy past discriminatory practices. They are not totally unsympathetic to the problems of white males (who indeed will probably find it harder now that they must compete with women and minorities) but have felt that the more important concern was for the victims of discrimination: "Adequate protection of Negro[48] rights under Title VII may necessitate . . . some adjustment of the rights of white employees. The Court must be free to deal equitably with conflicting interests of white employees in order to shape remedies that will effectively protect and redress the rights of Negro victims of discrimination."[49]

All of the court cases involving numerical or percentage goals have two things in common: the goals are enacted for a limited time or until they are achieved and do not go on ad infinitum, only until the effect of past discrimination is corrected,[50] and, there is no compunction to hire unqualified persons to fill the goal. In the few cases where goals have been overturned by the courts,[51] it was because the goal was not a goal, but a quota, and because there was no provision to insure that qualified persons were hired.

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[43] *See* section in this paper on "goals" for a more complete discussion.

[44] Weeks v. Southern Bell Telephone and Telegraph Co., 408 F. 2d 228 (5th Cir. 1969).

[45] For a lengthy, but only partial listing of cases, *see Technical Comment #1*, International Association of Official Human Rights Agencies, 1625 K St., N.W., Washington, D. C. 20006, Sept. 7, 1972. When appealed to the Supreme Court, the Court has let all of these decisions stand by denying certiorari.

[46] Louisiana v. United States, 380 U.S. 145, 154 (1965).

[47] For a list of cases, *see* p. 6, "Statement of Affirmative Action for Equal Employment Opportunities by the United States Commission on Civil Rights," *supra*, note 7.

[48] The same principle applies equally to women and other minority groups.

[49] Vogier v. McCarty, Inc., 451 F. 2d 1236, 1238 (5th Cir. 1971).

[50] Carter v. Gallagher, 452 F. 2d 315 (8th Cir. 1971): "Such a procedure does not constitute a 'quota' system, because as soon as the trial courts' order is fully implemented, all hiring will be on a racially non-discriminatory basis, and it could well be that many more minority persons or less, as compared to the total population at large, over a period of time would apply and qualify for the position." *Id.* at 330–31.

LOOKING AHEAD: INCREASED LITIGATION

Women's groups can be expected to use the courts with increased frequency, particularly with the extension of Title VII to cover educational institutions. About 250 institutions have had charges filed against them under Title VII during the first year of coverage.

The Equal Employment Opportunity Commission can take to court employers who are found to be in violation of Title VII, although in most instances it is expected that employers will probably negotiate out-of-court conciliation agreements. Moreover, Title VII also allows individuals the right to file private suits against employers, thus allowing them to avoid the long delay of an EEOC investigation. The University of Pittsburgh has the dubious distinction of being the first academic institution to have a private lawsuit filed under these provisions with the result that a preliminary injunction has stopped them from firing a woman faculty member.[52]

Under the Executive Order, about 500 institutions have been charged with a pattern and practice of sex discrimination with some of these institutions being simultaneously filed against under Title VII, and about 250 individual cases have also been filed with HEW.

Numerous complaints of unequal pay have been investigated by the Equal Pay Division of the Department of Labor. Because of the anonymity features of Equal Pay enforcement and the informality of the complaint process, it is difficult to determine the number of complaints actually "filed" under the Equal Pay Act, although the number seems close to several hundred. Other cases have been filed under the Fourteenth Amendment and Section 1983 of the Civil Rights Act of 1866. None of these have been settled as yet, but among the institutions being sued are the University of California at Berkeley,[53] the University of Maryland,[54] Florida State University,[55] the University of Pittsburgh[56] and Texas Tech University.[57] Some of these suits involve requests for back pay and damages of more than a million dollars, while numerous others are in preparation, and still others have been filed under various state and local human relations laws.

The Department of Justice may also become involved in cases concerning educational institutions.[58] The Department can take cases direct to the courts and has already done so in non-educational private and public employment cases. They can also act on cases sent directly to them, although most cases reach them via other governmental enforcement agencies. The department can entertain all cases involving patterns and practices of discrimination, as well as individual cases suggesting these features. (In those individual cases which do *not* suggest a pattern, but are isolated instances of discrimination, the Department of Justice can only handle them where the employee is employed by a public institution *and* where the case has been referred to them by EEOC.)

In the years to come, the academic community is likely to be beset by a variety of issues. Although the financial crisis is likely to be the first issue of concern, sex discrimination will in all likelihood be the second largest issue for academic institutions to grapple with. The impact will be enormous, for many of the traditional practices and policies of academia will come under increasing fire for their discriminatory effect on women and minorities. Women are the fastest growing and potentially the largest advocacy group on campus. They are challenging policies and practices, and using the law to its full extent. The hand that rocked that cradle has learned to rock the boat.

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[51] *See, e.g.*, the 3rd Circuit decision overturning part of the order by the United States District Court in the Eastern District of Pennsylvania involving the hiring of policemen. Commonwealth of Philadelphia v. O'Neill, 5 EPD 7974: "This order does not, certainly on its face, limit the pool from which applicants are to be chosen to those necessarily qualified to be policemen.'

[52] Johnson v. University of Pittsburgh, 5 CCH Empl. Prac. Dec. ¶8660, (W.D. Pa. 1973).

[53] League of Academic Women v. University of Calif., No. 72-265 (N.D. Calif. Feb. 15, 1972).

[54] Cussler v. University of Maryland, No. 72-372 (D.C. April 13, 1972).

[55] Menzel v. Florida State University No. TCA 1834 (N.D. Fla. June 1972).

[56] Braden v. University of Pittsburgh, 343 F. Supp. 836, *vacated and remanded*, 477 F. 2d 1 (3rd Cir. 1973).

[57] Green v. Board of Regents, No. 72-1542 (U.S. Ct. App. 5th Cir.).

[58] The 1972 Amendments to Title VII provide that the authority of the Department of Justice to bring suit against *private* employers will be transferred to EEOC after March 24, 1974. However, the Amendments also allow the President to continue that responsibility with the Department of Justice. Whether the transfer will occur is under consideration by the Executive Branch.

APPENDIX I

Implementing Regulations and Guidelines for Laws and Regulations Concerning Sex Discrimination in Educational Institutions

Executive Order 11246 as amended by 11375 (write to: Office for Civil Rights, Division of Higher Education, Department of HEW, Washington, D.C. 20201, or Office of Federal Contract Compliance, Employment Standards Administration, Department of Labor, Washington, D.C. 20210, or Regional HEW or DOL Office)

Sex Discrimination Guidelines (June 1970)
Revised Order No. 4 (December 1971)
Obligations of Contractors and Subcontractors (May 1968)
HEW Higher Education Guidelines Executive Order 11246 (October 1972)

Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972 (write to: Equal Employment Opportunity Commission, 1800 G Street, N.W., Washington, D.C. 20506, or Regional EEOC Office)

Guidelines on Discrimination Because of Sex (April 1972)
Guidelines on Employee Selection Procedures (August 1970)

Equal Pay Act of 1963 as amended by the Education Amendments Act of 1972 (The Equal Pay Act is an amendment to the Fair Labor Standards Act of 1938) (write to: Wage and Hour Division, Employment Standards Administration, Department of Labor, Washington, D.C. 20210, or Field, Area or Regional Wage and Hour Office)

Equal Pay for Equal Work—Interpretative Bulletin 800 (August 1971)
Extension of the Equal Pay Act of 1963—Fact Sheet (September 1972)

Title IX of the Education Amendments Act of 1972 (Higher Education Act) (write to: Office for Civil Rights, Division of Higher Education, Department of HEW, Washington, D.C. 20201, or Regional HEW Office)

Memorandum to Presidents of Institutions of Higher Education Participating in Federal Assistance Programs (August 1972)
(Regulations being drafted)

Title VII (section 799A) and Title VIII (section 845) of the Public Health Service Act as amended by the Comprehensive Health Manpower Act and the Nurse Training Amendments Act of 1971 (write to: Office for Civil Rights Division of Higher Education, Department of HEW, Washington, D.C. 20201, or Regional HEW Office)

HEW Form No. 590—Assurance of Compliance (March 1972)
(Regulations being drafted)

APPENDIX II

Summary of Federal Policy Concerning Twenty-five Affirmative Action Issues in Employment

The following issues are coming up on many campuses. While by no means an exhaustive list, these items are among the major ones faced by administrators, and in most instances, federal laws and regulations apply. Unless otherwise mentioned, both Executive Order 11246 and Title VII of the Civil Rights Act apply.[30] HEW enforces the Executive Order; the Eqaul Employment Opportunity Commission enforces Title VII.

1. *Affimative Action Plans:* Required of all institutions with federal *contracts* totaling $50,000 or more and having 50 or more employees. Revised Order No. 4 details what these plans must cover. Public institutions have previously been exempt from the requirement of having a *written* plan: as of January 19, 1973, all covered institutions, public or private must have written plans.

2. *Numerical Goals and Timetables:* Required of all institutions with federal contracts covered by the Executive Order. President Nixon reaffirmed (August 11, 1972) federal policy which forbids quotas but upholds goals. Such goals are based on the available pool of qualified persons, and in line with anticipated vacancies, and may be projected in terms of percentages or actual number.

The institution *must document* its "good faith" efforts; such as what it did to recruit women and minorities; were they interviewed and what was the decision, etc. The obligation to meet the goal is not absolute; if the best qualified person is white and male, he can be hired, but the institution must be able to document what effort was made to recruit women and minorities, that such candidates were treated fairly, and that the white male was indeed "better qualified."

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[30] Title IX of the Education Amendments Act of 1972 (Higher Education Act) also covers many of these issues. The regulations for Title IX are expected to parallel other employment legislation and regulations.

The institution sets the criteria, not HEW. The criteria must be applied equally to men and women, whites and blacks, and must not in itself be discriminatory, i.e., criteria which gave preference to people who did their undergraduate work at Ivy League schools would be discriminatory in that women have been denied, until very recently, the opportunity to attend such institutions.

In very limited instances only can preference be given to women and minorities: when there has been a history or pattern of exclusion and/or discrimination, *and* if two candidates are equally qualified, only then can preference be given to the member of the excluded group.

3. *Salary Equalization:* Women and minorities cannot be paid less because of their sex and/or race. Bona fide merit systems are allowed, provided they are not discriminatory on the basis of race or sex. Criteria for raises must be applied equally. Numerous institutions have set aside specific sums for "equity adjustments." Such salary increases are exempt from federal wage controls. The Equal Pay Act also applies.

4. *Back Pay:*

Title VII—allowed up to two years (but not prior to date of coverage—for professional staff: March 24, 1972)

Equal Pay Act—allowed up to two years for a non-willful violation and three years for a willful violation (but not prior to date of coverage—for professional staff: July 1, 1972)

Executive Order—time limit not clear. HEW will seek back pay only for those individuals who were not covered by other laws allowing back pay at the time of violation.

5. *Pensions such as TIAA* which pay women less on a monthly basis because of actuarial differences: Under the Executive Order, employers make *either* equal contributions *or* provide equal benefits. Under the stricter Title VII guidelines (April 5, 1972), *equal benefits must be provided*, regardless of the contribution.

6. *Nepotism:* Under Title VII and the Executive Order *policies* or *practices* which restrict the employment of spouses are prohibited. (A policy which officially applied to *all* spouses but in *practice* applied mainly to wives would be illegal.) Institutions cannot prohibit spouses from working in the same department when both are qualified. To avoid conflict of interest, institutions can prohibit spouses from participating in employment decisions about each other. Such decisions, for example, when one is in a supervisory relationship to the other, can be delegated to someone else or to a committee. (See no. 16, *Marital and Parental Status*, and NOTE at end of paper.)

7. *Maternity Leave:* Both Title VII and the Executive Order apply.

Child*bearing* leave: Institutions are advised to follow the stricter Title VII guidelines which apply to all institutions, regardless of whether or not they receive federal aid. Title VII guidelines require that the part of pregnancy and childbirth when a woman is *physically unable* to work be treated like all other temporary disabilities in terms of sick leave, health insurance and job retention.

Child*rearing* leave: Under HEW guidelines, if leave is available for other personal reasons, it should be available for child*rearing* (when a woman is able to work but chooses not to). Such child*rearing* leave must be available to both sexes.

8. *Internal Grievance Procedures:* HEW does not require this but recommends that there be written procedures whereby individuals who feel aggrieved because of sex or racial discrimination can ask for investigation and if necessary, redress.

9. *Child Care:* Not required by any of the laws but recommended by HEW guidelines. Many women's groups are pressing for such centers to be available to the children of staff, faculty and students.

10. *Recruitment and Hiring:* Under the Executive Order, if current recruiting practices (such as word-of-mouth recruiting) result in a "significantly lower representation" of women and minorities in the applicant pool than would be expected from their availability in the labor force, then new sources of recruiting must be developed. (Minority and women's caucuses and organizations as well as individual women and minority persons are good sources.) Title VII policy is expected to be the same.

HEW requires that standards and criteria should be "reasonably explicit" and be accessible to employees and applicants.

11. *Affirmative Advertising:* All notices of job openings in advertisements, flyers, or letters should indicate that applications from women and minorities are being sought, such as "Women and minorities, including minority women, are welcome to apply." Employers *cannot* state that only members of a particular sex or race will be considered.

12. *Policy Statements:* Under the Executive Order institutions are required to have in writing a policy of non-discrimination in employment. The statement must appear in personnel manuals and be disseminated throughout the campus.

13. *Conditions of Employment, Salaries and Benefits:* Federal regulation and laws require that there be no discrimination in all conditions of employment, including:

recruitment, hiring, lay-off, discharge and recall, inservice training;
opportunities for promotion;
participation in training programs;
wages and salaries;
sick leave time and pay;
vacation time and pay;
overtime work and pay;
medical, hospital, life and accident insurance;
optional and compulsory retirement.

14. *Inbred Hiring:* Policies that forbid departments from hiring their own students upon degree completion decrease the available pool of qualified female applicants and work a particular hardship on married women who may not be mobile. Such policies *may be a violation* of the Executive Order and Title VII and need to be reevaluated.

15. *Search Committees:* HEW recommends that all search committees wherever possible should include women and minorities.

16. *Marital and Parental Status:* (See no. 6, *Nepotism*) Discrimination on the basis of marital status is specifically forbidden by Title VII when such criteria are applied to one sex only. Although not specifically mentioned, criteria concerning parental status would also be a violation if only applied to one sex.

17. *Monitoring and Accountability:* Under the Executive Order, affirmative action plans are required to have a system of accountability and monitoring:

(1) an institution-wide office that maintains records and monitors individual departments and units and reports annually

(2) individual departments and units are required to maintain records of all applicants and hires, as well as records of the efforts made to recruit women. Such records should allow for an ongoing analysis of all employment decisions: recruiting, hiring, promotions and salary increases.

18. *Job Analysis:* Under the Executive Order, *all* job classifications must be reviewed in order to identify "underutilization" of women and minorities. Data should be provided simultaneously on race and sex; i.e., black women, white women, etc.

19. *Minority Women:* In all programs recruiting or promoting minorities and/or women, minority women must not be ignored. Minority women are also protected by legislation prohibiting discrimination on the basis of race.

20. *Part-Time Status:* HEW takes no stand. Women's groups recommend that part-time status be reevaluated. In several institutions, qualified faculty members are able to ascend the tenure ladder in part-time status.

21. *In-Service Training:* Training programs are suggested by HEW. All such programs are required to be open to persons of both sexes and all races.

22. *Work Assignments:* Teaching load, research responsibilities, etc., can not be assigned on the basis of sex or race.

23. *Termination and Reduction in Work Force:* Disparate termination rates for women and minorities are prohibited unless the employer is able to demonstrate reasons unrelated to race, sex, national origin or religion. Lack of seniority cannot be used as a reason for termination when the person(s) laid off has been found to have less seniority because of previous discrimination.

24. *Student Employment:* Discrimination in employment of all staff, including undergraduate and graduate students is prohibited.

25. *Publication of Affirmative Action Plans:* Under the Executive Order, such plans, including numerical goals, must be disclosed other than those parts which would involve confidential information about employees and would constitute a violation of privacy, or would disclose financial information about the institutions.

References:
Executive Order 11246 as amended
Obligations of Contractors and Subcontractors
Revised Order No. 4
Office of Federal Contract Compliance Sex Discrimination Guidelines
HEW Higher Education Guidelines, Executive Order 11246
Title VII of the Civil Rights Act of 1964 as amended
EEOC Sex Discrimination Guidelines
Equal Pay Act of 1963 as amended
Title IX of the Education Amendments Act of 1972

NOTE: When state laws or regulations conflict with federal law or regulations, the federal laws and regulations supersede.

For a summary of laws, see *Federal Laws and Regulations Concerning Sex Discrimination in Educational Institutions*, prepared by the Project on the Status and Education of Women, Association of American Colleges.

Mr. O'HARA. Our next witness is Mordeca Jane Pollock representing the National Organiz[illegible]n for Women.

We would very much lik[illegible] hear your testimony.

STATEMENT OF MORDECA JANE POLLOCK, NATIONAL ORGANIZATION FOR WOMEN

Mr. O'HARA. Without objection, your statement will be printed in full at this point in the record.

You may proceed.

Ms. POLLOCK. Thank you.

I am Mordeca Jane Pollock. I am a member of the Employment Compliance Task Force of the National Organization for Women.

I must say and assert that despite the extensive legislation on the books, and despite certain agency programs such as that of the Office for Civil Rights of HEW, discrimination continues to be rampant in American colleges and universities. It continues to be rampant in the United States, but most especially, I think, in our institutions of higher education.

In the past 2 years the position of women has not improved in any significant way except perhaps in admission to law and medical schools, where there has been an improvement I am very happy to say.

The percentage of women on college faculties really has risen less than 1 percent and we witness a sort of academic musical chairs where the proportion of women on college faculties has decreased slightly and the proportion of women on university faculties—that is to say faculties which offer graduate education—has increased slightly.

We see the usual triangular phenomenon with women becoming rarer and rarer as posts become more and more prestigeous. You know that. There hasn't been any real change in the stratosphere. Men still hold 90.2 percent of the full professorships. That is all in the record.

There are a number of problems with affirmative action. First of all, colleges and universities will very often adhere to the letter of the law and they will violate the spirit. Affirmative action people around the country in institutions of higher learning, find ourselves in the somewhat anomalous situation of explaining to the department heads what the laws require of them. We are teaching people how to go through the steps to have legally justified behavior but not to end discrimination.

For example, we see job offers that are clearly not serious. I introduced some testimony on that.

We have also come to advise women who wish to file complaints with HEW to be ready for severe harassment. We are telling people, don't file individual complaints. You will be fired. Your salary will get cut. We have documented time and time again instances of harassment.

Unless a woman is independently wealthy and has an impeccable moral record and nerves of steel, she shouldn't file.

In the days previous, we heard people from institutions of higher education argue that institutions are being forced to hire unqualified and minority members and women. That isn't true. We have also heard that there are no qualified women—this is again untrue.

You set your numerical goals on what is in the work force. You are not asked to bleed a stone. You have heard others testify: there are plenty of qualified women on the scene. We hear university officials tell us that affirmative action endangers quality. Yet, every time HEW or EOC has gone into investigate university practices—we found again and again that universities are evaluating Anglo males at the expense of better qualified minority people or female people.

Another thing we found is that the universities are resisting, I think, what is a reasonable scrutiny of their hiring standards. The hiring standards in most universities—if you are in affirmative action you know this—have not been rationalized or validated.

What is the relationship between publishing 25 articles of four pages each and teaching freshman chemistry? Standards haven't been validated or rationalized. Rarely have they been set out. They certainly haven't been weighted against one another.

What is the relative weight of publications versus teaching performance versus service? (We heard about the industrial model. Dr. Sandler put that myth away.) The problem is not in the law. The problem is not that they endanger the quality of institutions. They don't take away academic freedom. Academic freedom doesn't mean freedom to deprive people of their rights.

The problem is that these affirmative action obligations of university and college contractors must be maintained, must be retained.

If this Congress wishes to aid more Americans in securing their constitutional rights, then not only must we maintain these requirements but make these requirements effective. We have to strengthen their enforcement. That, I think, is where the problem lies.

The problem is not so much in forcing universities to lower their standards. The problem is enforcing the law. The problem is in protecting people's rights, protecting those who have historically been discriminated against. The provisions of the Executive orders and the laws have not been effective simply because the Federal agencies in charge of enforcing them have not imposed real sanctions on offenders, on people who deprive other people of their constitutional rights.

Again, Dr. Sandler spoke of this.

Let's take the example of EEOC, if you will. It has been 2 years now that the EEOC has enforcement powers over private institutions of higher learning. In 2 years EEOC has not taken an institution to court. NOW has again and again gone to EEOC and said please do your job. That is what you are funded and mandated to do. NOW has said why don't you incorporate institutions of higher learing into your tracking system?

I am sure you know the EEOC tracking system establishes and follows very high impact targets for litigation. The system has been very effective. EEOC doesn't seem even seriously to have considered the proposal. It is "researching it." Whatever that means.

There is a very important and potentially precedent setting case under title VII against the University of Pittsburgh Medical School. NOW again has repeatedly urged EEOC to intervene in this. It is Sharon Johnson versus the University of Pittsburgh. EEOC has not responded with action to our requests.

When Congress voted up the amendments to title VII in 1972, Congress made a special point of including institutions of higher education. EEOC isn't doing its clearly mandated job. The legislative history of title VII and its amendments point to this. EEOC owes explanations to this Congress, that funds it.

The Department of Justice has not been much better. That is to say, it has been even worse. Justice has authority under title VII to take people to court. It has never done this, sought to eliminate employment discrimination in an institute of public education.

The HEW Office of Civil Rights makes the other agencies look energetic. HEW has done some terrible things. It lulled colleges into complacency by saying OK, we approve your affirmative action plan. Then 2 months later EEOC came out with a finding of probable cause for sex discrimination.

I think this is an irresponsibility to the people who pay for that agency.

HEW, as you know, has responsibility for enforcing Executive Order 11246. It hasn't yet issued contract compliance regulations. It is supposed to do that. It has an informal set of guidelines but it has no regulations that we published or commented upon.

In 1964, the Civil Rights Act was passed. It has been 10 years since 1964. Still we haven't seen any HEW-issued guidelines on title VI which prohibits discrimination against minority people in educational institutions.

In 1972, title IX of the higher education amendments was passed. It took 2 years before even proposed guidelines were set out. Then HEW declined to take on any complaints under title IX on the grounds that the implementing regulations haven't been issued. Of course they haven't issued the implementing regulations. Their reasoning is circular.

I think you know the General Accounting Office, NOW, other civil rights organizations have presented a lot of evidence to the House Subcommittee on Fiscal Policy, that HEW frequently violates the Executive order, that it is poorly administered.

GAO completed an audit of the Office for Civil Rights in response to Congressman Dellenback's request and found a number of insufficiencies.

I don't know if you heard the horror story of the University of California at Berkeley where for 4 years people aggrieved have been deprived of their rights, people who don't have jobs for the wrong reasons and have not gotten relief. HEW continually backed away from its obligation to enforce Executive orders. All this means the following:

NOW believes that any system that leaves the enforcement of civil rights to HEW is doomed to failure. We believe that civil rights responsibilities of HEW should be removed entirely from the Department and that they be lodged in a separate and independent commission.

We believe that the Commission must have cease-and-desist powers. We believe the Commission's chair must be appointed by the President but not subject to removal from office during a fixed term.

I think it is necessary to provide an office of public counsel in each of several civil rights agencies. They would be similar to the Office of Public Counsel operating within the ICC.

The Office of Public Counsel was established by the Railroad Reorganization Act of 1973 and it provides lawyers for those consumers, for the little person, who want to deal with the Agency.

Universities are large, prestigeous and very powerful corporations. They have no trouble dealing with department heads and in dealing with agencies of the Government.

Aggrieved persons are individuals and generally have a lot of trouble. Sometimes there are civil rights groups but I doubt at this point whether the Civil Rights Groups have as much or have more power than universities.

To sum our position up now opposes any legislation that would subsequently change or weaken in any way current affirmative action requirements.

We advocate the shifting of all HEW civil rights enforcement powers to a separate agency with cease and decease powers and court enforcement authority and we advocate the provision of an office of public counsel within each agency.

Thank you, sir.

Mr. O'Hara. Thank you very much, Mrs. Pollock, we appreciate your testimony.

There seems to be considerable unanimity in the view you expressed that HEW ought to be taken out of the civil rights enforcement bureau. People of all different viewpoints seem to agree on that. They may disagree on what HEW should have been doing but they all agree that it hasn't been doing it, whatever it is.

I was interested in the figures you used showing the number of women on faculties. I think the number of women on faculties, the percentage of women on faculties, has gone up slightly and the number on college faculties as a percentage has gone down slightly.

Have you tried to analyze why in most of the cases?

Ms. Pollock. I think what is happening is there is a shifting around of the same personnel.

Mr. O'Hara. Better endowed and stronger financially institutions have been able to hire them away.

Ms. Pollock. I think you are right. I think that is the case. There has been a trivial improvement but I don't think it is significant. I think we could have done much better given the pool or women, say, coming out of very prestigeous graduate universities.

Mr. O'Hara. Do you have any figures on the faculty new hires during the recent period?

Ms. **Pollock.** Not with me. I probably have it in my office.

Mr. **O'Hara.** Do you have any recollection or general notion of what that shows in terms of——

Ms. **Pollock.** Yes. It doesn't show any substantial improvement. Also, this is, as you know, a tight year for academies because they have been feeling the economic squeeze for a while.

I will tell you the best thing to do, the minute I get back to the office I will mail you down the figures if that is amenable.

Mr. **O'Hara.** This will be fine. Without objection, they will be entered into the record following your testimony.

What has been your experience with pay differentials?

Ms. **Pollock.** My experience with pay differentials has been painful.

Mr. **O'Hara.** How about the enforcement?

Ms. **Pollock.** Let's define some terms. First there is university faculty, teaching and nonteaching. Nonteaching would be, say, postdoctoral fellows in the sciences, who have a training period. Then on the staff side there are nonexempt and exempt jobs. Nonexempt are, roughly, nonprofessional people.

The Department of Labor has been fairly efficient about the nonexempt jobs because they are easy to classify. Where labor has been hesitant to step in, and the courts, is in the difficult analysis of faculty salary differentials and of professional salary differentials. We recently studied these differentials at my own university.

They show exempt categories and in some faculty categories, that there were differences in pay. There are inequities in salary, certainly on the faculty side and certainly on the professional side. They vary. The courts have been hesitant to come in and are just beginning to come in. Agencies have been hesitant to come in for good or not so good reasons.

Hopefully they will in the next year. It would be a good idea if they did.

Mr. **O'Hara.** Thank you very much, Mrs. Pollock, for your testimony.

Ms. **Pollock.** Thank you.

[The statement referred to follows:]

PREPARED STATEMENT OF MORDECA JANE POLLOCK, EMPLOYMENT COMPLIANCE TASK FORCE, EDUCATION DIVISION, NATIONAL ORGANIZATION FOR WOMEN

Good morning. I am Mordeca Jane Pollock of the Employment Compliance Task Force, Education Division, of the National Organization for Women (NOW). For purposes of identification only, I have been a faculty member of Brandeis University since 1967 and for the past year that University's affirmative action coordinator in charge of developing and implementing its affirmative action program.

NOW is a national civil rights organization, composed of more than 50,000 women and men, working in more than 500 chapters in all 50 States to bring women into the full mainstream of American society. One of our national goals is the elimination of discrimination against women and girls in educational opportunities. NOW has supported and lobbied extensively for the passage of the 1972 Amendments to Title VII of the 1964 Civil Rights Act, which extended that statute's coverage to educational institutions, as well as Title IX of the Education Amendments of 1972, and the Women's Educational Equality Act.

As testimony before this Subcommittee has already indicated, colleges and universities today are subject to a number of civil rights laws and orders mandating the elimination of most forms of discrimination based on sex, race, and national origin. Under these provisions, Federal agencies now possess many of the enforcement tools required to ensure that postsecondary institutions put an end to traditional patterns of favoritism for white males. These civil rights provisions reflect a strong public policy against discrimination in our nation's educational institutions. Despite extensive legislation and executive agency programs, however, discrimination continues to be rampant in America's schools, especially in institutions of higher education.

The position of women on college and university campuses has not improved significantly in any aspect of university life, except perhaps in admissions to law and medical schools. Since Executive Order 11246 was amended in 1969 to bar sex discrimination in employment, the percentage of women on college faculties has risen less than one percent. In 1973, men still held 90.2 percent of the full professorships and 83.7 percent of the associate professorships, while women were concentrated in the lowest teaching positions. While the proportion of women on university faculties has risen slightly, the proportion of women on college faculties has actually declined. It is clear that affirmative action has not worked.

Too often, college and university officials purport to carry out affirmative action by adhering to some of the requirements of the law while at the same time violating its spirit. For example, reports from universities have cited numerous examples in which recruitment files have been padded with resumes of obviously overqualified or underqualified women with no interest in the position. One woman told of receiving a rejection letter for a position for which she never applied. An associate professor was offered a job as an assistant professor, at a salary cut of $5,000 a year. Another woman, a dean at an extremely prestigious university, has received several job offers for positions as dean at smaller, less presitgious colleges. It is difficult to believe that any of these were serious job offers. It is more likely that they were made to present the appearance of affirmative action compliance.

Punitive institutional action against those who have asserted their rights by filing complaints has been fast and forceful. Academic women have learned that attempts to make the law work for them are likely to have a disastrous effect on their own careers. They can expect to be fired, blackballed, denied tenure, given inferior teaching assignments, or subjected to a variety of lesser harassment techniques. Shortly after Executive order became applicable to her university, one professor filed a complaint alleging dual salary standards for men and women. When the university was informed of her action, it revoked her husband's tenure and reduced his teaching load to a part-time level. Another woman filed a complaint shortly before she went on a paid leave of absence. In the middle of her leave, her salary was summarily reduced to half its former amount, from $10,000 to $5,000. In several instances, complainants have been removed from positions on important university or departmental committees. All this and more have led women's rights organizations to advise women not to file complaints with HEW.

The Committee has heard several witnesses argue that the civil rights laws and orders affecting postsecondary education have worked and that favoritism to white males has stopped. Opponents of affirmative action argue—and spuriously—that institutions are now being forced to favor underqualified women and minority males.

Let us look at the hard facts. While HEW may have found that white males were subjected to discrimination in fewer than 10 instances, that same agency in conducting *one* compliance review found approximately 50 instances of discrimination against women, many of whom had not filed complaints. The instances of alleged reverse discrimination are, thus, by comparison so miniscule as to be statistically insignificant.

The Committee has also heard protestations that affirmative action goals are being imposed as quotas. Consequently, universities claim that they must hire underqualified persons, that they must lower quality. As HEW and EEOC have repeated time and again, goals are not quotas but numerical objectives by which good faith effort may be measured, along with numerous other factors. The use of goals has been long recognized by the corporate community as a sound management technique, and the same principles apply to personnel management in institutions of higher education.

But even if universities and colleges had to fill those imaginary quotas you have heard so much about, postsecondary institutions would not have to hire unqualified women. As Betty Vetter, Commissioner of the Scientific Manpower Commission, has already testified before this Committee, the notion that qualified female academicians do not exist is a myth. Fewer women than men have traditionally been trained for academic positions, but substantial numbers of highly qualified but underutilized women can be found both on campus and off. A study by the College Art Association last year, for example, showed that while women were concentrated in the lowest ranks of the college art departments, they were on the average more highly trained than their male colleagues: 30.4 percent of the women, but only 24.7 percent of the men had Ph.D.'s.

We hear university officials express deep concern that affirmative action endangers quality. In the tiny number of cases in which the practices of postsecondary institutions have been scrutinized by EEOC or HEW, the facts have shown that the standard university practice has been to elevate white males at the expense of equally or better qualified candidates whose sex, ethnicity, or race did not qualify them for membership in the "old boy" network.

The majority of persons working in university compliance will tell us that faculty hiring and promotion practices have never been accountable to careful, measurable standards of merit or quality. Nor have measurable peer standards (such as number of publications) been assigned relative weights. Universities have urgently resisted scrutiny of their selection standards, primarily because such standards have not been rationalized, validated, or applied evenhandedly.

Another claim we have heard is that the policy of affirmative action is based on an industrial model and thus not appropriate to institutions of higher learning. Even assuming that the first claim is true—a view to which NOW does not subscribe—universities' personnel systems have grown to be very much like those existing in private industry. Second, the federal courts have already applied many of the precepts of affirmative action to educational institutions in cases challenging teacher selection procedures which operate to exclude minorities.

Finally, preference for female and minority candidates does have a place when two candidates possess equal qualifications which have been validated as necessary to the job and when past discrimination has produced an underrepresentation of women and minorities. White males should no longer receive preference on the basis of unvalidated qualifications which proportionately fewer minority males and women have had the opportunity to acquire. Affirmative action is based on the legally upheld view that a benign practice neutral on its face but discriminatory in effect, tends to perpetuate the *status quo ante* indefinitely.

It is NOW's position that the affirmative action obligations of university and college contractors must be retained. If the Congress wishes to help more than half of all Americans secure their Constitutional rights, affirmative action requirements not only must be retained, but they must be made effective by strengthening their enforcement.

Patterns of employment in postsecondary institutions prove that civil rights enforcement efforts have not been effective. The fault does not necessarily lie in the statutes and orders themselves. These provisions have not had the effect intended because Federal agencies responsible for their enforcement have failed to impose sanctions on offenders, in the face of serious violations, or to seek relief for discriminatees through the courts.

Let us take the example of the Equal Employment Opportunity Commission. For two years now, the EEOC has had enforcement powers over private institutions of higher learning. EEOC has determined that there is probable cause to believe that certain of these institutions have committed illegal discriminatory practices. In two years, however, EEOC has not taken one such institution to court. NOW has again and again proposed to the Chairman of EEOC and members of his staff that the Commission do its job; that the commission incorporate private colleges and universities into its tracking system. The tracking system was established to select high impact targets for litigation.

To our knowledge, EEOC has not seriously considered this proposal. Instead, as Chairman Powell has already indicated to this Committee, EEOC is "researching" special problems presented by educational institutions. NOW seriously questions to what extent EEOC has committed resources to such research and what findings have resulted.

In addition, NOW has repeatedly urged EEOC to intervene in a potentially precedential Title VII action against the University of Pittsburgh. But NOW's reiterated requests have not produced any action.

Congress made a special point of including educational institutions in the 1972 amendments to Title VII. NOW submits that EEOC owes Congress an explanation for its failure to use virtually any of its appropriations to carry out the intent of Congress.

The Department of Justice has been just as reluctant to assume its civil rights responsibilities in higher education. Never has Justice used its authority under

Title VII to eliminate employment discrimination at a public institution of education. Justice's inaction continues while hundreds of charges against universities pile up in EEOC's backlog.

But the inertia of EEOC and the Department of Justice has been far less harmful to women and minorities than the persistence with which HEW has lured colleges and universities into complacency by approving affirmative action plans which do not comply with Executive order regulations. This pattern of negative re-enforcement has been accompanied by the agency's failure to inform these institutions of their civil rights obligations.

For example, HEW has had responsibility for enforcing Executive Order 11246 since 1969. As of September 1974, however, it has still not issued contract compliance regulations, as it is required to do by the Secretary of Labor's regulations implementing the Executive order. Instead, HEW released in 1972 an informal set of guidelines, which were not published for comment pursuant to the Administrative Procedures Act and which fail to specify clearly to colleges and universities the extent and scope of their legal obligations. Further, it has been 10 years since Title VI of the 1964 Civil Rights Act was passed, yet HEW has never issued guidelines on the application of this statute to such critical issues as student admission policies. It was not until after two years following the passage of the 1972 Higher Education Amendments that HEW proposed guidelines on Title IX. HEW has declined to investigate complaints lodged against educational institutions under Title IX on the grounds that the implementing regulations have not been finalized. By the time the Title IX regulations are finalized, the law will be at least three years old.

HEW's failure to issue adequate regulations, or any regulations at all, is only the tip of the iceberg. Its compliance review procedures, both of employment practices and student services, have been wholly inadequate. The General Accounting Office, NOW, and other civil rights organizations in 1973 and 1974 have presented much evidence to the Subcommittee on Fiscal Policy of the Joint Economic Committee showing that HEW has frequently violated the Executive order and that it is generally ineffective as an administrative agency. In addition, the GAO recently completed a special audit of HEW's Office for Civil Rights in response to a request from Congressman Dellums, which NOW understands found a number of extreme deficiencies. NOW recommends that this report, as well as previous testimony before other committees, be considered by this Committee in the context of the current hearings.

HEW has repeatedly neglected to initiate enforcement proceedings when it has found violations by colleges and universities of the Executive order. Instead, it has routinely elected to pursue protracted negotiations, which sometimes last several years, and which ultimately lead to no relief for victims of discrimination.

The history of HEW's handling of the compliance status of the University of California at Berkeley is typical of the agency's contract compliance program. In 1970 and 1971, class action sex discrimination complaints were filed by numerous individual women and several organizations alleging sex discrimination on the Berkeley campus. More than a year after the first complaint was filed, HEW attempted to conduct a compliance review and investigation but was unable to do so because the University refused HEW access to its files. Such refusal is in violation of the Executive order, but HEW nevertheless took no enforcement action. Finally, in 1972, HEW conducted a compliance review and found extensive evidence of discrimination on that campus. Instead of initiating sanction proceedings, as Executive order regulations require, HEW simply requested the University to develop another affirmative action plan. Throughout 1973, despite extensive technical assistance from HEW, Berkeley did not produce a legally sufficient plan. Finally, in 1974, four years after the class action complaints were initiated, HEW agreed to approve Berkeley's compliance status in exchange for a commitment from the University to begin compiling information necessary for the development of an acceptable plan, to be submitted by the end of this month. In the interim, women employed on the Berkeley campus having lost all hope in HEW, in 1972 filed a class action lawsuit; this case, however, has not yet gone to trial because the Federal District Judge, relying on statements made by Berkeley and HEW officials, has delayed the proceedings on the grounds that the lawsuit would be mooted by an affirmative action plan. Yet the agreement between HEW and Berkeley does not provide that the upcoming version of the University's plan include any provision for the resolution of complaints. The Berkeley case is only one example of HEW's failure to provide relief to persons whom it identifies as victims of discrimination.

While the entire contract compliance program under the Executive order is susceptible to serious criticism for its ineffectiveness in securing equal employment, HEW's performance has been one of the worst of all 16 compliance agencies. Ultimately, the responsibility rests with the Secretary of Labor to ensure that the agencies delegated authority under the Order are doing their jobs. But the Labor Department has done nothing to oversee HEW's performance.

In view of all of the evidence presented to Congress over the past years, NOW believes that only one conclusion can be reached: HEW's record in civil rights enforcement has been appallingly deficient. Any system which leaves in the hands of HEW the enforcement of these rights will continue to fail. NOW recommends that civil rights responsibilities be removed entirely from HEW and lodged in a separate Commission. Furthermore, this Commission should have court enforcement authority and cease and desist powers if it is to be effective. The Commission's Chair should be appointed for a fixed term and not subject to removal from that position by the President.

Legislation should also be enacted to provide an office of public counsel in each civil rights agency, similar to the office now operating within the Interstate Commerce Commission. Established by the Railroad Reorganization Act of 1973, ICC's Office of Public Counsel provides lawyers to represent consumers in agency proceedings and planning. A civil rights office of public counsel could represent the concerns of victims of discrimination in proceedings involving individual complaints as well as general rulemakings. We have found that large employers, including colleges and universities, are well able to communicate their concerns regularly to the heads of federal agencies. Individual complainants, on the other hand, rarely receive a timely acknowledgement of their complaints.

In short, civil rights provisions, many of which have been in force for nearly a decade, have not brought relief to racial and ethnic minorities or to women in postsecondary institutions. If colleges and universities demonstrated stiff resistance to eliminating discrimination, with whatever spurious reasons they have put forth, Federal enforcement agencies have behaved with indifference and lethargy.

NOW opposes any legislation that would substantially change or weaken in any way current affirmative action requirements. We advocate the shifting of all HEW's civil rights enforcement powers to a separate agency, with cease and desist powers and court enforcement authority. In addition, we advocate the provision for an office of public counsel within each civil rights agency.

Mr. O'HARA. Our next witness will be Dr. Norma Raffel, Women's Equity Action League.

Dr. Raffel.

STATEMENT OF NORMA RAFFEL, WOMEN'S EQUITY ACTION LEAGUE

Ms. RAFFEL. I am Dr. Norma Raffel, head of the Higher Education Committee of the Women's Equity Action League—WEAL.

WEAL is a national voluntary organization which promotes equality in education and employment through legislation, litigation, and by pressing for full enforcement of existing antidiscrimination laws on behalf of women.

Formerly I was the national president of WEAL. I am also a member of the Pennsylvania Commission on the Status of Women and serve as their resource person on education. I served on the Pennsylvania Department of Education's Equal Educational Opportunity in Higher Education Task Force.

Also, I have taught courses in the biological sciences at Goucher College and the Pennsylvania State University.

I have been spokesperson for the women at the Pennsylvania State University in presenting information on their behalf to HEW's Office for Civil Rights during the compliance review at the university.

Since then I have attempted to expedite the activities of HEW/OCR so that an affirmative action plan will be developed and it will be monitored.

I would like to take parts of my written statement.

Mr. O'HARA. Without objection, the complete statement will be entered in the record in full.

Ms. RAFFEL. Until 1970 when the Women's Equity Action League filed the first sex discrimination complaint against educational institutions under Executive Order 11246 as amended, the issue of discrimination against women in the academic community was largely ignored.

Some persons say there is no discrimination at all. I have dealt with that in my written statement.

Some persons say that women, with few exceptions, cannot qualify for upper level faculty positions. How then can we account for the study which shows that the average woman doctorate is academically superior to the average male doctorate?

Some academicians say that they would hire qualified women if they were available. The number of women receiving doctorates give at least a partial indication of the numbers available.

Few institutions hire even half the number of women doctorates available at any but the lowest level. Their unemployment rates also suggest that women are available. In 1973 women with doctorates in science, engineering, and social sciences have an unemployment rate four times higher than men with doctorates in the same areas.

Many male academicians would at least hire, if not promote, superwomen. But alas, there are few superwomen just as there are few supermen in academia.

Many universities hire the average male doctorate. but deem the average female doctorate unqualified.

The insensitivity to existing inequities is illustrated by the distinguished male professor who said that he had been searching for qualified women to fill a faculty position for 15 years but he could not find one qualified.

When it was suggested that he submit a written report of why the women applicants were not qualified, he became enraged and left the room.

The fact is that there is discrimination against women in education. It was voluminously documented in Representative Edith Green's hearings before the Special Subcommittee on Education in 1970. Since then, additional studies and investigations at the State and Federal level have substantiated the charge of discrimination against women in the educational community. How, then, do we resolve this problem?

Although some discrimination today is manifested in conscious, overt acts, most employment discrimination persists in old employment practices, that is, soliciting candidates for a job from friends and making arbitrary employment decisions based on assumed characteristics of a group.

In order to eliminate the discriminatory effects of employment practices an analysis of such practices and their effect on underutilized groups would have to be made. Then appropriate remedial actions must be taken if discrimination is to be eliminated. These specific, positive remedial actions are called affirmative action.

Without it discrimination resulting from regular employment practices continues. Benigh neutrality or simply forbidding discrimination is not enough. This was recognized in the Presidential Executive orders from 1961 through 1967 which required Government contractors to take result-oriented affirmative action to eliminate job discrimination.

The present Executive Order 11246 as amended also requires affirmative action. There is a consistent trend in the courts to uphold affirmative action, including goals and timetables to overcome the effects of past discrimination.

Affirmative action is necessary to eliminate past and present employment practices which perpetuate unequal opportunities. Affirmative action is result-oriented. The finest plans are meaningless unless there is a measurable improvement in the numbers of underutilized persons.

Coping with affirmative action is relatively new to educational institutions. They seem to be going through the same apprehension that most groups experience when they have to deal with a new situation in which they don't see immediate benefits for themselves.

It is astounding to me that with all of the brains and talent at the disposal of educational institutions, more of them have not been able to produce acceptable, affirmative action plans. It is disappointing that educational administrators often seek to meet only the minimum legal requirements. If educational institutions would tackle discrimination with the same ingenuity and enthusiasm that they have used to attract Federal funds, there would be many more acceptable affirmative action plans and a greater increase in the hiring and promotion of minorities and women.

Instead, educational institutions are spending a great deal of time and effort resisting the requirements applied to all other Federal contractors.

For the first time in academia, hiring, promotion, and salary practices are being examined by outside groups. It is only natural for people to feel threatened when they are first asked to justify their judgments. Uniform policies must be developed and so must specific criteria for positions.

Policies must be applied in a consistent manner. One administrator at a large university said to me recently that although affirmative action had not resulted in much of an increase in the number of underutilized persons, the personnel practices were certainly improved.

Some persons suggest that goals and timetables are not suitable for educational institutions. They overlook the fact that goals are targets, not quotas. There is no penalty for not meeting a goal if good faith efforts are made. The determination of a numerical goal causes the persons involved to analyze the situation to see if there is underutilization and what can be done to remedy it. The determination of numerical goals and timetables take into account such factors as anticipated new vacancies, promotions, and the availability of qualified persons.

Preferential hiring of underutilized persons is not required. Unqualified persons do not have to be hired to meet a goal.

What has caused educators some concern is that they now must enumerate qualifications for positions. While it may be more complex to determine job qualifications for a professor than it is for a cab driver, it is no different from hiring any other professional person.

The attorney hired by a corporation, the physician hired by a hospital, and the professor hired by a university are all subject to similar considerations when being hired and promoted as professionals.

Corporations, hospitals, and universities all have a great deal at stake when they hire their professional personnel. Their future reputations and excellence may well be affected. If businesses and health facilities can recruit and promote their professionals successfully under affirmative action procedures, there is every reason to believe educational institutions can too.

Requesting separate rules for the academic community is a natural reaction, as they finally come to grips with the establishment of new procedures and practices. It is far easier to continue in the same old way. However, separate rules are not appropriate for educational institutions. All phases of the employment would would want a special classification because they all perceive particular problems in their own spheres.

There is nothing mystical about a good professor any more than there is about a good physician. If an outstanding teacher-scholar is needed, those qualities can be enumerated and objectively evaluated.

If certain job-related personal characteristics are desirable—they can be stated. Only then will discriminatory judgments; that is, "a woman would interfere with the right social mix," or "a woman's place in science is washing dishes or being a technician," or "I won't hire women, they are too emotional"—be eliminated from employment decisions.

Further, any special treatment for education would create a separate class of second-class citizens for women and minorities in the academic community. It would deprive underutilized persons in education of the same rights and remedies in employment afforded such persons in all other aspects of society.

There can be no exceptions made for any groups when it comes to affirmative action, which includes goals and timetables. Instead, Congress should be concerned that the requirements of Federal laws and regulations are vigorously enforced. Women's groups certainly are not satisfied with the progress made in enforcing these laws and regulations.

The reluctance of HEW/OCR to use its enforcement powers and rely on voluntary compliance has caused an inordinate delay in achieving an equal opportunity for women in education. In over 3 years there have been nearly 200 universities and colleges investigated.

However, during this time less than 20 affirmative action plans have been accepted by HEW/OCR. From May 1973 to June 1974 only 30 plans were evaluated, some accepted, some rejected.

There are, as of July 1, 1974, 201 affirmative action plans in the regional offices waiting to be evaluated. At that rate, it will take almost 7 years to eliminate the backlog.

Thus far, universities have had Federal contracts delayed not because they have been deficient in the implementation of affirmative action plans, but because they have not even developed acceptable affirmative action plans.

There is great concern among women's groups that the Office for Civil Rights is not committed to the enforcement of Executive Order

11246, as amended. As an illustration I have given Mr. Buell of the staff a copy of the memo of HEW's Assistant General Counsel for Civil Rights to the HEW General Counsel which was intended for the Secretary.

This memo describes the background of the HEW compliance review of the University of California, Berkeley, describing the weak legal position of HEW if they didn't issue a show cause notice to the university after a protracted period of negotiations and extensive technical assistance which resulted in an unacceptable affirmative action plan.

It describes the problem of renewing the university's eligibility for new Federal contracts at that time in view of the Department of Labor Regulations.

This legal memo was buried by the General Counsel. A show cause notice was not issued and the university became eligible for new contracts, regulations, notwithstanding.

Such actions call into question the intentions of HEW regarding equal employment opportunity in education.

Whether due to mismanagement or high level policy decisions, the inadequacies of HEW's enforcement of Executive Order 11246, as amended, are apparent. There is little reason to believe that the enforcement of title IX will be any better.

Because there are difficulties in enforcement and resistance from educational institutions does not mean that educational institutions should be relieved of their responsibilities for developing and implementing effective affirmative action plans.

Instead, they should be prime examples in overcoming discrimination and providing equal opportunity that is required morally and legally by the rest of society.

Mr. O'Hara. Dr. Raffel, it has been suggested to this subcommittee that the numerical goals that institutions of higher education have been required to set in their affirmative action plans have in some instances resulted in a preference in employment being given to women or to racial minorities because of the university's commitment to achieve a particular numerical goal.

If that is indeed the case, would you believe that such preference could have been justified?

Ms. Raffel. No; I think, as I said, preference is not required.

Mr. O'Hara. But it is not forbidden. Maybe it is forbidden but in any event, people claim it is going on.

Ms. Raffel. I find it very difficult to believe, having dealt with university administrators somewhat and have dealt with HEW, that there has to be this continuing confusion on the issue of goals and timetables.

There are qualified women and when they are in the applicant pool, they are there. You don't have to hire underqualified people. I don't believe it is necessary. In a situation, I recall, there was a department that had 64 members and there were no women. Yet 20 percent of the Ph. D.'s in that particular science were received by women. When they had 10 people all equally qualified they selected the woman out of that 10. That does not mean she was less qualified or underqualified.

As is happening now with the job situation, you may get 10 or 20 people who are fairly equally qualified for a job. If there is underutilization in the department, I would suggest they take a very careful look at that woman who is equally qualified with the men when selecting candidates.

Mr. O'HARA. Then you would say that a preference could not be justified to select, under the particular circumstances you described, to select a less qualified woman but that it would be all right to use a preference to select an equally qualified woman.

Is that a fair summary?

Ms. RAFFEL. I would think that would be justified. She would be equally qualified. I think preferential hiring on the basis of sex is not necessary. The woman getting a Ph. D. is qualified as much as a man getting it. I don't think we have to continually discuss this business of being underqualified.

Mr. O'HARA. I agree with you. I don't think it is necessary. I think there are indeed a great many very well qualified women who are available for a position on some university faculty and I don't see why any preferential hiring should be necessary to eliminate discrimination against women.

Mr. BIAGGI. I think it is fair to say you wouldn't want the woman denied if she is equally qualified.

Mr. O'HARA. I think she would accept a preference for a qualified woman.

Ms. RAFFEL. If there is underutilization of women in the department. This would be a hypothetical situation, if they had 90 percent women in biological science department, and there was a woman equally qualified with a man, I think you have to look at it differently.

The fact of the matter is that in most departments women are underutilized. What we are asking for is fair consideration and I believe we can stand on our own merits. As we talk, we seem to think that hiring takes place in a computerlike vacuum, but we all know how hiring goes on. Those who had access to some of the decisionmaking in hiring understand how the pros and cons of applicants are discussed and shift-offs back and forth that take place when considering persons.

Mr. O'HARA. We had a little flak at the University of Michigan a few years ago over a question of who would be promoted. Under the guidelines adopted under the Executive order, there was a provision that said that if you could not, in meeting your goal—you could use qualifications but you could not seek qualifications greater than the least qualified person presently employed at the higher faculty level. There was considerable discussion of that at the time.

Finally a clarification was issued that, well, they didn't really mean that as it applied to university employment.

I would like to get your attitude on that question. If we have a faculty in a particular department where the full professors are all males, where the assistant professors are a mix of male and female, and it comes time to make one of them a full professor, if the best qualified were a male but at least one of the females was as well qualified as the least qualified full professor, what would be your attitude toward that promotion?

Ms. RAFFEL. Well, I would have to take many things into consideration as I am sure anybody would in a case like that.

I can think of physics as an example. If you had a gentleman ready to retire who is a full professor and he had received that professorship on a master's degree, I would have to look at that kind of a situation a little differently than if everyone had the Ph. D. degree.

I think there are situations like that. That is where the problem comes in. If they all had the Ph. D. degree and the people considered for promotion all had their Ph. D. degrees and all had a research record, I would want to examine the criteria for promotion very carefully. These decisions are often subjective. For example, how many papers are published? I have had the opportunity to know administrators making employment decisions who flip through papers and evaluate it by the number of charts, not what is the quality of the research. They don't read each paper the person has published.

Mr. O'Hara. They do a lot of their grading that way, too.

Ms. Raffel. If they are in a hurry perhaps. You know, what we are saying is it is very subjective. How much better is one journal than another? These things are not always foremost in their minds. I would sit there and question very hard just what the criteria are. If you want a particular person promoted you can have a job description to fit him. That is the kind of thing we want to look at carefully.

That takes, of course, an experienced reviewer because these things are going on today and are not recognized.

Mr. O'Hara. Well, I thank you for your testimony.

Mr. Biaggi.

Mr. Biaggi. I am continually plagued by the spectre of what can be seen down the road. Accepting the premise that everyone is entitled to equal opportunity, which I concur with wholeheartedly, then we look to the affirmative action concept and its implication and how it affects everybody. Not simply sex differences or minorities, because the question that arises is what we regard as a minority. How it affects everybody.

The testimony we heard here and in my own personal travels finds everybody wanting a piece of the action. With equal claim and justification. On the basis that equal opportunity should be provided for all.

This morning we are talking in terms of sex discrimination. On an earlier occasion we spoke in terms of black discrimination. Spanish. Italian. Jewish. Irish. French. If you make a determination—if you are going to accept this concept, I can see an almost impossible situation developing.

This concerns the implementation of that principle. You would be advocating a woman within the same area, equally qualified women within the same area of 10 to 20 professors, you might have a Frenchman—an American of French origin.

You don't have an American with French origin on the whole staff. His position would be as strong as the advocate of the woman. You may have a black American. In that group you don't have a black head of a department. His position would be just as strong.

How do you make the delineation? Always assuming candidates are equally qualified.

Ms. Raffel. Being equally qualified is the first premise. Then I believe it is a decision that has to be made within the individual situation. Now, if it were a French department and the woman was an American, but the man was born and lived in France, they wouldn't be equally qualified because that person would naturally have an edge.

Mr. Biaggi. You have given us the edge. Let's deal with the premise for equality.

Ms. Raffel. In any case, it is not only women but any group. The idea is that we all be considered on the basis of our merit. Where there are underutilized people, have a good look at them, whether they are black or Indian or women, and see how they fit in. But the thing is not to give the preference automatically to white men all the time.

Mr. Biaggi. Let's stay with that. I don't think automatic is the word.

Ms. Raffel. Until 1970 it was operative.

Mr. Biaggi. Well, the way it is constructed today, for the most part that is what will be considered. Exactly what you have today; is that right? White male predominant.

Ms. Raffel. Yes.

Mr. Biaggi. OK. You are a white male of Irish origin. There isn't one in the school in an executive capacity. How does he fit compared to the advocate of the woman? If you pick him are you discriminating against a woman?

Ms. Raffel. If women are underutilized——

Mr. Biaggi. They are both underutilized. There wasn't one in the school of Irish origin.

Ms. Raffel. You can take any set goals for them if they are underutilized.

Mr. Biaggi. Let's stay with that. What you are saying then is we shouldn't take every group of the underutilized. Just pick a few groups if they are underutilized and cast the other groups aside.

Ms. Raffel. No, I wasn't saying that. All people need to be included. What you are asking me to do is make a judgment which would——

Mr. Biaggi. Explore it a bit, thinking out loud.

Ms. Raffel [continuing]. Which would depend really on the situation. We are talking about all equally qualified people. What we are advocating is to put women in the pool to be seriously considered with other equally qualified persons.

Mr. Biaggi. I couldn't agree with you more.

Ms. Raffel. How do we make that choice between a woman and a man who has Irish origin—I suspect he has not been underutilized in the total sense that he has been denied equal opportunity in educational institutions recently.

So I would put him in the category with the white male unless there was a good reason that that person would be exceptionally beneficial to the program.

Mr. Biaggi. Not simply because he is Irish but we are talking about consideration. Groups of Americans. Female Americans, Irish——

Ms. Raffel. Fifty-one percent of the population are women and they have been excluded and they do need equality.

Mr. Biaggi. You are talking in terms of principles. Is it less applicable to one injustice?

Ms. Raffel. No.

Mr. Biaggi. I would like to talk in terms of goals—I think the chairman addressed himself to it earlier—the practical effect of goals in the light of the Government's position under equal opportunity is to establish a target, a quota. That is the practical effect. My experience with the administrations of most universities is that they quiver when the Government is interested and they commit themselves to the principle but in the implementation of the principle they in fact go out of their way, sometimes appointing underqualified. But the net effect of the goal is a quota. That is our practical experience.

Ms. **Raffel.** Sir, I can't understand why if it is a goal, and if you don't meet the goal there is no penalty, as long as you are using the procedures and practices that are approved to try to include minorities and women—why do administrators get that way about goals? The problem is with them, not with the law and not with those enforcing the law. I think being educators with all that education, they can be convinced and see clearly what it is actually we are asking for. My own personal experience has been that they aren't falling over backwards to meet those goals. They are falling over backwards to justify why they don't have to have them.

Mr. **Biaggi.** Our experience is contrary. I happen to agree with you. It is the educators who are at fault.

Ms. **Raffel.** We should all work with them carefully and patiently until they understand clearly what a goal is and what it attempts to do, and that they will not be penalized if they don't meet that goal. They grasp all these other concepts so easily. I don't know why they would black out on this point.

Mr. **Biaggi.** Simply frightened.

Ms. **Raffel.** I don't know why. So few Federal funds have ever been withheld. HEW has done so little. I can't imagine that they would give much consideration at all to it any more.

Mr. **Biaggi.** The fact of the matter is many of their goals have been obtained by virtue of this desire to fulfill the commitment.

Ms. **Raffel.** May I say one thing? The increase in women over the past 4 years in education since affirmative action has gone into effect has been one-tenth of 1 percent. That is not very many women hired on faculties. That is hardly enough. If you took the cream of the crop you would still be skimming the cream in your hiring practices and I doubt if there was any dilution of educational excellence by hiring women. I know of many qualified women waiting for opportunities.

Take as an example Dixy Ray, the head of the Atomic Energy Commission, was an assistant professor. Nobody thought of promoting her. She was for at least 12 years an assistant professor and then went to the Atomic Energy Commission. Women are there. Women are qualified. I have difficulty in understanding this idea of being underqualified and dilution of excellence when it comes to academic hiring, particularly because there have been so few hired.

Mr. **Biaggi.** What troubles me is that we have a tendency of suffering from tunnel vision. We narrow our sights to one or two groups where the fact of the matter is we have the total population that is adversely affected and I think the principle of equal opportunity should be applied and applied forcefully to all. That is all.

Ms. **Raffel.** I certainly do, too.

Mr. **Biaggi.** Thank you very much.

Mr. **O'Hara.** Dr. Raffel, thank you very much. I am sure that Dixy Lee Ray is an extremely qualified and capable and conscientious public servant but she was appointed by the same man who appointed

Mrs. Farkus. I don't know that the mere fact of appointment establishes that. In her case, it happens to be the case.

Ms. Raffel. I guess what I was trying to say was the university couldn't recognize she couldn't be anything but an assistant professor for 12 years, which is a long time to be an assistant professor.

When she came to the Government she rose according to her capabilities and is now Chairman of AEC.

Mr. O'Hara. Before calling our next witness I would like to make it clear that it is certainly not my purpose to attempt to establish that women have not been discriminated against in employment in universities and colleges. I am sure they have. The evidence that they have been discriminated against is ample. There is no dispute over that, I don't think. The dispute goes to the question of the best ways to prevent such discrimination now and in the future.

[The full statement follows:]

Prepared Statement of Norma Raffel, Head, Higher Education Committee, Women's Equity Action League

I am Dr. Norma Raffel, Head of the Higher Education Committee of the Women's Equity Action League (WEAL). WEAL is a national voluntary organization which promotes equality in education and employment through legislation, litigation, and by pressing for full enforcement of existing anti-discrimination laws on behalf of women. Formerly I was the National President of WEAL. I am also a member of the Pennsylvania Commission on the Status of Women and serve as their resource person on education. I served on the Pennsylvania Department of Education's Equal Educational Opportunity in Higher Education Task Force. Also, I have taught courses in the Biological Sciences at Goucher College and The Pennsylvania State University. I have been spokesperson for women at The Pennsylvania State University in presenting information on their behalf to HEW's Office for Civil Rights during the compliance review at the University. Since then I have attempted to expedite the activities of HEW/OCR so that an Affirmative Action plan will be developed and it will be monitored.

Until 1970 when the Women's Equity Action League filed the first sex discrimination complaint against educational institutions under Executive Order 11246 as amended, the issue of discrimination against women in the academic community was largely ignored. Until the Executive Order, it was perfectly legal to discriminate against women in academe. WEAL recognized in 1970 that Executive Order 11246, as amended, applied to colleges and universities which held federal contracts and pressed the federal government to enforce the regulations. Its principle requirement is that to be eligible for federal contracts, an Affirmative Action plan to remedy the effects of past discrimination and prevent present discrimination must be developed and implemented. Women on campuses throughout the country used this first tool to provide an equal opportunity in education and collected information to demonstrate pervasive, sustained discrimination. As a result, hundreds of complaints were filed and women hoped they would, at last, be able to work, advance, and be rewarded in education on the basis of their qualifications and ability.

The 92nd Congress acted to prohibit discrimination against women on the campus by extending old laws and enacting new ones. Title VII of the Civil Rights Act of 1964 was amended to include all educational institutions. Congress enacted Title IX of the Education Amendments Act which forbids sex discrimination in any educational program or activity receiving Federal financial assistance. The Education Amendments Act of 1972 extended the coverage of the Equal Pay Act of 1963 to executive, administrative, and professional employees, including college and university faculties. The intent of Congress is clear: women shall have an equal opportunity in all phases of education. Women hope that there will be more progress toward equality of opportunity now that discrimination in the academic community is a legal problem as well as a moral one.

However, there is not room for much optimism. A study by the American Council on Education indicates that Affirmative Action has had little impact on faculty hiring. The report states that over a four year period, from 1968–69 to 1972–73, the percentage of women faculty members increased nine-tenths of one percent, from 19.1 per cent to 20.0 per cent.

Occasionally some person says there is not really discrimination at all, but that the primary reason women are not well represented in all phases of the academic community is "because, on the average, female faculty devote less time and energy to professional development (especially research) than men and more time to home responsibilities."[1] Such statements do not take into account that male faculty members are more likely to have their careers interrupted than are women. A fourth of the men—compared with a fifth of the women—interrupted their academic careers for more than a year because of military or family obligations.[2] Such statements do not take into account that increased home responsibilities due to young children occupy only a small period of time during the total time of career employment and that female Ph. D.'s who are married are twice as likely to be childless as women in the same age group in the general population. They are also likely to have a smaller family if they do have children. Further, about half of the female faculty in universities are not married.[3] The report by the Carnegie Commission on Higher Education, composed largely of men states, "Some married women clearly fall behind because they take time out to have children, but this is by no means the full explanation."[4]

Some persons say that women, with few exceptions, cannot qualify for "upper level" faculty positions.[5] How then can we account for the study which shows that the average woman doctorate is academically superior to the average male doctorate?[6] Some Academicians say that they would hire qualified women if they were available. The number of women receiving doctorates give at least a partial indication of the numbers available. Few institutions hire even half the number of women doctorates available at any but the lowest level. Their unemployment rates also suggest that women are available. In 1973 women with doctorates in science, engineering and social sciences have an unemployment rate four times higher than men with doctorates in the same areas.[7] Many male academicians would at least hire, if not promote, "super women." But alas, there are few "superwomen," just as there are few "super men" in academe. Many universities hire the average male doctorate, but deem the average female doctorate "unqualified." The insensitivity to existing inequities is illustrated by the distinguished male professor who said that he had been searching for qualified women to fill a faculty position for fifteen years but he could not find one qualified. When it was suggested that he submit a written report of why the women applicants were not qualified, he became enraged and left the room.

The fact is that there is discrimination against women in education. It was voluminously documented in Representative Edith Green's Hearings before the Special Subcommittee on Education in 1970. Since then, additional studies and investigations at the state and federal level have substantiated the charge of discrimination against women in the educational community. How, then, do we resolve this problem?

Although some discrimination today is manifested in conscious overt acts, most employment discrimination persists in old employment practices (i.e. soliciting candidates for a job from friends and making arbitrary employment decisions based on assumed characteristics of a group). In order to eliminate the discriminatory effects of employment practices an analysis of such practices and their effect on underutilized groups would have to be made. Then appropriate remedial actions must be taken if discrimination is to be eliminated. These specific positive remedial actions are called Affirmative Action. Without it discrimination resulting from regular employment practices continues. Benigh neutrality or simply forbidding discrimination is not enough. This was recognized in the Presidential Executive Orders from 1961 through 1967 which required government contractors to take result-oriented affirmative action to eliminate job discrimination. The present Executive Order 11246 as amended also requires affirmative action. There is a consistent trend in the courts to uphold affirmative action, including goals and timetables to overcome the effects of past discrimination.[8]

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[1] Richard Lester, *Antibias Regulation of Universities*, McGraw-Hill Co., 1974.

[2] Alan E. Bayer, *Teaching Faculty in Academe: 1972–73*, A.C.E.

[3] Helen S. Astin, *The Woman Doctorate in America: Origins, Career, and Family*, Russell Sage Foundation, New York, 1973.

[4] *Opportunities for Women in Higher Education*, Carnegie Commission on Higher Education, 1973.

[5] Richard Lester, *op. cit.*

[6] Helen S. Astin and Alan E. Bayer, "Sex Discrimination in Academe," *Educational Record*, Vol. 53, no. 2, Spring, 1972, pp. 101–18.

[7] *Doctoral Scientists and Engineers in the United States*, 1973 Profile, National Academy of Sciences, Washington, D.C. 20418, March, 1974.

Affirmative Action is necessary to eliminate past and present employment practices which perpetuate unequal opportunities. Affirmative Action is result-oriented. The finest plans are meaningless unless there is a measurable improvement in the numbers of underutilized persons.

Coping with Affirmative Action is relatively new to educational institutions. They seem to be going through the same apprehension that most groups experience when they have to deal with a new situation in which they don't see immediate benefits for themselves. It is astounding to me that with all of the brains and talent at the disposal of educational institutions, more of them have not been able to produce acceptable Affirmative Action plans. It is disappointing that educational administrators often seek to meet only the minimum legal requirements. If educational institutions would tackle discrimination with the same ingenuity and enthusiasm they have used to attract federal funds, there would be many more acceptable Affirmative Action plans and a greater increase in the hiring and promotion of minorities and women.

Instead, educational institutions are spending a great deal of time and effort resisting the requirements applied to all other federal contractors.

For the first time in academe, hiring, promotion, and salary practices are being examined by outside groups. It is only natural for people to feel threatened when they are first asked to justify their judgments. Uniform policies must be developed and so must specific criteria for positions. Policies must be applied in a consistent manner. One administrator at a large university said to me recently that although Affirmative Action had not resulted in much of an increase in the number of underutilized persons, the personnel practices were certainly improved.

Some persons suggest that goals and timetables are not suitable for educational institutions.[9] They overlook the fact that goals are targets, not quotas. There is no penalty for not meeting a goal if "good faith" efforts are made. The determination of a numerical goal causes the persons involved to analyze the situation to see if there is underutilization and what can be done to remedy it. The determination of numerical goals and timetables take into account such factors as anticipated new vacancies, promotions, and the availability of qualified persons. Preferential hiring of underutilized persons is not required. Unqualified persons do not have to be hired to meet a goal.

What has caused educators some concern is that they now must enumerate qualifications for positions. While it may be more complex to determine job qualifications for a professor than it is for a cab driver, it is no different from hiring any other professional person. The attorney hired by a corporation, the physician hired by a hospital, and the professor hired by a university are all subject to similar considerations when being hired and promoted as professionals. Corporations, hospitals, and universities all have a great deal at stake when they hire their professional personnel. Their future reputations and excellence may well be affected. If businesses and health facilities can recruit and promote their professionals successfully under Affirmative Action procedures, there is every reason to believe educational institutions can too.

Requesting separate rules for the academic community is a natural reaction, as they finally come to grips with the establishment of new procedures and practices. It is far easier to continue in the same old way. However, separate rules are not appropriate for educational institutions. All phases of the employment world would want a special classification because they all perceive particular problems in their own spheres. There is nothing mystical about a good professor any more than there is about a good physician. If an outstanding teacher-scholar is needed, those qualities can be enumerated and objectively evaluated. If certain job-related personal characteristics are desirable, they can be stated. Only then will discriminatory judgements (i.e. "a woman would interfere with the right social mix," or "a woman's only place in science is washing dishes or being a technician," or "I won't hire women, they're too emotional") be eliminated from employment decisions. Further, any special treatment for education would create a separate class of second-class citizens for women and minorities in the academic community. It would deprive underutilized persons in education of the same rights and remedies in employment afforded such persons in all other aspects of society.

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[8] A.T.T. & T. Agreement 1 EPG para. 1860 (1973; *U.S. v. Enterprise Association of Steamfitters Local* 638, 4 EPD para. 7906. (1972); *U.S. v. IBEW Local 38*, 438 F. 2d 144 (6th Cir. 1970); *Contractors Association of Eastern Pa. v. Hodgson*, 442 F. 2d 159 (3rd Cir. 1971), cert. den. 404 U.S. 854 (1971).

[9] Richard Lester, *op. cit.*

There can be no exceptions made for any groups when it comes to Affirmative Action, which includes goals and timetables. Instead, Congress should be concerned that the requirements of federal laws and regulations are vigorously enforced. Women's groups certainly are not satisfied with the progress made in enforcing these laws and regulations.

The reluctance HEW/OCR to use its enforcement powers and rely on voluntary compliance has caused an inordinate delay in achieving an equal opportunity for women in education. In over three years there have been nearly two hundred universities and colleges investigated, and none of WEAL's charges of sex discrimination have been refuted. However, during this time less than 20 Affirmative Action plans have been accepted by HEW/OCR. From May, 1973, to June, 1974, only 30 plans were evaluated. There are, as of July 1, 1974, 201 Affirmative Action plans in the regional offices waiting to be evaluated. At that rate, it will take almost 7 years to eliminate the backlog. Thus far, universities have had Federal contracts delayed not because they have been deficient in the implementation of Affirmative Action plans, but because they have not even developed acceptable Affirmative Action plans. Some educational institutions have been allowed over two years and still have not produced an acceptable Affirmative Action plan.

Despite the widespread lack of progress by universities, not once has an educational institution been taken to an administrative hearing. The reason given by HEW/OCR is that the cases are not documented well enough. If this is so, then investigators need their skills improved—they need effective training programs as well as consistent policies. Investigators need to know what information is pertinent and significant and how to obtain it. The present ineptness of investigators has dismayed those persons at the universities who support equal opportunity. More and more university administrators regard HEW/OCR as a "paper tiger" and turn to other priorities.

There is great concern among women's groups that the Office for Civil Rights is not committed to the enforcement of E.O. 11246, as amended. As an illustration I have given Mr. Buell of the staff a copy of the memo of HEW's Assistant General Counsel for Civil Rights to the HEW General Counsel which was intended for the Secretary, but was disregarded by the General Counsel. This memo describes the background of the HEW compliance review of the University of California, Berkeley, describing the weak legal position of HEW if they did not issue a "show cause" notice to the University after a protracted period of negotiations and extensive technical assistance which resulted in an unacceptable Affirmative Action plan. The Department of Labor Regulations (Section 60–2.2) require that a "show cause" notice must be issued in cases where a contractor does not have an acceptable Affirmative Action plan. It describes the problem of renewing the University's eligibility for new Federal contracts at that time in view of the Department of Labor Regulations. This legal memo was "buried" by the General Counsel. A "show cause" notice was not issued and the University became eligible for new contracts, regulations notwithstanding. Such actions call into question the intentions of HEW regarding equal employment opportunity in education.

Whether due to mismanagement or high level policy decisions, the inadequacies of HEW's enforcement of E.O. 11246, as amended, are apparent. There is little reason to believe that the enforcement of Title IX will be any better.

Because there are difficulties in enforcement and resistance from educational institutions does not mean that educational institutions should be relieved of their responsibilities for developing and implementing effective Affirmative Action plans. Instead, they should be prime examples in overcoming discrimination and providing equal opportunity that is required morally and legally by the rest of society.

Mr. O'Hara. Our last witness is Mr. Bernard Kuttner, Anti-Defamation League.

STATEMENT OF BERNARD KUTTNER, CHAIRMAN, NATIONAL DISCRIMINATIONS COMMITTEE, ANTI-DEFAMATION LEAGUE, ACCOMPANIED BY IRA GISSEN, DIRECTOR, DISCRIMINATIONS DEPARTMENT, ADL

Mr. KUTTNER. Thank you, Mr. Chairman.

Mr. Biaggi, I would like to introduce Mr. Ira Gissen who is the director of the Anti-Defamation League's discriminations department and has a long history of service in all levels of the Federal Government as well.

Mr. Chairman, in deference to the hour, I will not read the 18 or 21 pages which we have handed to you. I would like to highlight a couple of cases——

Mr. O'HARA. Let us first obtain unanimous consent that your statement will appear in full in the record.

Mr. KUTTNER. Thank you, Mr. Chairman.

The Anti-Defamation League of B'nai B'rith welcomes this opportunity to offer its experience and views in regard to what the obligations of postsecondary education institutions are and what they should be under the law, the Executive orders and the rules and regulations governing equality of opportunity in education and employment.

The B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews, which represents a national membership of more than 500,000 men and women and their families.

It is a cardinal goal of the Anti-Defamation League to bring about true equality of opportunity and to eliminate discrimination based on race, religion, national origin, or sex. We have vigorously pressed for legislation and administrative action to ban discrimination in employment, education, housing, and other areas of American life.

But after many years of struggle to bring about meaningful civil rights reform, it became clear by the early 1960's that laws against discrimination, by themselves, were simply not ridding our country of discrimination and its effects.

Part of the difficulty was inherent in the nature of civil rights law enforcement itself. To rely on a case-by-case basis of resolving individual complaints was obviously not sufficient. Many cases are extremely difficult to prove and can drag on for years.

Suffice it to say with the Kennedy and Johnson administrations, and later the last administration, our agency helped promulgate the concept of affirmative action. We urged that employers and educators take positive steps to remove barriers to equal opportunity and welcome those who were previously left out. However, by affirmative action we do not mean preferential treatment in the selection process. ADL has strongly supported the elimination of nonjob related tests and screening measures even before the 1971 Supreme Court decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), that required employers to do so.

Further, the Anti-Defamation League firmly supports the provision of compensatory education and training, retraining, special counseling, and other forms of help to those who have been discriminated against, to help them enter the mainstream of American life. ADL insists that all such programs be administered on an equitable basis.

We recognize that surveys of workforces, student bodies and so on, may be needed to provide data for evaluating compliance with nondiscrimination policies.

However, we continue to urge that questions as to race, color, ethnic group, place of birth, or religion, do not appear on application forms, and that individuals are at no time required to identify themselves by any of these characteristics, except anonymously.

We have reached a point now where the educational institutions, in a perversion of what Congress meant and what the rules and Executive orders mean, require individuals to list on their application forms their race, their sex, their religious origin.

We know, and there are examples here, where, as a result of this kind of perversion of what Congress meant, we say, most respectfully, that people are being kept out—not on the basis of their qualifications but on the basis of where their great-grandfathers may have originated from.

In New Jersey, the State I come from, these kinds of surveys now, until we got into the act, were made a condition of the relicensing of physicians. Physicians were told, and all the healing arts professions were told: we have a new regulation, and you must tell us your race and ethnic group if you want to be relicensed.

Clearly that was never intended by any of the Executive orders. At least we would urge that it should not be. We urge that the equal protection clause demands the elimination of racial barriers, not their creation, in order to satisfy our theory as to how society ought to be organized.

Unfortunately, the pressures to produce such dramatic results in ending "underutilization" or "underrepresentation" of minorities has brought about the widespread distortion of this concept of affirmative action.

Many of those charged with implementing affirmative action in employment and university admissions have forgotten what affirmative action is all about.

ADL is leading the efforts to get affirmative action on the right track again. Our basic rule is simply that in each case, we must make sure that every person, male or female, minority or nonminority, is accorded the same right to be free from discrimination as is every other person.

There must be no discrimination against a member of any group in hiring, promotion, admissions, or any other selective process in which some candidates are chosen and others are rejected. Any such act is illegal, since it violates the laws against discrimination, which prohibit all discrimination without exception.

It simply substitutes a new form of discrimination for an old form of discrimination; the victim has changed, but not the act.

Indeed, the presumed beneficiaries continue to be treated as second class citizens, requiring paternalistic and patronizing consideration as if they are not really qualified for the task or job or promotion but must be given consideration based on extraneous factors such as sex or race.

Worst of all, reverse discrimination is grossly unjust because it makes innocent persons pay a debt owed by a society as a whole. If we allow discrimination supposedly in a "good" cause, there is simply no logical stopping point. And there is no way to implement reverse discrimination on a "fair" basis. We have a moral as well as legal obligation to keep affirmative action working properly—and must not try to help members of one group by hurting innocent members of another.

Beginning in 1972, we have been filing charges of preferential treatment and racial quotas with the Department of Health, Education, and Welfare. The more than 100 "pattern and practice" cases which we reported existing in postsecondary education institutions have injured thousands of victims. Up until the time we began filing complaints, HEW gave no indication that it was at all concerned about its fundamental responsibility to correct the problem which it had helped create. HEW's performance since then has not been much better.

Although many, many documented complaints were brought to their attention in August of 1972, years have gone by and without going through every item in the complaints, no response has been received to a great many, and perfunctory responses have been received to most of the others. At least 34 instances of these kinds of preferential treatment—those dealing with student admissions—have not even been responded to.

This failure to respond, much less to take action to remedy the severe deprivation of equal protection rights imposed by racial quotas in federally funded school admissions, constitutes failure to enforce the clear statutory mandate of title VI of the Civil Rights Act of 1964.

We maintain that under the law, periodic enumerations of work forces or student bodies may be used to evaluate affirmative action policies provided, however, that: (1) questions concerning race, color, ethnicity, place of birth, or religion do not appear on application forms; (2) individuals are at no time required to identify themselves by any of the above; and (3) no records of any individual's race, religion, or ethnic origin are maintained by an employer or educational institution.

HEW's response relating to racial and ethnic data recognizes the possibility that such data can be employed for a discriminatory purpose, but claims that such data is necessary to maintain compliance with nondiscrimination laws.

Putting aside the question of the legality and correctness of this conclusion, we are aware of no guidelines, instructions or direction emanating from HEW which would counsel institutions as to how to collect and maintain this information in the manner least likely to facilitate discrimination and invade privacy.

HEW fails to give specific guidance as to how data is to be collected and prevent misuse. In conclusion on that issue, we charge that HEW is allowing reverse discrimination to continue spreading unchecked in violation of its obligations in the law.

As a result many people are being denied their legal rights and are being deprived of the Government's aid to redress these faults.

If I may, I would like to give you just a couple of the hundreds of examples we have on file on some of the kind of things that are being done.

We have used some of our limited resources to deal directly with several of the postsecondary education institutions on which we have received these hundreds of complaints.

Here is an example of the kind of letter that the admissions committee at the University of Wisconsin medical school sends to out-of-State applicants.

> DEAR STUDENT: Positions in the entering class available to nonresidents are limited to 5 percent of the total number admitted. These few positions are reserved for minority applicants, *e.g.*, Afro-Americans, mainland Puerto Ricans, Mexican Americans and Native Americans, and for applicants to a very limited, specialized program.
>
> Therefore, bulletins will be sent only to applicants that indicate minority status or that indicate an already developed interest in the above-mentioned program.

The Anti-Defamation League got this letter stopped.

This is not an isolated example and once our country, Mr. Chairman, gets to this point where the Americans of Lebanese descent and Armenians and Irish and every other ethnic group who are Americans are told that they shouldn't even get a bulletin, then the concept of America as we have it and worked so hard for, has been totally destroyed.

We received complaints from numerous people who have been excluded from institutions of higher education throughout this country. These are detailed here. I am not going to go into them.

But let me give you one example at the University of Massachusetts. A complaint was sent to me on behalf of two students. One a Jew. The other a Roman Catholic of Italian extraction.

That institution's officials on the upper level didn't even seem to know what the officials on the lower levels were doing, what kind of letters they were sending out to applicants. That was the same story that I might say was given to us in the previous example.

In the University of Massachusetts example I just mentioned, there were 6 openings in the graduate program and there were 300 applicants. The University of Massachusetts' administration spokesman said the human relations department accepted three blacks and three whites and rejected the others. This action was unauthorized, the spokesman said.

Under the prescribed procedure the university graduate school accepts and rejects applicants. The 6 accepted applicants should be put back into the pool of 300 and then the 6 top ones, rated on the basis of ability, should be chosen no matter who they are.

We had a shocking example at Sam Houston State University in Texas. This university had been seeking applicants from Kent State University. In interviewing an outstanding candidate they wrote him a letter as follows after interviewing him and saying he was really outstanding:

> DEAR MR. LAMMERMEIER: I am truly sorry to inform you that it has been unexpectedly necessary to look for a black to fill the position in black studies. Jim Olson was right, and so I am obligated at least to search diligently for such a person. It was nice to meet you. I appreciate your coming down. The members of the department felt that you would do a good job for us, but this unexpected turn of events makes it necessary for me to take another tack. I wish you well in your search for a satisfying post this next year.

The gentleman gave us permission to use his name. This man, highly qualified, wrote us that he is presently employed as a chef in a pancake restaurant. This is the way one individual American ended up because of the perversion of the concept of equal opportunity affirmative action.

The problems with the Equal Employment Opportunity Commission are of larger scope because they affect many more employers. For example, the EEOC recently published a two-volume guidebook entitled "Affirmative Action and Equal Opportunity—A Guidebook for Employers."

The guidebook is replete with serious errors and distortions concerning the subject of numerical goals in hiring, which it confuses with quotas. It starts out by citing numerous court cases which required remedial action: (1) where intentional employment discrimination had existed, or (2) where there was no discriminatory intent but certain personnel practices had a disproportionate disqualifying effect upon female or minority group applicants or employees. It correctly reports that courts in both types of cases have imposed hiring and promotion "goals" to be met by employers as part of the required remedial actions to be taken.

However, it fails to report that such courts have repeatedly expressed their concern over the effect that these "goals" would have upon male and/or nonminority applicants and employees. Nor does it mention that some courts have refused to set such goals, for that very reason.

The guidebook then goes on to state that the "remedial action" necessary to remove all barriers to equal employment opportunity "often requires some kind of special treatment for a period of time," basing this conclusion on the court cases it has cited and summarized.

It then repeats the statement that "specified remedial goals" are "increasingly" being resorted to by the courts and that although title VII bars preferential hiring simply to eliminate racial employment imbalances in relation to population ratios, Federal courts consistently have found numerical goals and timetables to be a justified and necessary remedy and means of eliminating the present effect of past discriminatory practices.

Without going into each and every distortion, suffice it to say that our agency is very disappointed in this guidebook and we feel that it contains numerous inaccuracies.

For example, it alleges that its contents are in accord with Revised Order No. 4's requirements and are necessary for all employers covered by title VII whether or not they are Government contractors.

But actually, the detailed plans set forth in the Guidebook are not legally binding on any employer. Furthermore, many of the provisions in the Guidebook violate the terms of Revised Order No. 4.

That order was issued by the Department of Labor's Office of Federal Contract Compliance (OFCC) to enforce the Presidential Executive Order 11246, which requires Federal contractors to provide equal employment opportunity.

Although Revised Order No. 4 indeed requires numerical goals, it sets forth certain caveats against their misuse, and also recognizes that there are some circumstances where such goals cannot be set.

Suffice it to say the Anti-Defamation League seeks no special favors for anybody while advocating equal opportunity for all Americans.

Thank you very much.

[Mr. Kuttner's prepared statement follows:]

PREPARED STATEMENT OF BERNARD A. KUTTNER, ESQ., CHAIRMAN, NATIONAL DISCRIMINATIONS COMMITTEE, THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

Mr. Chairman and members of the Committee: The Anti-Defamation League of B'nai B'rith welcomes this opportunity to offer its experience and views in regard to what the obligations of post-secondary education institutions are and what they should be under the law, the Executive Orders and the rules and regulations governing equality of opportunity in education and employment.

The B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews, which represents a national membership of more than 500,000 men and women and their families. The Anti-Defamation League of B'nai B'rith was organized in 1913 as a section of the parent organization to advance good will and proper understanding between Americans and translate into greater effectiveness the ideals of American democracy. It holds that the welfare and security of all persons in the United States are inseparably related to the extension and preservation of equal opportunity for all; that an invasion of the rights of any racial, religious or ethnic group is a threat to the safety of all groups and the individual members thereof.

It is a cardinal goal of the Anti-Defamation League to bring about true equality of opportunity and to eliminate discrimination based on race, religion, national origin or sex. We have vigorously pressed for legislative and administrative action to ban discrimination in employment, education, housing and other areas of American life. But after many years of struggle to bring about meaningful civil rights reform, it became clear by the early 1960's that laws against discrimination, by themselves, were simply not ridding our country of discrimination and its effects.

Part of the difficulty was inherent in the nature of civil rights law enforcement itself. To rely on a case-by-case basis of resolving individual complaints was obviously not sufficient. Many cases are extremely difficult to prove, and can drag on for years. Sometimes, it may simply not be possible to find a complainant, with a really well documented case, who is willing to step forward.

And even where institutions do not discriminate in their policies, the effects of a heritage of discrimination often serve to keep minority group members and women from reaching their full potential. The evil effects of past discriminatory acts frequently persist after the acts themselves have ceased, leaving their marks on their victims. The Anti-Defamation League has always asserted that a just society has an obligation to help undo the evils that flow from discrimination.

To meet this need, we helped promulgate the concept of *affirmative action*. We urged that employers and educators take positive steps to remove barriers to equal opportunity and welcome those who were previously left out. However, by affirmative action we do *not* mean preferential treatment in the selection process. ADL has strongly supported the elimination of non-job related tests and screening measures even before the 1971 Supreme Court decision that required employers to do so.

Further, the Anti-Defamation League firmly supports the provision of compensatory education and training, re-training, special counseling and other forms of help to those who have been discriminated against to help them enter the mainstream of American life. ADL insists that all such programs be administered on an equitable basis.

We recognize that surveys of work forces, student bodies and so on, may be needed to provide data for evaluating compliance with non-discrimination policies. However, we continue to insist that questions as to race, color, ethnic group, place of birth, or religion, do not appear on application forms, and that individuals are at no time required to identify themselves by any of these characteristics, except anonymously.

We continue to remind government civil rights agencies that conformity to affirmative action guidelines should be evaluated in terms of good faith efforts, and not as rigid requirements. And we are always alert to detect abuses of the affirmative action idea and vigorously protest them wherever and whenever they occur. To put it very simply, the reason that we oppose quotas, preferential treatment, the use of proportional representation, and the use of race as an absolute qualification for any position, is that they *deny* equality of opportunity instead of promoting it.

The obstacles that affirmative action seeks to overcome are deeply entrenched. Large scale representation of women and minorities at all levels and all ocupations obviously cannot be achieved immediately. But pressures to accomplish such dramatic results have brought about widespread perversion and distortion of the affirmative action concept. Many of those charged with implementing affirmative action in employment and university admissions have forgotten what affirmative action is all about. ADL is leading the efforts to get affirmative action on the right track again. Our basic rule is simply that in each case, we must make sure that every person, male or female, minority or non-minority, is accorded the same *right to be free from discrimination* as is every other person.

There must be no discrimination against a member of *any* group in hiring, promotion, admissions, or any other selective process in which some candidates are chosen and others are rejected. Any such act is illegal, since it violates the laws against discrimination, which prohibit all discrimination without exception. It simply substitutes a new form of discrimination for an old form of discrimination; the victim has changed, but not the act. Indeed, the presumed beneficiaries continue to be treated as second class citizens, requiring paternalistic and patronizing consideration.

Worst of all, reverse discrimination is grossly unjust because it makes innocent persons pay a debt owed by a society as a whole. If we allow discrimination supposedly in a "good" cause, there is simply no logical stopping point. And there is no way to implement reverse discrimination on a "fair" basis. We have a moral as well as legal obligation to keep affirmative action on the right track by remembering that we cannot possibly—and must not try to—help members of one group by hurting innocent members of another.

It was not so many decades ago that the Anti-Defamation League fought and won a successful "crack the quota" campaign against discrimination in colleges and universities. Today, once again, we find ourselves confronted with the specter of quotas, cloaked in the guise of goals. The theoretical distinction between numerical goals and quotas, while not impossible to define and describe, nevertheless disappears in the marketplace of recruitment and selection. The Jewish community as well as other historically oppressed minorities knows all too well the cruel frustrations that are suffered by the victims of quotas.

Our nation has but recently emerged from a devasting decade in which some of our national leaders told us that we must make war for peace. Is there a strange quirk in their logic that dictates we must now be told that we have to discriminate in order to achieve equal opportunity; that certain groups must be kept out, in order that other groups be let in?

Beginning in 1972, we have been filing charges of preferential treatment and racial quotas with the Department of Health, Education, and Welfare. The more than one hundred pattern and practice cases which we reported existing in post-secondary education institutions have injured thousands of victims. Up until the time we began filing complaints, H.E.W. gave no indication that it was at all concerned about its fundamental responsibility to correct the problem which it had helped create. H.E.W.'s performance since then has not been much better.

The length of time which H.E.W. has taken in replying to the various series of complaints we have submitted, absent other explanations, can only be interpreted as indicating the low priority which the Department accords to problems of reverse discrimination.

Our first series of 33 complaints was submitted in August 1972 and partial replies were received in January and again in April 1973. However, we have yet to receive responses concerning ten of the original August 1972 complaints.

The most recent reply (October 15, 1973) dealt with 19 complaints submitted in December 1972. Why it took ten months to answer these complaints is particularly difficult to understand, since the cases involved no complex questions of law and required no extensive factual investigations. In fact, of the total number of complaints dealt with by H.E.W., in 11 no inquiry whatsoever was conducted, because H.E.W. claimed that the complaint lacked "adequate documentation;" contended that jurisdiction lay in another agency, or argued that the complaint did not deal with what it viewed as legally actionable discrimination.

The August 8, 1972, submission contained ten complaints relating to preferential treatment in admissions to undergraduate, graduate and professional schools. These included numerous documented instances of outright racial and ethnic admission quotas. Five additional instances of preferential treatment in admissions were brought to H.E.W.'s attention in April, and in July 1973 another 18 instances were submitted.

As of today, more than two years after the first complaint of preferential admission was presented to H.E.W., no response of *any* sort has been received by our agencies with respect to these 34 instances of preferential treatment in admissions. This failure to respond, much less to take action to remedy the severe deprivation of equal protection rights imposed by racial quota systems in federally funded school admissions, constitutes failure to enforce the clear statutory mandate of Title VI of the Civil Rights Act of 1964.

In an October 15, 1973 letter to us, H.E.W. repeatedly asserts that the allegations submitted, for the most part based on verbal admissions by college officials of a discriminatory university policy, are "difficult to investigate" or "lack adequate documentation." We believe H.E.W. is applying a double standard with respect to documentation and is requiring reverse discrimination complaints to document their complaints to a degree not expected of other discrimination complainants. We believe that H.E.W. is unfairly requiring those who complain of reverse discrimination to do investigatory work which is properly the role of the government in these instances.

Thus H.E.W. rejects, because "we do not believe that we have been provided with sufficient information upon which to base an inquiry," a complaint that a named hiring official, at a stated time and place, asserted that the complainant "would be seriously considered for the opening . . . if he were a woman or black."

The substance of the remarks clearly indicates a discriminatory policy—the hiring officer is named, the time and place given. One wonders what further information H.E.W. requires. We venture to say that if the intended victim of the discriminatory policy had not been a white male, further inquiry would have been made.

Similarly, H.E.W. contends that where a named hiring officer in an interview with a job applicant states that "the university is under pressure to consider other factors besides qualifications," such a statement is merely "ambiguous" or "unfortunate." H.E.W.'s further conclusion that it is "unable to initiate" an investigation "in the absence of more compelling evidence of discrimination" reflects a certain naivete concerning the code words of reverse discrimination, singularly inappropriate for an Office for Civil Rights specifically assigned the task of investigating such complaints.

In another instance, H.E.W. rejected a complaint based on an allegation that the complainant was passed over in favor of a minority candidate whom the complainant characterized as having "virtually no academic experience" and "little in the way of legitimate graduate work." H.E.W. refused to inquire into the matter because they claimed "such generalizations (as used to characterize the qualifications of the other candidate)" were "insufficient."

However, the classic *prima facie* case of discrimination is proved if the complainant establishes that he was of a particular race; that he was qualified; that he was rejected and that someone else of a different race was subsequently hired. See, e.g., *McDonnell Douglas Corp. v. Green*, 93 S. Ct. 1817, 5 FEP Cases 965 (1973).

In proving discrimination, it has never been an element of the plaintiff's *prima facie* case that the complainant must allege or prove that the person actually hired was less qualified than the complainant. Since the complainant did allege he was passed over in favor of an applicant of a different race, surely it would have been appropriate for H.E.W. to determine whether the complaint's characterization that the recipient of the job was less qualified was correct and whether discrimination had taken place.

H.E.W.'s double standard with respect to inquiries concerning reverse discrimination is shown by their views, noted in their letter, that:

> The colleges are not really rejecting candidates because of their race or sex; they are merely *saying* that they are pursuing a discriminatory policy and in their words, "cast[ing] the role of 'heavy' upon the Federal Government in rejecting candidates for employment."
>
> It would be destructive of affirmative action efforts in educational institutions, which are particularly sensitive to the Federal presence, for H.E.W. to make inquiries concerning complaints of reverse discrimination because these complaints arise principally from these college's efforts to blame "affirmative action" when rejecting applicants.

In view of the Supreme Court's rejection of the factor of intent as an element of proof in employment discrimination cases—*Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)—it is strange to hear a government official claiming that when an employer says he is rejecting an employee because of race or sex, we are not to believe him but must look beyond his words and conclude that the employer really is not applying a discriminatory policy. Assume for the sake of argument, however, that the colleges are, in fact, employing these tactics, i.e., using affirmative action as an excuse for rejecting candidates they would otherwise have rejected on grounds of inadequate qualifications. Surely, it is the task of H.E.W. to preserve the integrity of the affirmative action concept by investigating and making sure that the university officials discontinue this practice where it is in a fact taking place. In our view, affirmative action is in greater danger from a failure to investigate than from "indiscriminate inquiries."

H.E.W. inquiries which may have the consequences of making universities and applicants face up to the realities of present day academic hiring, and discontinue employing affirmative action as a scapegoat, can only have a healthy effect. Let us assume, on the other hand, that they also confirm, as we believe they will, that discriminatory policies are, in fact, being implemented. If as a result of H.E.W.'s inquiries corrective action is taken, the inquiries will be even more salutary.

In case where there are written documents in which university hiring officials actually announce a discriminatory hiring policy, H.E.W. contents itself with a mere admonition to the violator that "much greater care must be exercised in the wording of vacancy announcements" or urges that university administrators be made to "familiarize themselves with the Guidelines." These responses reinforce our impression that a double standard is operating. The merest allegations of discrimination against the "protected" racial, sexual and ethnic minorities, based on evidence less weighty than that presented here, would, we are confident, prompt a full scale inquiry into one employer's hiring practices. Furthermore, findings that discriminatory policies were actually enunciated and minorities turned away on that account would, we are sure, in the usual situation prompt a rigorous and continuing review of the offending university's employment policies. H.E.W.'s treating complaints of reverse discrimination differently is clearly a denial of equal protection of the laws.

In H.E.W.'s response to us, there is no indication that any formal procedure for monitoring the future behavior of the erring hiring officials has been established. When H.E.W. recites that assurances of clarification of university hiring policy have been given, there is no indication that the assurances received from the university are in writing, are taken seriously by the university officials involved and that these officials understand that future errors of this nature will prompt more serious action by H.E.W.

As an organization which has undertaken the responsibility for bringing complaints to the attention of H.E.W., our confidence in this process would be enhanced by some indications that corrective action has in fact been taken by the universities. Such evidence could take the form of written copies to us of the "assurances" given by the offending university officials or of directives issued by the college to university hiring personnel, or participation by our organizations in the proposed "briefing sessions" to be conducted by the university. In the absence of such indications, we feel that we are engaged in a futile exercise.

The exchanges between our agencies and H.E.W. are characterized by a sharp disagreement as to the legality and propriety of the collection of racial and ethnic data in conjunction with monitoring university employment and enrollment for possible civil rights violations. We maintain that under the law, periodic enumerations of work forces or student bodies may be used to evaluate affirmative action policies provided, however, that: (1) questions concerning race, color, ethnicity, place of birth or religion do not appear on application forms; (2) individuals are at no time required to identify themselves by any of the above; and (3) no records of any individual's race, religion or ethnic origin are maintained by an employer or educational institution.

It is our considered view that the relevant statutes and regulations do not and constitutionally could not require that applicants for admission to schools or for employment specify their race or ethnic origin prior to hiring or admission. We recognize that institutions are legally required under the various Executive Orders and regulations to submit racial statistics in gross figures. Nevertheless, in the absence of a judicial or administrative charge or finding of prior discrimination in employment or admission, the risk of misuse of this data is so great, in our view, that a university should not be permitted to maintain individual personnel files relating to rates of pay, promotions and other personnel matters in which employees are identified by race and ethnic origins. And we know of no specific legal requirement that information be retained in this form.

H.E.W.'s response relating to racial and ethnic data recognizes the possibility that such data can be employed for a discriminatory purpose but claims that such data is necessary to maintain compliance with nondiscriminatory laws. Putting aside, for the purposes of this letter, the question of the legality and correctness of this conclusion, we are aware of no guidelines, instructions or direction emanating from H.E.W. which would counsel institutions as to how to collect and maintain this information in the manner least likely to facilitate discrimination and invade privacy.

H.E.W. has set forth specific and detailed guidelines governing every aspect of an educational institution's affirmative action program. Yet, H.E.W. fails to give specific guidance as to how racial and ethnic data is to be collected and maintained to prevent its misuse. This fact reinforces the impression that HEW does not really care if the institution employ this data for the purposes of reverse discrimination or other improper practices.

In conclusion, we find that for all of the foregoing reasons the responses of H.E.W. to date, on the whole, are unsatisfactory, and that H.E.W. is allowing reverse discrimination to continue spreading unchecked, in violation of its obligations under law. As a result many people are being denied their legal rights and—unlike victims of "traditional" kinds of discrimination—are being deprived of Government aid to redress these wrongs.

We have met twice with Secretary Caspar Weinberger and members of his staff. To date, we have been advised of no corrective action being taken on any of the foregoing. On May 23, 1974, we met with top staff of H.E.W.'s Office for Civil Rights to discuss their proposed "Memorandum to College and University Presidents." The purpose of the memorandum was to advise post-secondary education administrators on how to avoid reverse discrimination while promulgating programs of affirmative action. To date, not even that has been published—and another academic year is lost.

On July 5, 1973, the Federal Register published new regulations for H.E.W.'s implementation of Title VI of the Civil Rights Act of 1964. The key provision of Title VI, upon which these regulations are based, states: "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

However, under the new regulations (Section 80.3, paragraph b–6) the following statement appears: "Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin." Further, section 80.5 (j) provides: "Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, (etc.) . . ."

Also, in section 80.6 (b) a new sentence is added to require recipients to keep racial and ethnic data in relation to Federally assisted programs. In addition, recipients are admonished (80.6c) that: ". . . asserted consideration of privacy or confidentiality may not operate to bar the Department from requiring recipients to keep such data."

Based upon our experiences with the problems of preferential treatment, reverse discrimination, and the usage of numerical goals as if they were quotas, it is our considered judgment that these provisions will encourage much greater abuses of the law. These regulations serve to contravene the intent of Congress, as stipulated in Title VII of this same Act, which states expressly that, "nothing contained in this Title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race (etc.) employed . . . in comparison with the total number or percentage of persons of such race, (etc.) . . . in any community, state, section, or other area, or in the available work force of any community, state, section or other area."

We recommend that these provisions be deleted. If not deleted, we alternatively recommend that they be issued with instructions against their usage for preferential treatment, reverse discrimination or implementing numerical goals as if they were quotas.

We further recommend that: (1) questions as to race, color, ethnicity, nativity or religion do not appear on application forms; and (2) individuals are at no time required to identify themselves by any of the foregoing, except anonymously.

We oppose H.E.W.'s advocacy of the invasion of privacy and we oppose H.E.W.'s insistence upon the preferential treatment of select minorities not only as a matter of policy and principle, but also out of deep concern over the damage being done by H.E.W. to individual lives. There are many examples:

We have surveyed college student application forms in several states. The situation in Florida is representative:

Our results were startling. Of the 62 institutions of higher learning in the state, 54 ask questions which would identify applicants as to their ethnic characteristics. Most of them cite the Federal Government or H.E.W. as their authority.

We sent personalized form letters to the presidents of each college which employed application forms asking for ethnic data. The letter pinpointed the questions asked by the particular school and included a strong statement of concern on the part of our office. We also included within the letter our recommendation that a simple tear-off form, attached to the application for admission, could be utilized for the anonymous gathering of ethnic statistics. Thus, where applicable, the schools could successfully comply with government agency requests for ethnic data while still preserving the anonymity of the individual applicant.

We have unearthed new problems which emanate from the gathering of ethnic data on application forms. Of the greatest significance is the phenomenon of by-name lists of students of a particular ethnic category being provided to would-be employers for the purposes of hiring. Thus, while a school's request for an applicant's ethnic identification on an admissions form may, in some cases, play no role in the decision as to acceptability for that school, the information gathered serves the cause of discrimination in hiring two or four years later.

Out of our growing sense of frustration over H.E.W.'s unwillingness to correct the problems it helped to create, we have used our own limited resources to deal directly with several post-secondary education institutions. We cannot enforce nationwide standards, but our results, on an ad hoc basis, have generally been successful.

For example, the Admissions Committee of the University of Wisconsin Medical School has been sending the following letter to out-of-state applicants:

> DEAR STUDENT: Positions in the entering class available to non-residents are limited to 5% of the total number admitted. These few positions are reserved for minority applicants, e.g. Afro Americans, mainland Puerto Ricans, Mexican Americans and Native Americans, and for applicants to a very limited, specialized program. Therefore, bulletins will be sent only to applicants that indicate minority status or that indicate an already developed interest in the above mentioned program.
>
> Sincerely,
>
> STEVEN W. BERKLEY,
> *Admissions Associate.*

The Anti-Defamation League got the letter stopped.

We received three complaints from students trying to enter graduate school at the University of Massachusetts. They reported letters received from the University advising that their applications were rejected because spaces were reserved for minority group applicants.

It is most significant to point out that *although the ADL had received only three complaints regarding the situation, as a result of our action the fact was uncovered that three hundred students had been similarly rejected because of reverse discrimination.* As a result of our action the University created new openings for the rejected students equal in number to those filled under their discriminatory policy.

The newspaper, the "Springfield Republican" in an editorial entitled, "Watergate at U. Mass", commented as follows:

> A small-scale "Watergate" appears to exist at the University of Massachusetts. Officials on upper levels don't seem to know what those on lower levels are doing.
>
> Discrimination against non-minority applicants at the Graduate School's Center for Human Relations is charged by the New England regional office of the Anti-Defamation League.
>
> The charge is that whites are excluded in favor of blacks, because of a "constrictive quota and a commitment to recruit minority students."
>
> Discrimination is discrimination—as unfair when directed against whites as when aimed at non-whites.
>
> However the U Mass incident evidently wasn't sanctioned by top authorities.
>
> At issue are six openings in the graduate program, for which there were about 300 applicants. A U Mass administration spokesman said the Human Relations Department accepted three blacks and three whites and rejected the others. This action was unauthorized, the spokesman said.
>
> Under the prescribed procedure the University Graduate School accepts and rejects applicants.
>
> The six accepted applicants should be put back into the pool of 300, and then the six top-rated, on basis of ability, should be chosen, no matter who they are.

The ADL complaint was filed on behalf of two students, including a Jew and a Roman Catholic of Italian extraction.

H.E.W.'s pervasive pressure for preferential treatment and exclusionary quotas is illustrated in yet another arena of higher education. On May 17, 1974, the Office of Education published regulations governing "Grants for Training in Librarianship". They provided for priorities in the review of proposals, including: "The attraction of minority and/or economically deprived persons into the library field . . . as professionals and paraprofessionals." Accordingly, Queens College of the City University of New York established three fellowships and limited these federally funded grants to minorities exclusively.

H.E.W. has all but totally ignored the extraordinary racial discrimination taking place in the employment of faculty for Afro-American, African and Black Studies. The case at Sam Houston State University is typical. Having sought applicants from Kent State University, it interviewed an outstanding candidate and then wrote to him as follows:

> DEAR MR. LAMMERMEIER: I am truly sorry to inform you that it has become unexpectedly necessary to look for a Black to fill the position in Black Studies. Jim Olson was right, and so I am obligated at least to search diligently for such a person. It was nice to meet you. I appreciate your coming down. The members of the department felt that you would do a good job for us, but this unexpected turn of events makes it necessary for me to take another tack. I wish you well in your search for a satisfying post this next year.
>
> Sincerely,
>
> MARY S. OWEN, *Director.*

On January 6, 1974, Mr. Lammermeier wrote to us as follows:

> I received your letter yesterday requesting permission to use my name and circumstances regarding the reverse discrimination situation with the Department of History at Sam Houston State University in Huntsville, Texas. Please feel free to use whatever you think necessary to describe my case, including my name.
>
> I am still employed as a chef in the Perkins Pancake House in Mentor and will probably work there through next summer. I am presently continuing to pursue all avenues of possible employment, including higher and secondary schools and governmental agencies. As you are probably well aware, the job market in education is extremely tight right now.
>
> Thank you for your continued interest on my behalf. I would be very interested in seeing that forthcoming issue of *Rights.*
>
> Sincerely yours,
>
> PAUL J. LAMMERMEIER.

Other than telephone the University and receive a verbal denial of discrimination, H.E.W. did nothing.

The problems with the Equal Employment Opportunity Commission are of larger scope because they affect many more employers. For example, the E.E.O.C. recently published a two-volume guidebook entitled "Affirmative Action and Equal Opportunity—A Guidebook for Employers."

The Guidebook is replete with serious errors and distortions concerning the subject of numerical goals in hiring, which it confuses with quotas. It starts out by citing numerous court cases which required remedial action: (1) where intentional employment discrimination had existed, or (2) where there was no discriminatory intent but certain personnel practices had a disproportionate disqualifying effect upon female or minority group applicants or employees. It correctly reports that courts in both types of cases have imposed hiring and promotion "goals" to be met by employers as part of the required remedial actions to be taken.

However, it fails to report that such courts have repeatedly expressed their concern over the effect that these "goals" would have upon male and/or nonminority applicants and employees. Nor does it mention that some courts have refused to set such goals, for that very reason.

The Guidebook then goes on to state that the "remedial action" necessary to remove all barriers to equal employment opportunity "often requires some kind of special treatment for a period of time," basing this conclusion on the court cases it has cited and summarized.

It then repeats the statement that "specified remedial goals" are "increasingly" being resorted to by the courts and that

> Although Title VII bars preferential hiring simply to eliminate racial employment imbalances in relation to population ratios, Federal courts consistently have found numerical goals and timetables to be a justified and necessary remedy and means of eliminating the present effect of past discriminatory practices.

The subsection immediately following is entitled "Advantages of Voluntary Affirmative Action to the Employer." It advises employers that "affirmative action will help you avoid expensive legal judgments and sudden disruption of your regular operations and will help you qualify for government contracts." It further states that "It is to your advantage to conduct a thorough self-audit voluntarily to determine possible existence of discriminatory practices and needed remedial action." Thus, this manual clearly implies that there is no difference between court-ordered remedial action, imposed and supervised by an impartial tribunal, and a self-imposed affirmative action program voluntarily engaged in by an employer and supervised by no one other than his own executives. The implication is clear: either employers will impose goals on themselves, or the courts will do so.

This is far more than a blurring of an already indistinct line; it is a fundamental confounding of two entirely separate processes, and can only lead to the institutionalizing of preferential treatment, with employers imposing "do-it-yourself" quotas in hiring and promotion, although their actual prior practices would in fact not be discrimination.

Certainly, it would appear that such is the Commission's intent, for although it strongly urges the use of "numerical goals" in hiring and promotion, and does not use the word "quotas" at all, it fails entirely to mention the distinction often made by Federal equal employment opportunity officials between goals and quotas, and furthermore includes language that seems to suggest that quotas enforced with the utmost rigidity are what it really wants. It thus leaves employers with the impression that court-ordered "goals" (which are avowedly quotas) and an employer's self-imposed goals are one and the same.

The manual also alleges as follows:

> The actions suggested in this Guidebook are in accordance with *Revised Order No. 4* requirements and are necessary for *all* employers covered by Title VII whether or not they are government contractors. (emphasis in original)

Both statements in that sentence are outright falsehoods. The detailed plans set forth in the Guidebook are *not* legally binding on *any* employer. Furthermore, many of the provisions in the Guidebook *violate* the terms of Revised Order No. 4.

That Order was issued by the Department of Labor's Office of Federal Contract Compliance (OFCC) to enforce the Presidential Executive Order 11246, which requires federal contractors to provide equal employment opportunity.

Although Revised Order No. 4 indeed requires numerical goals, it sets forth certain caveats against their misuse, and also recognizes that there are some circumstances where such goals cannot be set. It clearly attempts to differentiate goals from quotas, and forbids their use for discrimination against *any* employee or applicant. None of these safeguards is even mentioned in the Guidebook.

Another major federal document, to which EEOC itself is a signatory, is also not mentioned. The March 23, 1973 Memorandum on Permissible Goals and Timetables in State and Local Government Employment Practices, which is entirely devoted to spelling out the differences between "permissible goals on the one hand and impermissible quotas on the other" is not cited in the Guidebook, and none of the strictures it contains is set forth even in paraphrased form.

What then does the Guidebook say about numerical goals? It seeks to imply that affirmative action goals, rather than being good faith estimates of the results of legitimate and proper affirmative action, as called for in Revised Order No. 4 and the above-cited memorandum are rather specific numbers that must be achieved.

In addressing itself to employers, Affirmative Action is the priority that E.E.O.C. puts forward. But in responding to Congressmen, it presents a different image. Witness this statement in a letter from E.E.O.C.'s Office of Congressional Affairs, addressed to Congressman Edward I. Koch dated August 9, 1974:

> The Equal Employment Opportunity Commission, while actively promoting affirmative action programs which will put the principle of equal employment opportunity into practice, does not have this as its primary function.

In concluding my statement I would like to refer to the United States Supreme Court decision in *Griggs* v. *Duke Power Co.*, which arose under title VII of the Civil Rights Act of 1964. The Supreme Court prohibited Duke Power from using a high school education or intelligence test scores as conditions of employment when neither standard was shown to be significantly related to successful job performance. Both requirements operated to disqualify blacks at a substantially higher rate than white applicants, and the jobs in question formerly had been filled only by white employees as part of a long-standing practice of giving preference to whites.

Despite the long history of discrimination by Duke Power, there is no suggestion in *Griggs* that imposition of a quota would be an appropriate remedy. On the contrary, Mr. Justice Burger stated:

> Congress did not intend by Title VII . . . to guarantee a job to every person regardless of qualifications . . . the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.

Similarly, the Anti-Defamation League seeks no special favors for any group. We advocate equal opportunity for all Americans.

Mr. O'HARA. Thank you very much. I was interested in your case involving the Kent State graduate who is now employed as a chef at the pancake house. One of our witnesses, in defending preferential treatment of minorities in faculty hiring, said, well, you don't have to worry about the white applicants that don't get the job because they will make out fine anyway.

That is part of the rationale, that white males will do—it doesn't matter if they don't get a particular job because there will be another one along in a few minutes.

This experience suggests that that might not be the case.

Mr. KUTTNER. It is absolutely so. Of course, this is only one of the hundreds of examples of individuals who have felt the brunt of this kind of preferential treatment who didn't succeed or who didn't contact some agency fast enough.

We have hundreds of examples of individuals who were severely injured by this kind of thing.

Mr. O'HARA. Mr. Kuttner, I think it would be appropriate for me to reaffirm your statement that your organization was in forefront of activity that led toward the adoption of the civil rights laws of the late fifties and early sixties.

As a Member of Congress at that time who was concerned with the legislation involved, I can testify that your organization was in the forefront of those working for those goals.

I can recall working on a number of cases when persons representing the organization here in Washington in those years and in Detroit back in those years worked very hard. I think you can be proud of the role you played in obtaining enactment of that legislation. I share your dismay over regulations, guidelines and rules that have been adopted contrary, I believe, to anything that was intended in the legislation that was enacted.

Your example of, what happened to that title VII language with respect to how the statute may not be used to require preferential hiring—think how that worked out in actual practice. Such that you suggested maybe we ought to repeal that part of the law. That is a very disturbing example.

I think your statement at the top of page 4 about the effect of so-called reverse discrimination, making innocent persons pay a debt owned by society as a whole is one of the best statements in that paragraph on the problem I have seen.

Mr. Kuttner. Thank you, Mr. Chairman. I might say I agree with you in your remarks in opening this committee that discrimination should be called that, and we don't need fancy adjectives to say where it is coming from, whether it be reverse or forward. It is still the same discrimination. I think it is unfortunate that this has gotten into the language of the kind of concerns that we are all dealing with.

Mr. O'Hara. Thank you.

I feel very strongly about that. It isn't any different. Discrimination is discrimination. It doesn't change a bit whether is it done for a "good" purpose or for a "bad" purpose. That is the problem I think.

We have gotten now to the point where we say, well, discrimination isn't discrimination if it is done for a good purpose such as remedying the effects of past discrimination.

If "A" was discriminated against, or the group of which "A" is a member was discriminated against in the past, then it is OK to discriminate against "B" who is a member of a group that might have been preferred in the past, but it doesn't seem to me the situation is different at all. "B" is being subjected to exactly the kind of unconstitutional, illegal, and immoral discrimination that we tried to stop when it was being directed toward "A." There is just no way of justifying it.

Mr. Kuttner. I certainly concur.

Mr. O'Hara. Mr. Biaggi.

Mr. Biaggi. Thank you, Mr. Chairman.

Thank you for your very substantial statement, Mr. Kuttner. It was very informative.

In connection with the "pancake house" reference you made, I think it is unfortunate, but before we conclude, the question comes to my mind, what recruitment efforts did the Sam Houston State officials make?

I think that is an area. The answer at this point is not important, but I think if a reasonable effort was made to recruit, that is the issue, minorities or other groups who had been heretofore neglected.

Was the candidate's qualifications equal to the others? If it was, it was unfortunate in his rejection.

You make reference to HEW. I have a particular peeve with HEW, not only in this area but other areas that I enunciated here. In connection with bilinguals, HEW unfortunately is laboring under the impression that there is only one segment of its community involved with discrimination or education problems and it is unfortunate because they could hardly remedy the situation if they haven't diagnosed it properly.

I asked a question here in this very room in connection with bilinguals in connection with the number of programs they had for Americans of Italian origin who had language problems.

Despite the fact that we have espoused a course supporting bilingual programs and urged more moneys be appropriated for that program.

First, they don't know. Then when they finally responded there wasn't one single program in the United States.

Going further, there were portions of America where we have pockets of Americans of French origin that have language problems up in areas of New England. The same question was put in that area. There wasn't a single one.

I made some statements in connection with my observations of their attitude then and now to bilingual as far as this is concerned might be charitable if I said they were neglectful. It is the most flagrant discrimination I have seen in Government as a result of bureaucratic attitude and policy.

Their implementation of our law, especially in connection with applications, I recall not too long ago when if one dared ask for a man's race or religion he was subjected to criticism, suit and action, and rightly so.

Then it was completely reversed. Which brings us almost into the position of discrimination. Just by simply doing that, it becomes a very subjective situation and discrimination comes into plan, subtlely or very directly.

Again, I challenge HEW for being the most destructive force and the most difficult obstacle to overcome in fighting this discrimination by creating almost impossible problems. Dealing with goals is a euphemism for quotas.

From a practical point of view that is all it amounts to, although ideologically it shouldn't be. The practical effect of it goes under this present atmosphere that it establishes quotas.

It is something that should be dealt with forthrightly.

What I would like to ask in connection with affirmative action, that itself has taken added significance. No one can quarrel with affirmative action. It is the thing to do. Apparently the organization has done it at the outset. But now it takes on an added meaning. It takes on a meaning that enrages some and is embraced by others.

Affirmative action in my judgment is an eliminating barrier, eliminating discriminatory situations. I think that was the position of your organization.

In your experience, how do you find the principle of affirmative action applied in practical life?

Mr. KUTTNER. Are you asking how would we like to see it applied?

Mr. BIAGGI. No.

Mr. KUTTNER. How do we find it applied? We find, unfortunately, that the concept has been applied not to break down the barriers of discrimination, which is what we would hope would happen so that every American gets an equal opportunity. What we find is that affirmative action has been used improperly to set up a quota system or preferential treatment.

I am sure you are familiar with the case at Queens College where in May of this year the grants in training provided for priorities in the attraction of minority and/or economically deprived persons into the librarian field as professionals and paraprofessionals.

Accordingly Queens College of the City University of New York established three fellowships and limited this federally-funded aid to minorities exclusively. This is a magnificent example in our own bailiwick of how the concept is improperly applied and I think that if we look down the end of the tunnel which you so aptly mentioned earlier, what we see is the use of affirmative actions to set up numerical goals and quotas, keeping some Americans out in an attempt to correct the inequities.

What we see happening is that kind of "affirmative action" that is not really affirmative action. It is a logical conclusion to the kind of concept that you heard from some of the witnesses in this very room.

The logical conclusion is that we are going to get to be a society where the only proper affirmative action, according to these folks, is when you have that number of Congressmen, teachers, musicians, who represent that proportion of the population. We say that in jest, but it is a very serious problem. You are going to need a Jewish lawyer only for Jews, an Armenian will never be elected to Congress. They aren't a big enough proportion of the population. That is what this concept, as perverted as it has been, leads us to: racial quotas, improperly applied.

Mr. Biaggi. It is more than racial. It is ethnic, too.

Mr. Kuttner. I am using the term—and sex.

Mr. Biaggi. That is the point I was talking to Dr. Raffel about earlier. That is the point I am making. I can see further down the road, why every group will be asserting its prerogatives and making its claims, and rightly so, and eventually what we would have in this country is a question of proportion representations in every field. Absent that you have chaos.

But with it you have an impossible situation. What it does ultimately is deprive—it removes incentive and deprives the Nation of the best because they will be boundary quotas. That is inevitable. Call it what you will. Goals, quotas, targets, whatever. If you deal with the needs for each group—that is what I am talking about. That is what is happening. First you start with one and then you start with another and then start with another and every group will be in there making their claim for some of the action, as said earlier. Eventually you will have the country divided into a hundred segments each making a claim in every area.

Mr. Kuttner. I couldn't agree with you more.

Mr. O'Hara. Thank you.

Mr. Kuttner, we have a very serious problem. It is true there has been discrimination. It is true I believe that discrimination continues. You and I would agree that affirmative action programs that go beyond affirmative action to the setting of numerical goals which in practice work out to be quotas is the wrong way to remedy this.

On the other hand, we had witnesses before this committee who have rightly complained that the traditional methods of remedying discrimination, doing it on a case-by-case basis, are ineffective to accomplish the results. So, we are faced with a problem of how do we do justice to everyone under these circumstances?

It is not enough for us simply to say, well, the present system is creating more injustice that it is correcting and therefore we won't permit the administrative agencies to continue doing this sort of thing.

We have to have, I think—we don't have to have but we ought to at the same time try to formulate some effective mechanisms for making sure there is no discrimination.

Now, I would certainly appreciate suggestions on any information that you have now or that comes up in the future that would lead us to that.

Mr. KUTTNER. Well, thank you. We have developed a booklet on this problem of affirmative action and we certainly have made some suggestions. We are actively working to try to make sure that the affirmative action concept should properly be applied so as to do the job and not on the other hand discriminate against anyone.

Mr. O'HARA. I will ask Mr. Buell, the subcommittee counsel, to be in touch with you and obtain any suggestions or information you have on this subject and keep in touch with you. It will be useful to the subcommittee.

Thank you very much.

Mr. KUTTNER. Thank you very much.

Mr. O'HARA. I thank all of you for appearing before this subcommittee and for your assistance in this inquiry.

The subcommittee will now adjourn until tomorrow morning at 9:30 in room 2261 and continue our inquiry.

[Whereupon, at 12:10 p.m., the committee recessed, to reconvene at 9:30 a.m., Friday, September 20, 1974.]

[The following material was submitted for the record.]

Initial Report*

September 16, 1974

AFFIRMATIVE ACTION IN FACULTY EMPLOYMENT UNDER EXECUTIVE ORDER 11246

(By Prof. Jan Vetter, University of California School of Law, Berkeley, Calif.)

INTRODUCTION

Many institutions of higher education hold federal contracts. As government contractors, they fall subject to Executive Order 11246, as amended.[1] The Order requires contractors to assure equal employment opportunity without regard to race, color, religion, sex or national origin in all of the contractor's facilities, not just those involved in performance of a contract. In higher education, as elsewhere, administration of the Executive Order, or contract compliance, program has provoked a good deal of controversy. From within higher education there may be heard angry claims that the program seeks to override traditional standards of academic judgment and impose quotas of minority and women faculty.[2] This charge the Government denies. At the same time, persons interested in improving the position among higher education faculty of minority groups and women criticize the program as ineffective. There may be some truth in both these positions. Indeed, they are not necessarily inconsistent. For a number of reasons the program—at least in higher education, perhaps more generally—lacks clear direction. It may be turned to a number of purposes but exists in danger of losing any particular sense of purpose.

It may seem surprising to find the contract device employed as a reform measure. This use of the government contract, however, is by no means unprecedented. The United States Government is a formidable presence in the American economy. Each year it consumes a substantial fraction of the goods and services the country produces. As sovereign, the Government also makes and enforces laws advancing its conceptions of wise policy. These activities are sometimes connected—the Government uses it power as consumer to achieve its aims as regulator.[3] The antidiscrimination program carried out under Executive Order 11246 represents perhaps the most important contemporary example.

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* This report was prepared for consideration by the Committee on Grant and Benefit Programs of the Administrative Conference of the United States. It represents only the views of the author, not necessarily those of the Committee or the Conference. At this point, the report has neither been acted upon nor adopted by the Committee or the Conference. It is not available for publication, quotation or attribution in its present form.

[1] Exec. Order No. 11, 246, 3 C.F.R. 339 (1964–65 Comp.), amended by Exec. Order 11, 375, 3 C.F.R. 320 (1966–70 Comp.), 42 U.S.C. § 2000e (1970).

[2] See, *e.g.*, Seabury, *HEW and the Universities*, COMMENTARY, Feb., 1972, at 38; Shils, *Academic Appointment, University Autonomy and the Federal Government*, 9 MINERVA 161 (1971). For a critical view of the literature critical of the HEW program in higher education see Ezorsky, *The Fight Over University Women*, NEW YORK REVIEW OF BOOKS, May 16, 1974, at 32.

The Order obliges employers contracting with the Government to promise *nondiscrimination* on grounds of race, color, religion, sex or national origin and *affirmative action* to assure equal employment opportunity. If the Government finds that a contractor has breached these obligations, it may terminate existing contracts and declare him ineligible for future contracts, to mention only the more draconian remedies. In the degree to which an employer depends upon government contracts, it may seem, he will try to perform his commitments to nondiscriminaton and affirmative action. Given the Government's wide reach in the marketplace, the argument follows, execution of this strategy should contribute in a major way toward curing discrimination in employment.

Except for a short period around the close of the Second World War, executive orders attacking employment discrimination have been in effect since 1940.[4] Up to the current order at least, they were not conspicuously successful. It is true that one investigator, discovering the existence of the then effective order in 1957, announced the end of discrimination.[5] A successor, observing a flurry of activity carried out under a later order in the early 1960's expressed optimism that the program might prove effective.[6] In retrospect, both statements seem unguarded. Progress clearly depended upon a much more substantial investment than had been committed. In 1965 the present order was promulgated, and the program entered a period of reorganization and expansion. The Labor Department has been given responsibility for administration of the program. The Secretary, pursuant to a delegation contained in Executive Order 11246, has issued a series of detailed regulations. Within the Department, the Office of Federal Contract Compliance implements the Order and regulations. This includes oversight of the work of other agencies designated by the Secretary of Labor as compliance agencies. For higher education, the compliance agency is the Department of Health. Education and Welfare and, within the Department, the Office of Civil Rights (OCR). HEW's Office of Civil Rights in Washington supervises branches in ten regional offices of HEW around the country. It is the activity of OCR and the regional offices which has proved so controversial, stirring a great, but stationary, cloud of dust.

A number of the factors which account for this situation are readily identified. OCR has only a small number of people to deal with a large number of institutions. No one seems to know how many institutions of higher education hold federal contracts, but of a total of approximately 2300 such institutions, one estimate places the number of contractors at 1100. It seems that many institutions have had little or no contact with the program. A great deal of time has been spent in more or less inconclusive battle between OCR and a handful of universities.

The Government employees who work in the program ar poorly trained and seem to have little knowledge or understanding of higher education. Consequently, much time and effort are expended on the job in discovering the intricacies of university organization and academic personnel practices. Compliance review teams gather a great deal of data, but it is not always clear that what is obtained is understood.

The Labor Department's regulations are overgeneralized. The construction industry is treated separately, but otherwise all contractors are lumped together under the same regulations. These regulations clearly have in view a model of industrial employment. They fit the conditions of faculty employment very poorly indeed. Such matters as faculty participation in the management of universities, advanced work in intellectual disciplines and the unique combination of functions manifested in the professorial role find no reflection in the regulations.

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[3] See Miller, *Government Contracts and Social Control: A Preliminary Inquiry*, 41 Va. L. Rev. 27 (1955).

[4] The principal orders applying antidiscrimination regulation to government contractors are the following: Exec. Order No. 8802, 3 C.F.R. 957 (1938–43 Comp.); Exec. Order No. 9001, 3 C.F.R. 1054 (1938–43 Comp.); Exec. Order No. 9346, 3 C.F.R. 1280 (1938–43 Comp.); Exec. Order No. 10, 210, 3 C.F.R. 390 (1949–53 Comp.); Exec. Order No. 10, 227, 3 C.F.R. 739 (1949–53 Comp.); Exec. Order No. 10, 231, 3 C.F.R. 741 (1949–53 Comp.); Exec. Order No. 10, 243, 3 C.F.R. 752 (1949–53 Comp.); Exec. Order No. 10, 281, 3 C.F.R. 781 (1949–53 Comp.); Exec. Order No. 10, 298, 3 C.F.R. 828 (1949–53 Comp.); Exec. Order No. 10, 308, 3 C.F.R. 837 (1949–53 Comp.); Exec. Order No. 10, 479, 3 C.F.R. 961 (1949–53 Comp.); Exec. Order No. 10, 557, 3 C.F.R. 218 (1954–58 Comp.); Exec. Order No. 10, 925, 3 C.F.R. 443 (1959–63 Comp.), 5 U.S.C. § 3301 (1970); Exec. Order No. 11, 246, 3 C.F.R. 339 (1964–65 Comp.), 42 U.S.C. § 2000e (1970); Exec. Order No. 11, 375, 3 C.F.R. 320 (1966–70 Comp.), 42 U.S.C. § 2000e (1970).

[5] Pasley, *The Nondiscrimination Clause in Government Contracts*, 43 Va. L. Rev. 837 (1957) ("It can fairly be said that discrimination by government contractors is now the exception rather than the rule.")

[6] Sovern, Legal Restraints on Racial Discrimination in Employment, ch. 5 (1966).

The sanctions the Government has at its disposal are clumsy and overpotent. Although OCR has requested government agencies not to contract with certain institutions for brief periods of time, it has never moved seriously to debar a university. In order to cut off a contractor, the Government must deny itself the contractor's services, and this the Government may be unwilling to do. Then too, OCR fears the impact such a step would have on the institutions. The university, of course, shares the same sentiment and moves some way to meet OCR's demands. In consequence, the parties negotiate toward a settlement, and such outcomes as are achieved reflect less the standards of the regulations than they do the chances of a bargaining process.

More fundamental than any of these difficulties, in part their cause, is the ambiguous and contradictory character of the regulations themselves, at least in relation to higher education. It is clear neither to OCR nor to institutions of higher education what it is that the regulations require. This helps account for such features of the program as poor administration, inefficiency, improvised solutions and prolonged negotiation.

Although the problems of administering the Executive Order in higher education are serious enough, the program has begun to encounter an additional set of problems created by a variety of antidiscrimination statutes which overlap the Executive Order. There have now come to exist many opportunities for duplicated effort, conflicting results, inconsistent standards and administrative confusion. This makes urgent a more sustained and fruitful effort at coordinating the many arms of federal antidiscrimination regulation than has taken place thus far.

THE EXECUTIVE ORDER PROGRAM—ADMINISTRATION IN HIGHER EDUCATION

Executive Order 11246 is the source of the contract compliance program. It requires that nonexempt[1] government contracts include a so-called equal employment opportunity clause, providing as follows:

"During the performance of this contracts, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

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[1] Section 204 of Executive Order No. 11246 provides:

"The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order. The Secretary of Labor may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: *Provided*, That such an exemption will not interfere with or impede the effectuation of the purposes of this Order: And *provided further*, That in the absence of such an exemption all facilities shall be covered by the provisions of this Order."

"(3) The contractor will send each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however*, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States."[2]

The Order places he Secretary of Labor in charge of the contract compliance program and gives him authority to adopt rules and regulations and issue orders, to require compliance reports from contractors and subcontractors and to provide for hearings for compliance, enforcement or educational purposes.[3] A series of "sanctions and penalties" are specified, including: (1) publication of the names of noncomplying contractors, (2) recommendation to the Justice Department for suit to enforce the provisions of the Order, (3) recommendation to the Justice Department or the Equal Employment Opportunity Commission for institution of proceedings under Title VII of the Civil Rights Act of 1964, (4) recommendation to the Justice Department of criminal proceedings for furnishing false information to the Secretary of Labor or a contracting agency, (5) cancellation, termination or suspension of contracts or portions of contracts for noncompliance, (6) debarment of contractors as eligible bidders on government contracts.[4] (Of this list of possible sanctions, the ones of practical significance in the administration of the program have been those providing for termination and cancellation of contracts and debarment.) Government contractors are divided into two classes—construction and nonconstruction. Institutions of higher education fall in the latter category, and it is the program for nonconstruction contractors that is of concern here.[5] The Order allows the Secretary of Labor to delegate his functions or duties "except authority to promulgate rules and regulations of a general nature."[6] The Secretary has designated the Department of Health, Education, and Welfare as the compliance agency for a number of industries including medical, legal and education services. HEW, therefore, administers the contract compliance program in higher education pursuant to regulations promulgated by the Secretary of Labor.

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[2] Exec. Order No. 11, 246 § 202. See also 41 C.F.R. § 60-1.4 (1973).
[3] Exec. Order No. 11, 246 §§ 201, 203, 208.
[4] *Id.* § 209.
[5] Part II of Exec. Order No. 11, 246 deals with nonconstruction contractors, Part III with federally assisted construction contracts.
[6] *Id.* § 401.

The Labor Department has issued a set of regulations (which seem always to be in the process of revision) controlling administration of the program. These are found in 41 CFR Chapter 60 and include: "Obligations of contractors and subcontractors" (41 CFR 60-1), "Affirmative action programs" (41 CFR 60-2), "Employee testing and other selection procedures" (41 CFR 60-3), "Sex discrimination guidelines" (41 CFR 60-20), "Hearing rules for sanction proceedings" (41 CFR 60-30), "Examination and copying of OFCC documents" (41 CFR 60-40), "Guidelines on discrimination because of religion or national origin" (41 CFR 60-50) and "Contractor evaluation procedures for contractors for supplies and services" (41 CFR 60-60). The more important of these in the administration of the program are "Obligations of contractors and subcontractors," "Affirmative action programs," "Employee testing and other selection procedures," "Sex discrimination guidelines" and "Contractor evaluation procedures for nonconstruction contractors."[7]

Much of the regulation on "Obligations of contractors and subcontractors" repeats the provisions of the Executive Order and outlines its requirements at a greater level of detail. Exemptions from the Order are specified.[8] Compliance agencies are instructed to develop programs for administration of the Order.[9] Contractors are required to furnish compliance reports annually and to supply with bids information relevant to a determination of compliance status.[10] Segregated facilities are prohibited.[11] Compliance reviews, consisting of "comprehensive analysis and evaluation" of employment practices as they bear on contractors' obligations for nondiscrimination and affirmative action, are established as a basic tool of the program. The regulation further provides that no contract of $1,000,000 or more is to be awarded unless satisfactory compliance has been determined through a preaward review or a compliance review conducted within the preceeding twelve months.[12] Procedures for processing complaints are set up,[13] and a system of hearings for cancellation, termination and debarment is established.[14] Contractors are instructed to permit access to their records for purposes of investigation.[15] Most significantly, contractors (and subcontractors) with fifty or more employees and a contract of $50,000 or more are required to develop written affirmative action programs.[16]

The regulation on "Affirmative action programs"—Revised Order No. 4—is in many ways the heart of the contract compliance program. According to Order 4, "an affirmative action program is a set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith effort."[17] Such a program rests on two devices: utilization analyzes and goals and timetables. The first of these entails an obligation of the contractor to determine if minority group members or women are encountered less frequently at various levels and in various areas of his operations than would be expected in view of their availability ("underutilization"). In the event that analysis discloses underutilization, or a "deficiency," the contractor must establish "goals and timetables"—predictions of increased utilization, to be achieved by good faith effort, according to a prescribed time scale to the point at which the deficiency is eliminated.[18] Persons who are discovered to be suffering from the effects of past discrimination make up an

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[7] The "Guidelines on discrimination because of religion or national origin" stand in some contrast to the regulations dealing with race and sex discrimination. Contractors are instructed to review their employment practices "to determine whether members of the various religious and/or ethnic groups are receiving fair consideration for job opportunities." If the review shows deficiencies, a contractor is to undertake "outreach and positive recruitment activities." Religious and ethnic discrimination is made subject to the OFCC compliance review and complaint procedure. However, it is made clear that "the scope of the employer's efforts shall depend upon all the circumstances, including the nature and extent of the employer's deficiencies and the employer's size and resources." Contractors need not establish affirmative action plans, with their substructure of utilization analyzes and goals and timetables, to deal with religious and ethnic discrimination. The elaborate criteria applied to employer selection procedures need not be satisfied. The Guidelines provide that contractors must take reasonable steps to accommodate employees' religious practices if they can do so without "undue hardship." The question of hardship entails consideration of "(a) business necessity, (b) financial costs and expenses, and (3) resulting personnel problems." This seems a good deal more indulgent than various provisions of the Sex Discrimination Guidelines.

[8] Section 60-1.5, 41 C.F.R. ch. 60 specified certain exemptions, including, *inter alia*, contracts not exceeding $10,000 and contracts to be performed outside the United States by employees not recruited domestically.

[9] *Id.* at § 60-1.6.

[10] *Id.* at § 60-1.7.

[11] *Id.* at § 60-1.8.

[12] *Id.* at § 60-1.20.

[13] *Id.* at §§ 60-1.21-1.24.

[14] *Id.* at § 60-1.26.

[15] *Id.* at § 60-1.43.

[16] *Id.* at § 60-1.40.

[17] 41 C.F.R. § 60-2.10.

[18] *Id.* at §§ 60-2.11, 60-2.12.

"affected class," and "corrective action" measures must be instituted to establish compliance.[19] An affirmative action program must in addition include a number of elements the regulations summarize as follows:

(a) Development or reaffirmation of the contractor's equal employment opportunity policy in all personnel actions;

(b) Formal internal and external dissemination of the contractor's policy;

(c) Establishment of responsibilities for implementation of the contractor's affirmative action program;

(d) Identification of problem areas (deficiencies) by organizational units and job classification;

(e) Establishment of goals and objectives by organizational units and job classification, including timetables for completion;

(f) Development and execution of action oriented programs designed to eliminate problems and further designed to attain established goals and objectives;

(g) Design and implementation of internal audit and reporting systems to measure effectiveness of the total program;

(h) Compliance of personnel policies and practices with the Sex Discrimination Guidelines (41 CFR Part 60–20);

(i) Active support of local and national community action programs, designed to improve the employment opportunities of minorities and women;

(j) Consideration of minorities and women not currently in the workforce having requisite skills who can be recruited through affirmative action measures.[20]

Many actions a contractor must take in conducting a utilization analysis, in establishing goals and timetables and in satisfying the other requirement of an affirmative action program are stipulated in the regulation. In sum, affirmative action demands attempts to seek out eligible minority and female candidates, efforts—as by way of training and provision of child care—to redress disadvantages from which minorities and women are thought to suffer and continuous, systematic and detailed oversight of personnel policies and practices to eliminate discrimination and guard against inadvertent or unconscious bias.

The regulation on "Employee testing and other selection procedures," though principally directed at formal testing programs, covers all methods of "hire, transfer, promotion, training or retention." "Test" is defined as "any paper-and-pencil or performance measure used as a basis for any employment decision" as well as "all other formal, scored, quantified or standardized techniques of assessing job suitability including, for example, personal history and background requirements which are specifically used as a basis for qualifying or disqualifying applicants or employees, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales and scored application forms." [21]

Contractors using tests are required to develop evidence of the test's validity—that is, demonstration of a relationship between test performance and job behavior. Minimum standards for validation are prescribed,[22] and separate demonstrations of validity for minority groups and women are demanded where "technically feasible." [23] If tests of substantially equal validity are available, contractors are expected to use the test "which will have the least adverse effect on the employment opportunities of minorities or women." [24] Contractors are not required to use "tests," but where there is evidence suggesting that techniques other than tests have had the effect of discriminating—*e.g.*, underutilization is found, evidence of validity may be required. If the contractor is "unable or unwilling to perform such validation studies," then "he has the option of adjusting employment procedures so as to eliminate the conditions suggestive of employment discrimination." [25]

The "Sex discrimination guidelines" are currently shifting in content, the text, of a proposed revision having appeared in the Federal Register at the end of December, 1973. The principal changes under consideration relate to "corrective action," insurance and pension and retirement plans and maternity benefits. Otherwise, both versions cover much the same ground. Thus, contractors must recruit among both sexes for all jobs, may not advertise in "Male" and "Female" columns, must provide equivalent facilities and services for both sexes and may not address requests for information— *e.g.*, marital status—to applicants of one sex only.[26] Employees of both sexes must enjoy equal opportunity to qualify for any job.[27] No sex-based distinction may be drawn in "employment opportunities, wages, hours, or other conditions of employment," [27a] sex-linked seniority lines, different retirement ages for men and women, discrimination in compensation and anti-nepotism rules which bear unequally on one sex are explicitly prohibited.[28] A contractor may not justify sex discrimination by reliance on state protective legislation—*e.g.*, a law limiting the weight women may be required to lift.[29] The proposed changes on insurance, pension and retirement plans and maternity benefits are discussed below. The subject of corrective action, introduced in the proposed guidelines for the first time, has to do with the problem of relieving the effects of past discrimination.[30] For example, the effects of historic sex segregation of jobs may persist after company policy is changed to permit transfer between jobs. This will likely occur when seniority for purposes of layoff dates from entry into a job, line of progression or department because women formerly locked into their positions by segregation may be reluctant to give up their accrued seniority upon transfer. The proposed regulation requires protection against consequences of this kind. In the example given, this might mean a shift to company-wide seniority for the affected women or an award of seniority credit to transferring women back to the date on which it may be calculated they would have made the transfer in the absence of segregation.

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[19] *Id.* at § 60–2.1.

[20] *Id.* at § 60–2.13. as amended July 8, 1974, 39 Fed. Reg. 25654. (1974).

[21] 41 C.F.R. § 60–3.2.

[22] *Id.* at § 60–3.5.

[23] *Id.* at § 60–3.5(b)(5).

[24] *Id.* at § 60–3.14.

[25] *Id.* at § 60–3.13.

"Contractor evaluation procedures for contractors for supplies and services"—also known as Revised Order No. 14—lays down procedures for compliance reviews. As amended in February, 1974, this regulation describes a three-step review procedure consisting of (1) a desk audit, (2) an on-site review and (3) an off-site analysis of "information supplied by the contractor during or pursuant to the on-site review." [31] A desk audit is a review of a contractor's written affirmative action program and "workforce analysis," [32] to be furnished upon request of the compliance agency. Normally,[33] an on-site review will be scheduled following the desk audit except in two classes of cases: (1) where the desk audit discloses the contractor's failure to make a reasonable effort to meet his obligations, in which case enforcement proceedings should be commenced, and (2) where an on-site review has been conducted within the previous twenty-four months, the desk audit confirms that the contractor has a satisfactory program and the circumstances of the previous audit have not substantially changed.[34]

An on-site review, which is to include employee interviews,[35] encompasses "(1) information necessary to conduct an in depth analysis of apparent deficiencies in the contractor's utilization of women or minorities, (2) information required for a complete and thorough understanding of data contained in or offered in support for the affirmative action program and (3) information concerning matters relevant to a determination of compliance with the requirements of Executive Order 11246 (as amended) but not adequately addressed in the affirmative action program." [36] Finally, an off-site analysis of material obtained during the on-site review is to be conducted "where issues have arisen concerning deficiencies or an apparent violation which, in the judgment of the compliance officer, should be more thoroughly analyzed off-site before a determination of compliance is made."[37] The regulation attempts to provide a good deal of protection against public disclosure of data furnished by contractors.[38] Information a compliance agency obtains from a contractor is ordinarily available for public inspection and copying under the Freedom of Information Act.[39] This extends to affirmative action plans, conciliation agreements and validation studies of tests.[40] However, a contractor may claim that certain data is not subject to disclosure and obtain a determination of the question from the compliance agency, with a right of appeal to the Director of OFCC.[41] Material taken off-site for analysis and much information held by a compliance agency during a compliance review or an enforcement proceeding is considered part of an investigatory file compiled for law enforcement purposes and therefore exempt from disclosure under the Act for the duration of the review.[42]

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[26] 41 C.F.R. §§ 60–20.2(a)–(c), 60–20.3(f).

[27] *Id.* at § 60–20.3(b). An exception is made for jobs for which sex is a bona fide occupational qualification.

[27a] *Id.* at § 60–20.3(c).

[28] *Id.* at §§ 60–20.4. 60–20.3(i), 60–20.5(a), 60–20.3(j).

[29] *Id.* at § 60–20.3(g). See also *id.* at § 60–20.6, providing that inconsistent state law is preempted.

[30] *Id.* at § 60–20.2(e).

[31] 41 C.F.R. § 60–60.3.

[32] "Workforce analysis" is defined as a listing of each job title as appears in applicable collective bargaining agreements or payroll records (not job groups) ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision. If there are separate work units or lines of progression within a department a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line. Where there are no formal progression lines or usual promotional sequences, job titles should be listed by department, job families, or disciplines, in order of wages rates or salary ranges. For each job title, the total number of incumbents, the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups must be given. Blacks, Spanish-surnamed Americans, American Indians, and Orientals. The wage rate or salary range for each job title must be given. All job titles, including all managerial job titles, must be listed." *Id.* at § 60–2.11(a), 39 Fed. Reg. 25654–55 (1974); 41 C.F.R. § 60–2.11(a), 39 Fed. Reg. 25654 (1974).

[33] See "Exceptions to the desk requirements," *Id.* at § 60–60.3(a).

[34] *Id.* at § 60–60.3(b).

[35] *Id.* at § 60–60.5.

[36] *Id.* at § 60–60.3(b)(1).

Certain data, such as trade secrets, confidential commercial or financial data, the names of complainants and personnel and medical files are regarded as not subject to disclosure.[43] A compliance review is to be concluded with an exit conference in which the compliance officer summarizes for the contractor the findings of the review. At that time or after further analysis the agency is to seek a written conciliation agreement committing the contractor to correct deficiencies revealed by the review.[44] The entire process is to be completed expeditiously. Enforcement procedures "shall be applicable" if a contractor fails to supply an affirmative action program and supporting documents, including a workforce analysis, within thirty days.[45] Within sixty days of receipt of the necessary documents the compliance agency is to have notified the contractor that he is in compliance or have issued a thirty-days show cause notice (subject to extensions of time for good cause).[46]

THE OFFICE OF CIVIL RIGHTS

Within HEW, the compliance agency for education, the agency responsible for performing the department's contract compliance functions is the Office for Civil Rights. Within OCR, the Higher Education Division has charge of the program for institutions of higher education. The Division's activities are conducted by a headquarters staff in Washington, D.C., and branch office personnel in ten regional offices. The location of the regional offices, the number of employees assigned to the executive order program in higher education as of June 30, 1973, and the number projected for June 30, 1974, are shown below:

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[37] *Id.* at § 60-60.3(c).

[38] See *id.* at Subpart C—"Disclosure and Review of Contractor Data"—and § 60-60.3(b)(1), limiting requests for information during on-site reviews to ". . . the specific items of information which the compliance officer determines are: (i) Necessary for conducting the review and completing the standard compliance review report, and (ii) Nor contained in or able to be derived from the material submitted by the contractor." See also § 60-60.3(a)—"Exceptions to the desk audit requirements" and § 60-60.3(b)(2).

[39] *Id.* at § 60-60.4(d); 41 C.F.R. 60-40.

[40] 41 C.F.R. § 60-40.2.

[41] 41 C.F.R. § 60-60.4(d).

[42] 41 C.F.R. § 60-40.3(5); 41 C.F.R. §§ 60-60.4(c), (d).

[43] 41 C.F.R. § 60-40.3. It seems apparent that the Labor Department undertook this latest revision of Order No. 14 in order to secure by administrative revision rather than attempt by appeal reversal of the decision in *Alameda County Legal Aid Society v. Schultz*, 349 F. Supp. 771 (N.D.Cal. 1972), holding that the Freedom of Information Act (5 U.S.C. § 552) required disclosure of a great deal of material furnished the Government by contractors. Under the new version of Order No. 14 it may be argued that much information revealed to government agents in the course of compliance reviews escapes the Freedom of Information Act because it never comes into the Government's possession (material made available only during an on-site review) or makes up part of an investigatory file compiled for law enforcement purposes. Comments furnished the Labor Department following publication of the revision show that both contractors and antidiscrimination groups saw the issue of public disclosure as by far the most significant aspect of the revision. Given the expansion in the legal concept of discrimination and the consequent narrowing of the gap between "underutilization" under the Executive Order and "discrimination" under Title VII of the Civil Rights Act of 1964, contractors have reason to fear that publicly disclosed data compiled for compliance review purposes will be used as evidence against them in Title VII cases and that plaintiff representatives may use such data to select defendants. These considerations operate with particular force where "affected class" situations are involved. Moreover, publicity itself can be used as a sanction. Plaintiff representatives might be expected to favor maximum disclosure for the same reasons contractors would resist it. Such material may also be helpful in litigation aimed at compelling compliance agencies to enforce the regulations because it may show that agencies are not in fact enforcing the regulations as written. Since academic personnel systems are often thought to depend upon confidential written evaluations of professors by colleagues and scholars in the same field, the question of disclosure has been a particularly sensitive one in HEW's higher education program. Revised Order No. 14 probably effects a satisfactory compromise from the point of view of most institutions of higher education; it is unlikely to please groups interested in employing the Order to advance minority and women faculty.

[44] 41 C.F.R. § 60.60.6.

[45] *Id.* at § 60.60.2.

[46] *Id.* at § 60.60.7, as amended July 8, 1974, 39 Fed. Reg. 25655 (1974).

Region and city	June 30, 1973	June 30, 1974
Headquarters, Washington, D.C	19	19
Region:		
I Boston	7	10
II New York City	13	14
III Philadelphia	6	10
IV Atlanta	14	13
V Chicago	10	13
VI Dallas	10	12
VII Kansas City		8
VIII Denver	4	9
IX San Francisco	13	13
X Seattle	4	6
Total	100	127

There are an additional 48 employees projected for June 30, 1974, who will have responsibility for Titles VI and IX of the Civil Rights Act of 1964 (Title IX having been added by the Equal Educational Opportunity Act of 1972).

OCR's activities under the Executive Order might be divided into three categories: (1) performance of compliance reviews, (2) investigation of complaints and (3) furnishing technical assistance to higher education institutions. OCR's statistical record of its activities in higher education is not all one might wish, but the following data, supplied by OCR, gives some idea of the scale of its operations. In the period November 16, 1971, to December 31, 1972, OCR processed higher education affirmative action plans as indicated:

Regions	I	II	III	IV	V	VI	VII	VIII	IX	X	Total
AAP's approved interim or final	1	1	1	0	0	11	0	8	7	1	30
AAP's rejected	0	13	0	6	0	5	11	5	8	3	51
AAP's pending	15	17	3	6	24	9	0	21	17	4	116

During the period January 1 to July 23, 1973, sixty-two affirmative action plans were received, of which three were given final approval. The rest remained pending; none were rejected. Five plans were requested but not received. Since July 23, 1973, only a very few plans have been approved. Statistics on the number of plans approved fail to reflect the actual condition of the program. During the period in which there had been sustained compliance activity in higher education standards for approval of affirmative action programs have grown more stringent. Consequently, many plans previously approved, including plans adopted by some leading universities, do not meet OCR's current conception of the requirements of Order No. 4. The Director of the Higher Education Division has estimated that the number of approved plans which do meet this standard is probably nine (excluding junior colleges) and in any case not more than nineteen (as of April, 1974).

Statistics on the handling of complaints are, if anything, even more fragmentary. According to figures supplied by OCR, the agency received 544 complaints between November 16, 1971, and December 31, 1972. (These include both academic and non-academic staff.) Of these, 355 claimed sex discrimination and 189 charged discrimination on grounds of race and national origin. Two hundred twenty-five complaints were "settled or closed," seventy-six were under investigation, 107 had not been reached for investigation and 137 had been transferred to the Equal Employment Opportunity Commission. (EEOC acquired jurisdiction over higher education in March, 1972, and complaints filed with OCR after that date were transferred to EEOC. So-called "class complaints"—complaints filed on behalf of an individual and other persons similarly situated—of which eighty-eight were pending on December 31, 1972, were divided into class and individual aspects after EEOC's entry into the field, with the former component of the complaint being retained by OCR and the latter referred to EEOC. OCR currently has this arrangement under review.) The disposition of complaints carried as "settled or closed" is not clear. Many appear to have been dismissed as lacking in merit; in at least a few cases the agency obtained backpay settlements or reinstatement. Currently, OCR has 303 Executive Order complaints pending, of which 180 are class complaints and 123 individual complaints. These cases date back in some instances to 1969. (OCR is also processing at the present time some 62 complaints under Title VI and Title IX.) By the end of March, 1974, OCR had completed seventy-three letters of findings on individual and class complaints during the current fiscal year.

OCR employees spend some part of their time responding to inquiries and requests for assistance from institutions. Thus, in this fiscal year OCR anticipates furnishing guidance to about 178 institutions. In October, 1972, OCR issued its "Higher Education Guidelines," giving an interpretation of the OFCC regulations in the higher education context. Over a long period of time OCR has been attempting to prepare a technical assistance package supplying information bearing on the availability for academic positions of minority group members and women and discussing methods of calculating availability for purposes of determining underutilization and setting goals and timetables.

It seems generally agreed, within and without OCR, that administration of the higher education program in its first years suffered from a number of defects. As the figures given above suggest, the agency has had difficulty in achieving satisfactory and prompt resolution of complaints. It also appears that in some cases complaints were lost or files mislaid (hence, agency statistics on complaints are not entirely reliable). Nevertheless, a great deal of time has gone into this activity; according to estimates supplied by the branch officers to the Washington office of the Higher Education Division in January, 1973, individual complaints required an average of 27.2 man days per complaint. Also revealing is the variation reported among the branches; the estimates of man days required per complaint ranged from ten to fifty man days, suggesting that the regions held contrasting views on what constitutes a proper investigation.[47]

I	30	VI	15
II	50	VII	50
III	--	VIII	15
IV	10	IX	30
V	30	X	15

The compliance review process seems also to have been more burdensome to institutions than it was effective in securing compliance. Thus, many reviews have been conducted but only a relatively few plans have won approval and, of these, only a small handful are currently regarded as actually satisfactory. Meanwhile, institutions have supplied a great deal of data, and in some areas have been put to much trouble and expense, without any clear resolution of their compliance status having been achieved. Branch office representatives have not always appeared capable of analyzing properly the information they have received, and seem also to have lacked a common understanding of the compliance review process and of the standards to be applied to affirmative action programs. Complaints of universities on this last point seem to receive some confirmation from the information given in the table below, showing action on affirmative action programs by region for the period November 16, 1971, through November 31, 1972, and the region's estimates, given in January, 1973, of man days required for a compliance review.

Region	AAP's approved interim or final	AAP's rejected	AAP's pending	AAP desk audits man-days	AAP field review man-days
I	1	0	15	30	110
II	1	13	17	8	50
III	1	0	3		
IV	0	6	6	5	40
V	0	0	24	15	30
VI	11	5	9	10	15
VII	0	11	0	10	27
VIII	8	5	21	10	40
IX	7	8	17	20	20
X	1	3	4	15	60

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[47] According to information supplied by OCR the regional offices made the following estimates of mandays required per complaint:

Thus, Regions II and VII collectively rejected twenty-four plans and approved only one while Regions VI, VIII and IX approved twenty-six plans and rejected eighteen. The region approving the highest number of plans (VI) required the least time to perform a compliance review—twenty-five man days, while the regions with the most adverse ratio of rejected to approved plans (II, VII) required fifty-eight and thirty-seven days, respectively, to complete a review.

At least some of the problems encountered in the administration of the program appear to be in the process of solution owing to the leadership provided by the current director of the Higher Education Division. Thus, the Division appears to be compiling more detailed and informative records, gaining more sensitivity to the unique characteristics of higher education and providing the branch offices more guidance and supervision and the compliance program as a whole may show a firmer sense of management. Certain difficulties remain, however.

The Division staff lacks experience with higher education. OCR has claimed fourteen employees have been connected with institutions of higher education in faculty, consultative and administrative positions, but there is good reason to believe that this number, though small, is inflated. There is one Ph. D. on the Division staff (the Director) and a small number of employees with Master's or law degrees. As of March 1, 1974, thirty-five positions were vacant owing to difficulty in recruiting persons with experience in higher education. Training within OCR has been limited. A three and one-half day seminar was given in Fall, 1972 and a three day seminar (for OCR personnel generally) in Winter, 1972 and Spring, 1973. A program concerned with affirmative action standards was given for senior branch office employees from August 20 to 24, 1973. New employees since February, 1973, are supposed to undergo a three month training and orientation program under the regional office branch chiefs. This includes "introductions, briefings, and seminars with local college administrators and equal opportunity officials, women's campus groups, officials in related Federal programs (e.g., OE, EEOC, and OFCC), etc.," together with "an overall orientation of compliance programs administered by the Office for Civil Rights."[48]

The Division's jurisdiction is vast and ill-defined. There are about 2,400 institutions of higher education in the United States, employing slightly over 250,000 fulltime faculty members (and, of course, many more part-time faculty nonteaching academic employees and nonacademic staff.) How many of these institutions are federal contractors is unknown, but one estimate, from the Higher Education Division, places it at about 1,100. How much federal money reaches these institutions through government contracts also appears to be unknown although, for some institutions government contracts undoubtedly provide an important source of funding. The total amount and its distribution, whatever they may be, would considerably understate OCR's purchase on higher education.

At least with respect to sex discrimination in employment, Title IX, forbidding sex discrimination in federally assisted educational programs and activities, provides an additional instrument or regulation. HEW also holds the view, a debatable one, that Title VI of the 1964 Civil Rights Act, which prohibits discrimination on grounds of race, color or national origin in programs receiving federal financial assistance, may apply to employment practices.[49] However, the Executive Order and Title VI and Title IX provide different criteria of administration (discussed below), so that these programs cannot easily be treated as a single integrated program. Passage of Title IX, together with HEW's interpretation of Title VI, both enlarge and complicate OCR's mandate in higher education. From the perspective of individual institutions, OCR must seem to resemble Gulliver in Lilliput, but OCR must feel that the more appropriate analogy is to Gulliver in Brobdignag. The agency lacks the staff and resources to fulfill its charter; it has failed to keep its complaint docket current, and it cannot perform compliance reviews in anything approaching the number or frequency OFCC regulations require. Many contracts of $1,000,000 or more have been awarded without a pre-award review, and it seems safe to say that a large number of higher education contractors have never been through a compliance review.

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[48] Letter from Gwendolyn H. Gregory, Director, Office of Policy Communication, Office for Civil Rights, HEW, to Sheldon E. Steinbach, American Council on Education, dated September 17, 1973.

[49] Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, seems not to apply to employment practices "except where a primary objective of the Federal financial assistance is to provide employment." *Id.* at § 604, 42 U.S.C. § 2000d–4. However, HEW takes the position that where employment discrimination produces effects prohibited by Title VI employment practices come within the statute. See 45 C.F.R. § 80.3(c)(3).

OFCC regulations rather impede than facilitate the administration of a compliance program in higher education. The very problematic application of these regulations receives extensive discussion below. Here, it may be sufficient to give one example of their lack of fit to higher education. Order No. 14 directs completion of compliance reviews in ninety days, from the compliance agency's request to the contractor for his affirmative action program to the agency determination of compliance status. OCR regards this schedule as hopelessly unrealistic, and it is clearly true that its reviews have regularly consumed a great deal more time than ninety days. The affirmative action program of Harvard University, approved in November, 1973, was reportedly the product of two years of negotiations, for example. At the same time that OCR administers an inappropriate set of regulations it also must coordinate the contract compliance program with other programs and other agencies. For some time, the Executive Order was the only federal regulation directed at employment discrimination in higher education (with the possible exception of Title VI of the 1964 Civil Rights Act, which seems to have had little or no practical significance for employment practices in higher education). The Order has now been joined by Titles VII and IX of the Civil Rights Act of 1964 and the Equal Pay Act, and OCR finds itself in uneasy alliance with the Wage and Hour Administration and EEOC. Whether or not there are too many cooks is not yet clear, but there are plainly enough to get in one another's way.

FEDERAL ANTIDISCRIMINATION REGULATION OF HIGHER EDUCATION

For a number of years the Executive Order was the only federal regulation of any significance covering discrimination among higher education faculty (and the Order, of course, applied only to institutions with government contracts). Title VII of the Civil Rights Act of 1964 did not extend to institutions of higher education or to agencies of state and local government.[1] HEW has interpreted the Title VI (of the 1964 Civil Rights Act) prohibition on racial or national origin discrimination in federally assisted programs as applicable in some circumstances to employment (although the Act states that it covers employment only when the purpose of the assistance is to provide employment),[2] but this administrative construction of the statute seems not to have had any importance in enforcement. The Equal Pay Act, forbidding sex discrimination in pay, excluded administrative, executive and professional employees.[3] The discovery that the Reconstruction Civil Rights Act (42 U.S.C. §§ 1981, 1983) might reach employment discrimination did not come until the late 1960's.[4]

The situation is now very much changed. The Equal Employment Opportunity Act of 1972 extended Title VII to take in higher education and state and local governments.[5] The same statute added Title IX to the Civil Rights Act with the effect of prohibiting sex discrimination in federally assisted programs (unlike Title VI, the new provision includes discrimination in employment.)[6] We are now learning that discrimination in employment on grounds of race violates 42 U.S.C. § 1981 and that race or sex discrimination by a state agency may violate 42 U.S.C. § 1983.[6a] In 1972 the exemption from the Equal Pay Act for administrative, executive and professional employees was eliminated. Higher education faculty now fall within an area covered by a number of overlapping but only partially consistent antidiscrimination measures.

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[1] Section 702 of Title VII (78 Stat. at 255 (1964) provided that "this title shall not apply with respect to . . . an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution."

[2] See, however, 45 C.F.R. § 80.3(c)(3); "The Executive Order Program—Administration in Higher Education" n. 49.

[3] Section 6(d)(1) of the Fair Labor Standards Act forbids sex discrimination in pay. Until the passage of P.L. 92–318, 86 Stat. 373 (1972) effective June 23, 1972, section 13 (a)(1) excluded persons employed in a professional, administrative or executive capacity from section 6.

[4] See Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 56 (1972); *Braden v. University of Pittsburgh*, 477 F. 2d 1 (3rd Cir. 1972).

[5] Public Law No. 92–261, § 2, 86 Stat. 103 (1972) amended 42 U.S.C. § 2000e–1 to remove the exemption for educational institutions.

[6] 20 U.S.C. § 1681 *et. seq.*, 86 Stat. 373 (1972).

[6a] With respect to § 1981, see Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. CIV. RIGHTS–CIV. LIB. L. REV. 56 (1972); on § 1983 see, *e.g.*, *Smith v. City of East Cleveland*, 363 F. Supp. 1131 (N.D. Ohio 1973); *Cohen v. Miami*, 54 FRD 274 (S.D. Fla. 1972).

Along with this development has come a multiplication of enforcement processes and of forums in which questions of discrimination may be pursued. When the Executive Order was the sole measure applicable to higher education institutions (those which were federal contractors) their employment practices were subject to the HEW compliance review process, and individuals could file complaints with HEW, thereby triggering the cancellation, termination and debarment process. It would appear also that the Justice Department could sue to enforce the contract, seeking an order compelling conformance with the equal employment opportunity clause.[7] Now that Title VII covers higher education an individual can file a complaint with the Equal Employment Opportunity Commission and then bring an action in federal court. A case of this kind may of course be brought as a class action. At the same time that the higher education exclusion was dropped, Congress gave EEOC the power to sue, so that the agency becomes a potential plaintiff in addition to the individual complainant. Increasingly, sections 1981 and 1983 of Title 42 are becoming established as alternative vehicles for individual and class actions raising issues of discrimination, 1981 with respect to discrimination against blacks, 1983 with respect to race and sex discrimination by state agencies. As a result of the recent extension of the Equal Pay Act to administrative, executive and professional employees, questions of sex discrimination in compensation among higher education faculty are open to investigation by the Wage and Hour Administrator of the Labor Department, on his own initiative or in response to a complaint. Either the Secretary of Labor or individual employees may sue to redress claimed violations of the Act.[8]

The prevailing view has been that the Executive Order gives no basis to private parties for suit against contractors for alleged violation of the Order or its implementing regulations.[9] However, the law may now be shifting toward recognition of private actions based on the Order.[10] Title IX gives federal departments and agencies providing financial assistance a basis independent of the Executive Order for promulgating regulations dealing with sex discrimination in higher education; HEW, which provides much of the government's assistance to higher education, may become simultaneously the agent of the Labor Department in carrying out the contract compliance program on behalf of minority groups and women and the principal in its own program, in aid of women, setting conditions to any form of federal financial assistance. Title IX, however, merely forbids discrimination; unlike the Executive Order, it does not demand affirmative action.

HEW's proposed Title IX regulations provides for affirmative action only as a remedy when discrimination has been established.[11] In this respect the proposed regulations resemble court decisions under Title VII in which quotas or hiring ratios have been imposed to remedy proven discrimination. Title IX also differs from the Executive Order in that the latter applies to all facilities of a contractor, including facilities not involved in performance of any federal contract, while under the former assistance may be denied or terminated only as to a "particular political entity or part thereof or other recipient" found out of compliance, "limited in its effect to the particular program, or part thereof" in which noncompliance is established.[12] While over-all supervision of the Executive Order program is centralized in the Labor Department, Title IX divides authority among all agencies providing financial assistance to higher education.

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[7] Section 209(a)(2) of Exec. Order No. 11246 authorizes the Secretary of Labor to recommend to the Justice Department that proceedings be brought to enforce the equal employment opportunity clause.

[8] FLSA § 16(b), 17 29 U.S.C. §§ 216(b), 217. Under section 16(b) employees may bring class action for damages, but "no employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."

[9] See *Farkas v. Texas Instruments, Inc.*, 375 F. 2d 629 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967); *Farmer v. Philadelphia Elec. Co.*, 329 F. 2d 3 (3d Cir. 1964).

[10] See *Lewis v. Western Airlines, Inc.*, 8 FEP Cases 373 (N.D. Cal. 1974). In *Lau v. Nichols*, 94 S.Ct. 786 (1974), the Supreme Court entertained on the merits an action brought by private plaintiffs claiming violation of HEW regulations issued pursuant to Title VI and incorporated in funding contracts between HEW and the defendant school district, a recipient of federal financial assistance. As Justice Stewart's concurring opinion points out, the defendants did not contest the standing of the plaintiffs to sue as beneficiaries of the contract (94 S.Ct. at 790 n. 2). Nevertheless, the decision may suggest that the Court is sympathetic to private enforcement of equal employment provisions in govern-

[11] See HEW, *"Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, Nondiscrimination on the Basis of Sex,"* § 86.3(a), 39 Fed. Reg. 22227, 22233 (1974).

[12] 20 U.S.C. § 1682, 6 Stat. 374 (1972).

HEW thus is not the only agency with responsibility under Title IX, and institutions receiving assistance from more than one federal source will find themselves coming under the jurisdiction of a number of agencies. It may be the case that the various agencies responsible for administration of the Executive Order and Title IX are subject to private actions seeking to require the agencies to conform to their own regulations, the Order or one or another statute.[13] To the extent this occurs, the agencies are forced to share authority for the formulation and administration of policy with the federal courts, and regulated employers cannot rely with entire confidence on agency interpretations.

A single university may find itself in the following position. As a federal contractor it is obliged to refrain from discrimination on grounds of race, color, religion, sex and national origin and to take affirmative action to insure equal employment opportunity without regard to race, color, religion, sex or national origin. Its employment practices are subject to investigation by HEW as the compliance agency designated by the Department of Labor. Failure to conform to the requirements of the Executive Order program expose it to cancellation or termination of contracts and debarment as a federal contractor, and it may be sued by the Department of Justice in an action to enforce the equal employment opportunity clause.

Conceivably, individuals who claim to have been injured by violations of the nondiscrimination or the affirmative action standards of the program may also sue as a kind of third party beneficiary of the equal employment opportunity clause. As an employer subject to Title VII the university may be sued by persons who have filed charges with the EEOC claiming discrimination in employment on grounds of race, color, religion, sex or national origin. Such cases may be prosecuted by a single person attacking a particular event—*e.g.*, termination—or as a class action on behalf of a large number of "similarly situated" persons in which very extensive and detailed judicial regulation of employment practices is sought. The same range of issues may arise in suits brought by the EEOC in response to a complaint. It seems clear that blacks who wish to avoid certain procedural requirements of Title VII can by-pass the EEOC and sue directly under section 1981 of Title 42. If the university is a state agency, members of other groups may be able to make parallel use of section 1983. Since the university receives various forms of federal financial assistance, it is obliged under Title IX of the Civil Rights Act to conform to whatever regulations HEW and other agencies may eventually issue to implement the statute's prohibition of sex discrimination in federally assisted programs. The same may be true of alleged employment discrimination on grounds of race, color or national origin under Title VI of the Civil Rights Act of 1964. If violations of the regulations are shown in an administrative hearing, the agency conducting the proceeding may require affirmative action or terminate or deny assistance. HEW's proposed regulations provide for individual complaints, and, here too, it is possible that individuals may be able to sue directly on the regulations.

Finally, the university may find itself involved in disputes with the Wage and Hour Administrator or with individual employees over issues of compensation arising under the Equal Pay Act. Of course, many questions are common to more than one source of regulation. Thus, a claim of sex discrimination in pay could be raised under the Equal Pay Act, Title VII, Title IX or the Executive Order. At the same time, the same question can be posed differently depending upon the regulatory context in which it arises. Thus, one agency might conclude that a particular action was not "discriminatory" under Title IX while HEW might decide that the same action fell short of a commitment to "affirmative action."

There may be something to be said for this proliferation of antidiscrimination measures and enforcement mechanisms. It sets many guardians on employers and guarantees complainants a forum in which to press their claims. The inevitable collision of philosophies and the competition among divergent procedures may help clarify the goals of antidiscrimination policy and contribute to developing suitable methods of achieving them. But there are also costs which make the present, confused situation appear very doubtfully desirable.

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[13] In *Adams v. Richardson*, 480 F. 2d the Court of Appeals for the District of Columbia Circuit held, *en banc*, that private plaintiffs could sue for an injunction requiring HEW to carry out the provisions of Title VI of the Civil Rights Act of 1964 by commencing proceedings to terminate federal financial assistance to segregated systems of education. See also, *Legal Aid Society of Alameda County v. Brennan*, — F. Supp. — (N.D. Cal. 1974).

These costs are of several kinds: (1) one proceeding conducted by one agency may duplicate another proceeding undertaken by another agency; (2) one agency may establish standards which conflict with standards developed by another agency; (3) different agencies may follow inconsistent interpretations of the same standards; (4) there is only limited assurance that a resolution achieved with one agency will be accepted by other agencies.

(1) EEOC investigations of Title VII complaints, agency investigations of Title IX complaints, HEW compliance reviews—whether under Title IX or the Executive Order—and investigations of the Wage and Hour Administrator all may cover some of the same ground. Unless the agencies standardize their investigatory procedures as much as possible, particularly their demands for information, multiple inquiries into the same events, employment patterns or personnel practices will prove needlessly burdensome to institutions and to the agencies themselves. For example, individuals sometimes file with OCR so-called class complaints on behalf of the complainant and all others similarly situated. After institutions of higher education came under Title VII and until recently, OCR's practice has been to refer the individual aspect of the case to EEOC and retain the "class" element of the charge for investigation by the appropriate field office. EEOC's demands for information can be very wide-ranging. Indeed, an exploration of a question of discrimination in an individual instance may require comparison among many similar cases, so that EEOC in effect may conduct much the same investigation as will OCR (or *vice versa*). If each agency fails to coordinate its approach with the other, they may repeat interviews with the same people, demand information bearing on similar concerns but in different form and otherwise waste their own and others' resources. The practical difficulties of distinguishing class complaints from individual complaints has led OCR to reexamine its practice in this regard, but no clear solution has emerged.

(2) Different agencies may fall into conflict on the same issue. This possibility has been realized perhaps most dramatically in the case of insurance and pension and retirement plans, but questions of maternity benefit policy and testing standards supply additional examples.

All the agencies are concerned to prevent discrimination. It follows that men and women should receive equal treatment under insurance and pension and retirement plans. What has remained obscure is what treatment is equal. Because the costs of medical insurance (excluding pregnancy and pregnancy-connected disabilities) and retirement benefits apparently tend to run higher for women than for men, it is open to argument whether equal contributions by the employer or equal benefits to employees yields equality of treatment. Originally, the OFCC Sex Discrimination Guidelines accepted either equal contributions or equal benefits.[14] So did EEOC, in giving its interpretation of Title VII, and the Wage and Hour Administrator, in furnishing his interpretation of the Equal Pay Act.[15] EEOC has changed its view, and now takes the position that only equal benefits will satisfy Title VII.[16] OFCC has issued a proposed revision of the Sex Discrimination Guidelines which avoids commitment to either position, merely setting out both as alternatives without presently choosing between them.[17] The Wage and Hour Administration (like OFCC, an agency of the Labor Department) stands on its original position. HEW's proposed regulations under Title IX follow the Wage and Hour Administration.[18] Fortunately, perhaps, the meaning of "discrimination" in this context is open to litigation under Title VII, and the courts may ultimately resolve this question.[19]

The agencies appear to be arriving at a common view on maternity benefit policy, but only after a period of disagreement resembling the impasse over retirement benefits. OFCC's current version of the Sex Discrimination Guidelines obliges a contractor to extend maternity leave on the same terms (except one) that leave is given for other purposes under his existing leave policy. The exception has to do with length; maternity leave must be granted for a "reasonable" time. If the contractor has no leave policy, the regulation compels him to grant reasonable maternity leave and reinstatement to the same or equivalent employment.[20] These requirements are less rigorous than the demands of Title

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[14] 35 Fed. Reg. 8888 (1970).

[15] This history is reviewed at 38 Fed. Reg. 35337 (1973). For the Labor Department's view, see 29 C.F.R. § 800.116(d) (1973) (Interpretive Bulletin on Equal Pay Act).

[16] 29 C.F.R. § 1604.9 (1973).

[17] 38 Fed. Reg. 35336 at 35338 (Dec. 27, 1973).

[18] See 39 Fed. Reg. at 22237, § 86.46(b)(2) (1974).

[19] *Cf. Rosen v. Public Sec. Elec. & Gas Co.*, 477 F. 2d 90 (3d Cir. 1973).

[20] 41 C.F.R. § 60–20.3(g) (1973).

VII as interpreted in EEOC's Sex Discrimination Guidelines.[21] However, if OFCC adopts the proposed revision of its Sex Discrimination Guidelines the two agencies will come into congruent positions. In the OFCC's language, "medically verifiable disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are[,] for all job-related purposes, temporary disabilities and shall be treated as such under any health or temporary disability insurance policies or sick leave plans available in connection with employment." Matters such as "the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance policies or sick leave plans" are to be dealt with on the same terms as "other temporary disabilities." However, if employees suffer termination because no leave or "insufficient" leave is available, the employer may be guilty of discrimination. This consequence follows if his policy follows with "disparate effect" on one sex, and he lacks justification in "business necessity." [22] The Wage and Hour Administrator takes no position on maternity benefits, holding to the view that they are not compensation for purposes of the Equal Pay Act.[23] The proposed regulations drafted by HEW under Title IX track the EEOC interpretation of Title VII and OFCC's proposed construction of the Executive Order.[24] Again, litigation under Title VII may give the courts the last word.

EEOC and OFCC have issued guidelines on testing and other employee selection procedures.[25] These are generally consistent with each other but probably inconsistent with Civil Service Commission practices in federal government employment. When the Federal Service Entrance Examination, developed and administered by the Civil Service Commission, was attacked in litigation as discriminatory against blacks, EEOC, as *amicus curiae*, asserted a position adverse to the Civil Service Commission.[26] (The plaintiffs' motion for preliminary injunction was denied and the case remanded to the Civil Service Commission for exhaustion of administrative remedies instituted after the action was filed.) An effect of this incident was to furnish a demonstration that one agency of government held a view of antidiscrimination policy sharply at variance with the conceptions of personnel selection followed by another agency with responsibility for administering the federal civil service. More recently, the Equal Employment Opportunity Coordinating Council, a group of agency representatives including EEOC and CSC, has collaborated on a set of uniform guidelines for testing and employee selection. Successive drafts of these guidelines have been circulating for many months but have not yet taken definitive form. HEW's draft regulations under Title IX seem to resemble OFCC and EEOC guidelines but are far less detailed. Questions of testing and employee selection are frequently raised in Title VII litigation; a number of courts have endorsed various aspects of the EEOC Guidelines, but some difficult problems remain unresolved.[27]

(3) Different agencies do not seem to share the same understanding of common techniques or strategies which they all employ. The proper use of "goals and timetables" illustrates this problem. "Goals" refers to projected proportions of minority and female employment in certain occupations or jobs utilized by an employer. "Timetables" are the periods of time in which the goals are expected to be reached. For example, a goal and timetable might predict that black employment in a certain job would expand from its current level of 2% in increments of 2% per year for five years, arriving at a total of 12% of employment in the job in five years' time.[28] Goals and timetables are a standard feature of affirmative action programs required by OFCC and its compliance agencies under the Executive Order. EEOC and the Justice Department have secured goals and timetables in negotiating settlements with employers in Title VII cases, and the courts have imposed them in some litigated cases as a remedy for past discrimination. The Civil Service Commission may also become involved with goals

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[21] 29 C.F.R. § 1604.10 (1973).

[22] 38 Fed. Reg. 35337 (1973) (§ 60–20.3(h)).

[23] 29 C.F.R. § 800.110 (1973).

[24] 39 Fed. Reg. at 22237 § 86.47(b) (1974).

[25] 29 C.F.R. 1607 (1973) (EEOC); 41 C.F.R. 60–3 (1973) (OFCC).

[26] The case is *Douglas v. Hampton*, 4 FEP 382 (D.D.C. 1972).

[27] In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court endorsed generally the EEOC interpretation of Title VII as requiring that tests used for employee selection purposes be job related. How to interpret and apply this requirement remains problematic, as a number of cases illustrate. See, e.g., *Allen v. City of Mobile*, 466 F. 2d 122 (5th Cir. 1972). *Spurlock v. United Airlines*, 475 F. 2d 216 (10th Cir. 1972).

[28] Examples of goals and timetables, and of a process of calculating them, may be found in the OFCC "imposed" plans in the construction industry. See, *e.g.*, 41 C.F.R. 60–5 (1973) (the Washington Plan).

and timetables in seeking to prevent discrimination in federal personnel programs.

A survey of federal officials from these agencies and the Commission on Civil Rights in September, 1973, appeared to disclose differences of emphasis and perhaps of underlying conceptions, as well as a certain vagueness, in appraising the device of goals and timetables.[29] For the Civil Service Commission, goals and timetables seemed to serve as a tool for measuring an employer's progress in administering a system of employment based on "merit." In varying degrees other agencies appeared to regard goals and timetables as something approaching a commitment to produce increased minority and female employment.[30] Differences of degree and emphasis on the length of timetables and the size of goals, also revealed in the comments of agency officials, seem to reflect tension between a view of antidiscrimination action as a process designed to afford equal employment opportunity presently and in the future and a conception of antidiscrimination programs as a means of rapidly achieving the same pattern of outcomes as would have been obtained had there been no discrimination in the past. If past discrimination in society generally has had the effect of reducing the present qualifications, at least for some occupations, of minority groups and women, the latter view seems more likely to result in discrimination against whites and males than the former. It is not surprising, therefore, that agencies with a more result-oriented conception of affirmative action tended more to favor explicit consideration of race and sex in choosing among "equal" applicants and employees.[31] It is also noteworthy that four agencies—the Justice Department, the Labor Department, EEOC and the Civil Service Commission—had arrived at a common, written position on the use of goals and timetables in March, 1973. That document included the following passage:

"Under a system of goals, therefore, an employer is never required to hire a person who does not have qualifications needed to perform the job successfully; and an employer is never required to hire such unqualified person in preference to another applicant who is qualified; nor is an employer required to hire a less qualified person in preference to a better qualified person, provided that the qualifications used to make such relative judgments realistically measure the job in question, or other jobs to which he is likley to progress. The terms "less qualified" and "better qualified" as used in this memorandum are not intended to distinguish among persons who are substantially equally qualified in terms of being able to perform the job successfully. Unlike quotas, therefore, which may call for a preference for the unqualified over the qualified, or of the less qualified over the better qualified to meet the numerical requirement, a goal recognizes that persons are to be judged on individual ability, and therefore is consistent with the principles of merit hiring."[32]

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[29] See *Malbin, Non-Discriminatory Hiring*, 5 NAT'L J. REPS. 1400 (1973).

[30] A representative of the Civil Service Commission said, ". . . goals are not the be-all and end-all of affirmative action. In fact, they are not affirmative action at all, but are merely the means of encouraging affirmative action" and that, "a selecting official should have some flexibility in hiring, but he may not use race or sex as a criterion in making his final selection." *Id.* at 1404. A Justice Department spokesman said, "You have a mix of people who were actually discriminated against and you have a mix of people who were not but who, by conditions of their race and sex have historically been discriminated against . . . Since you can't historically turn the clock back to know which are which, the judge takes some of the first group and adds a presumption that there are additional persons in the second group, and sets a goal." *Id.* at 1408. The Director of OFCC stated that as between two roughly equal candidates, "'I would encourage the contractor to give the minority applicant every consideration,' rather than let the decision be made by lot." *Ibid.* Another official of OFCC said that "before Order No. 4 it was a matter of looking at techniques. Now we look at results" and stated also, "it's a simple fact that there has been discrimination in the past. Our purpose is to achieve a degree of utilization which would have existed had discrimination not occurred. The mere fact that a contractor s hiring in rough proportion to availability does not mean that the contractor is in compliance. It depends on the seriousness of the deficiency. You would expect the goals in many cases to be higher than the current availability in order to remedy past deficiencies." *Ibid.* The Civil Rights Commission has issued a statement whch takes the view that, "An affirmative action plan must require some action that has not heretofore taken place, otherwise it is useless . . . One of the requirements therefore is that in the subjective evaluations that always occur in the selection process one factor previously excluded should now be included—a concern that a reasonable number of qualified minorities and women be hired until equity is attained." *Id.* at 1409.

[31] Compare a statement by a CSC representative—"I personally don't believe minorities can expect to catch up in the employment situation until they also catch up in other areas which affect their employability, such as education and past employment service. A lot of elements in society have to come along. This has to be looked at in a total context. It has been happening. Blacks, for example, have been increasing their college enrollment. More and more women are going into occupational areas formerly considered male. Things are changing but it is a gradual process. I don't see any overnight changes in the employment picture. A lot of people are looking for shortcuts, but shortcuts won't work. If you n. 30, *supra*, at 1405—with the Civil Rights Commission statement—"The best test for short-cut the idea of goals too much, leaving out the backup, they become quotas." *Malbin*, determining whether these aims are being achieved is by a results test. Whether expressed in terms of applications, hires or promotions, the rseults test is the best test of whether women and minorities in fact are achieving the equal employment opportunities required pursuant to the twn aims of affirmative action." *Id.* at 1409.

These statements may appear categorical; in practice they turn out to be ambiguous. Without a fairly precise understanding of such critical terms as "qualifications," "realistic measures" and "equal" qualifications different persons can agree on this formulation while holding quite divergent views on the size of pools of qualified labor, what proportion of those qualified are equal and how quickly minority and female employment can be increased without reverse discrimination. It is by no means apparent that a common understanding of such questions has emerged.[33]

(4) Given the present situation of overlapping jurisdiction, inconsistent standards and diverging interpretations of policy, an institution of higher education cannot be confident that conformity to one agency's views of its obligations will satisfy other agencies. This is most clearly evident in the case of retirement benefits. In this instance a university can comply with all relevant agency interpretations of the law only by adopting an equal benefits formula. The courts may, of course, ultimately hold that this position is correct. On the other hand, they may not. Meanwhile, there is at the least a certain anomaly in a state of affairs under which a university must abandon a position one agency considers in compliance with law to take a different position another agency of the same government regards as legally required. The very vague character of dominant concepts—"discrimination," "goals and timetables," "qualified," etc.—referred to above and discussed more fully below, leads to less obvious conflicts in the approaches different agencies bring to administration of equal employment opportunity in higher education. Conflicts of this kind may surface on occasion, as in a celebrated case involving the Bogalusa, Louisiana plant of Crown Zellerbach Corporation.[34] There, EEOC approved an alteration in the seniority system to redress the effects of past discrimination. This was overturned by OFCC, which imposed a new arrangement. The OFCC solution in its turn was attacked (successfully) by the Justice Department in litigation under Title VII. More commonly, discrepancies of view may remain concealed in the low visibility workings of administrative processes in which multiple agencies settle the conditions of eligibility for grants and contracts and attempt resolution of complaints of discrimination.

There presently exists machinery for coordinating the work of agencies active in the antidiscrimination field. This equipment, however, does not yet appear to be in good working order. The Equal Employment Opportunity Act of 1972 added section 715 to Title VII of the Civil Rights Act to create an Equal Employment Opportunity Council, composed of representatives of the Labor Department, the Justice Department, EEOC, the Civil Service Commission and the Civil Rights Commission.[35] The Council has "responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders and policies." The principal achievement of the Council to date seems to be a set of draft guidelines on employee selection procedures. The Council deserves a great deal of credit for addressing what is probably the most crucial and difficult problem for antidiscrimination policy. On the other side, the Council has to be faulted for its failure to deal with the problem effectively. The Council's members have not agreed on a document they are prepared to publish, and the draft they have produced perpetuates some of the more notable inadequacies of the existing guidelines adopted by OFCC and EEOC. The four agency agreement on goals and timetables represents another praiseworthy, though only ambiguously successful, effort to achieve consistent interpretation of policy. There is also a section of the OFCC Sex Discrimination Guidelines providing:

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[32] "Memorandum for U.S. Attorneys, Field Representatives of the Civil Service Commission, Field Representatives of the Equal Employment Opportunities Commission, Field Representatives of the Office of Federal Contract Compliance—Subject: Federal Policy on Remedies Concerning Equal Employment Opportunities in State and Local Government Personnel Systems" (Mar. 23, 1973) 3–4.

[33] See n. 30, 31, *supra.*

[34] *Local 189, United Papermakers & Paperworkers, AFL–CIO v. United States,* 416 F. 2d 980 (5th Cir. 1959), *cert. denied,* 397 U.S. 919 (1970).

[35] 42 U.S.C. § 2000e–14, 86 Stat. 111 (1972).

"To avoid overlapping and conflicting administration the Director will consult with the Administrator of the Wage and Hour Administration before issuing an opinion on any matter covered by both the Equal Pay Act and Executive Order 11246, as amended by Executive Order 11375." [38]

The undertaking to consult, however, clearly does not insure agreement, as evidenced by OFCC's willingness to consider a position in conflict with that of the Wage and Hour Administrator on retirement plans. The efforts at coordination made so far lead in the right direction. They remain piecemeal approaches to one or another problematic feature of antidiscrimination policy and fail to reflect a comprehensive view of what that policy ought to be. The Executive branch seems to lack capacity to formulate a clear conception of policy and to secure obedience to it on the part of the responsible agencies.

In many ways, despair seems the most appropriate response to the present state of affairs. In varying degrees, a number of agencies of the executive branch, the legislature and the courts have contributed to the tangle of overlapping jurisdictions, remedies and substantive standards which now exists. In all probability, it will never be entirely pulled apart and rationalized. It does not seem too much to ask, however, that at least the agencies of the executive branch concerned with equal employment opportunity should get out of each other's way, whether by deferring to some one agency on questions unique to a particular field, such as higher education, or by coming to a shared understanding on issues of common importance to all of them. Congress has already said there should be coordination; what remains to be done is actually to coordinate.

THE FAILURE OF ENFORCEMENT: HEARINGS AND SANCTIONS

On the surface, it would appear that the contract compliance program should furnish frequent occasion for administrative hearings directed toward the imposition of sanctions. Among the principal sanctions for noncompliance which the Executive Order provides are cancellation, termination or suspension of contracts and debarment of contractors.[1] The regulations contemplate regular compliance reviews, and no contract over $1,000,000 is to be awarded unless compliance on the part of the successful bidder has been established through a preaward review within the preceding twelve months.[2] Whenever a compliance review discloses that a contractor lacks an acceptable affirmative action program, or has "substantially deviated" from an approved affirmative action program, he must be declared nonresponsible; [3] the regulations provide that upon a second finding of nonresponsibility debarment proceedings must be commenced.[4] Furthermore, "when the Director [of OFCC] has reasonable cause to believe that a contractor has violated the equal opportunity clause he may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings or other appropriate action to ensure compliance should not be instituted." [5] Under Revised Order 14, as published in the Federal Register in February, 1974, a compliance agency seemed to be required, within sixty days of receiving a contractor's affirmative action program, either to notify the contractor that he was in compliance or to issue a thirty day show cause notice.[6]

Earlier versions were more vague as to the periods within which compliance agencies were to act but also looked toward a finding of compliance or issuance of a show cause notice.[7] Revised Order No. 4 requires the compliance agency to give a thirty day show cause notice "immediately upon finding that a contractor has no affirmative action program or has deviated substantially from an approved affirmative action program or that his program is not acceptable . . ."[8] While it is not certain that these provisions are wholly consistent,[9] it is clear that cancellation, termination and debarment serve as prompt alternatives, at least on paper, to satisfactory compliance. None of these sanctions may be imposed without offering an opportunity for hearing.[10] The Director may suspend existing contracts under the regulations, but only during the period proceedings for cancellation, termination or debarment are pending; when the Government has accepted the contractor's plan within the preceding twelve months even suspension must be preceded by a hearing, unless the contractor has "deviated substantially" from the plan.[11] The Comptroller General has ruled that progress payments due under a contract may not be withheld for violation of the equal employment opportunity clause without an opportunity for hearing.[12]

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[38] 41 C.F.R. § 60-2.5(c) (1973).

[1] Exec. Order No. 11, 246 §§ 209(a)(5), (6).

[2] 41 C.F.R. § 60-1.20(d) (1973).

[3] 41 C.F.R. § 60-2.2(b) (1973): If, in determining such contractor's responsibility for an award of a contract it comes to the contracting office's attention, through sources within his agency or through the Office of Federal Contract Compliance or other Government agencies, that the contractor has not developed an acceptable affirmative action program at each of his establishments or has substantially deviated from such an approved affirmative action program, the contracting office shall notify the Director and declare the contractor-bidder nonresponsible unless he can otherwise affirmatively determine that the contractor is able to comply with his equal employment obligations or, unless upon review, it is determined by the Director that substantial issues of law or fact exist as to the contractor's responsibility to the extent that a hearing is, in his sole judgment, required prior to a determination that the contractor is nonresponsible. . . .

[4] *Ibid.*

[5] 41 C.F.R. § 60-1.27 (1973).

[6] 39 Fed. Reg. 5630 (1974). On July 8, 1974, the regulations were amended to make clear that extensions of time could be granted, 41 C.F.R. § 60-6.7, 39 Fed. Reg. 25665 (1974).

Finally, the Equal Employment Opportunity Act of 1972 added to Title VII of the Civil Rights Act section 718, which provides:

> No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of title 5, United States Code, section 554, and the following pertinent sections: *Provided*, that if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply. . . .[13]

Government agencies award a large volume of contracts to institutions of higher education yet only a few of them have approved affirmative action plans. There has been ample opportunity for commencement of proceedings leading to cancellation or termination of contracts and debarment. The typical outcome of a compliance review is a finding of deficiencies in the institution's affirmative action program.

Only a small number of plans have received final approval, a larger number have been rejected and many plans have remained pending for long periods of time. The Director has had authority to initiate enforcement proceedings whenever he believed a contractor had violated the equal employment opportunity clause. Findings of noncompliance after compliance reviews are supposed to trigger show cause notices. Given the length of time some programs have been held under review, it must be the case that two or more contracts over $1,000,000 in amount have been awarded to a single institution with no finding of compliance having been made. But Revised Order 4 prohibits the award of a contract in excess of $1,000,000 unless a preaward review has established compliance and requires a debarment proceeding upon a second finding of nonresponsibility. Many contracts are awarded to institutions which have never undergone a compliance review because OCR, in common with other compliance agencies, lacks the manpower to perform the tasks set down in the regulations. It is also true, however, that the conditions to sanction proceedings are routinely satisfied at institutions which are reivewed. Yet the Government has never moved seriously to invoke against an institution of higher education the sanctions provided in the Executive Order.[14] Why not?

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[7] Under 41 C.F.R. 60–60, 38 Fed. Reg. 13377 (1973) on-site investigations were to be conducted no later than forty-five days from the request to a contractor for his affirmative action program. 41 C.F.R. §§ 60–60.3(c)(2), (d) (1973). Within forty-five days of the initiation of the on-site investigation the contractor was to be notified that he was in compliance or a 30-day show cause notice was to issue. *Id.* at § 60–6.8. However, the compliance agency could grant an extension of time "for good cause, including an opportunity for the contractor to avail himself of conciliation . . ." *Ibid.*

[8] 41 C.F.R. § 60–2.2(c) (1973).

[9] It is not entirely clear whether a thirty-day show cause notice is to issue upon a finding of noncompliance or after failure of conciliation following noncompliance or one or the other, at the discretion of the compliance agency or Director of OFCC or dependng upon whether the deficiency is discovered in a preaward review, in a regular compliance review or in some other way.

[10] 41 C.F.R. § 60–1.26(b)(2) (1973).

[11] *Id.* at 60–1.26(b)(2)(iv) (1973).

[12] 52 COMP. GEN. 476 (1973).

[13] 42 U.S.C. § 2000e–17, 80 Stat. 384 (1972).

Several reasons may be offered for the absence of formal sanctioning proceedings in higher education. It is possible that HEW lacks the political will to pursue the drastic remedies of cancellation, termination and debarment on any very wide scale or against influential contractors. The sanctions are so overwhelming as to deter their use. The government projects an attitude of ambivalence toward the program, reflecting the tension between the function of the government contract as a means of procuring required goods and services at the highest quality for the lowest cost and use of the contract as a regulatory technique. HEW has an alternative means of bringing pressure to bear on contractors (the contract freeze, discussed below) which avoids the commitment of time and resources entailed by formal enforcement proceedings and postpones the need to resolve the underlying tensions and dilemmas of the regulations, as well as the problems posed by their lack of fit to the conditions of higher education. These features of the regulations furnish an additional, formidable impediment to straightforward enforcement.

At least some OCR employees have entertained doubts about the willingness of politically appointed officials to support strong enforcement measures against contractors. Whether or not such doubts are well-founded, their existence probably serves to inhibit vigorous action by the people involved in the day to day work of the compliance program. How persistent, widespread and deepseated is the skepticism about the current administration's commitment to the program is hard to say. Some officials profess considerable confidence in the wholehearted support of highranking political appointees in the executive branch, others are noncommittal and still others acknowledge considerable uncertainty.

If there is any general rule about the matter, it would seem to be that skepticism varies directly with the distance in the organization's hierachy between the speaker and the highest levels of administration, but what this tendency may measure could be less the real attitude of the speaker than the degree of his willingness to speak candidly. A number of people in and out of government claim awareness of one or another incident suggesting that political considerations may have deflected the program's administration on some occasion. Naturally, it is quite difficult either to verify or to disprove allegations of this kind. It does seem fair to say that OCR does not reflect full confidence that the Department stands prepared to support stern enforcement measures.

The very severity of the sanctions creates another obstacle to their use. Debarment of a number of universities, including may of those at which OCR has concentrated its efforts, would inflict considerable damage. Probable consequences would include layoff of personnel, sharp curtailment or elimination of many research programs and constriction of educational and training opportunities, particularly for advanced students. Futher, since universities are complex organizations very poorly described by the industrial model reflected in OFCC regulations, it is often difficult to frame clear issues and build a compelling case demonstrating that a university stands in default on a clearly stated and important requirement of the program. For example, much frustration has been encountered in developing satisfactory analyses of university workforces for the purposes of compliance review. Even to the initiated, an epithet OCR representatives infrequently deserve, a large university seems a confusing, if not chaotic, welter of job titles, disciplines, subfields and organizational units.

OCR representatives and university officials have in some cases spent considerable time constructing suitable methods of collecting and reporting data on employees.[15] The problem of calculating deficiencies and setting goals among academic employees supplies another illustration. There has been lacking fully satisfactory means of establishing the availability of eligible minority and female candidates, especially in the case of minorities. but these determinations must be made to estimate underutilization and set goals. In consequence of difficulties of this kind, it is easy to find a university out of compliance but hard to say exactly what it should have done in order to comply. Review of a university becomes a process of mutual discovery of a series of intractable problems; the university may lag behind OCR demands and requests, but it can usually avoid falling into obvious recalcitrance. In this setting, extreme sanctions which fall heavily on "innocent" employees and students seem out of proportion to the university's fault. Consequently, they are not employed.

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[14] It is reported that the Office for Civil Rights requested HEW's General Counsel in November, 1971, to initiate steps leading to termination of Columbia University's federal contracts and debarment of Columbia as a government contractor. No hearing was ever held, however. See Wheeler, *The Role of University Counsel in Dealing with Equal Opportunity Compliance Problems*, 7 THE COLLEGE COUNCIL 249 (1972).

[15] See the account furnished by a lawyer for Columbia University in Wheeler, n. 14 *supra*.

In addition to the paradox that, at a certain point, sanctions lose efficacy as they gain in power, contract compliance faces the dilemma that its sanctions injure the Government at the same time they hurt the university. One of the purposes of contract awards to colleges and universities is to strengthen the higher education system.[16] To withhold contracts in aid of antidiscrimination efforts thus serves to advance one federal policy at the expense of another. (The converse is true only if there is no feasible alternative to withholding of contracts.) But Government policies conflict still more sharply.

The Government desires the goods and services it purchases through contracts with universities. Termination, cancellation and debarment further the Government's interest in improving the condition of women and minority groups but sacrifice the performance for which the Government has contracted and the contractor's capacity to assist the Government in achieving many of its goals. For example, it was reported that indefinite continuation of the recent freeze of contract awards at the University of California at Berkeley would have required cancellation of the Apollo-Soyuz space flight planned for July, 1975.[17] There will be disagreement, of course, over the appropriate ordering of priorities as between elimination of discrimination and achievement of various other objectives. The responsibility of monitoring compliance with the equal employment opportunity clause was separated from the function of awarding contracts precisely in order to increase the weight of antidiscrimination policy in the overall mix of governmental objectives represented by the Government contract device. The point remains that enforcement of equal employment opportunity involves a balance of gains and losses, and the responsible officials may sometimes conclude that the balance weighs against enforcement. At least some OCR officials see this tension in contract compliance quite clearly, and this perception contributes to their sense of isolation and to their suspicion that sanction proceedings will not be carried through to the end against important contractors.

OCR has available to it one method of bringing pressure to bear on contractors apart from the formal procedures of termination, cancellation and debarment. This method—the freeze on new contract awards—has been used on a number of occasions.[18] Revised Order No. 4 provides:

> If, in determining such contractor's responsibility for an award of a contract it comes to the contracting officer's attention, through sources within his agency or through the Office of Federal Contract Compliance or other Government agencies, that the contractor has not developed an acceptable affirmative action program at each of his establishments or has substantially deviated from such an approved affirmative action program, the contracting officer shall notify the Director [of OFCC] and declare the contractor-bidder nonresponsible unless he can otherwise affirmatively determine that the contractor is able to comply with his equal employment obligations or, unless upon review, it is determined by the Director that substantial issues of law or fact exist as to the contractor's responsibility to the extent that a hearing is, in his sole judgment, required prior to a determination that the contractor is nonresponsible. . . .[19]

Under the Federal Procurement Regulations contracting officers are required to evaluate the "responsibility" of prospective contractors. For the most part, the criteria of responsibility—*e.g.*, financial resources, record of performance—have to do with the contractor's capacity to supply goods or services according to contract specifications.[20] However, in order to be considered responsible a prospective contractor must "be otherwise qualified and eligible to receive an award under applicable laws and regulations . . .," including Executive Order 11246 and its regulations.[21]

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[16] See Wilson, *A Dilemma of American Science and Higher Education Policy: The Support of Individuals and Fields versus the Support of Universities*, 9 MINERVA 171 (1971).

[17] See BNA, 42 Daily Lab. Rep. A12–A13 (Mar. 1, 1974).

[18] According to information supplied by HEW, delay of contracts has been utilized on some twenty-two occasions involving twenty institutions of higher education and nearly $28.5 million in contract awards (in some cases, no contracts were pending at the time the contract freeze was imposed). Letter from Cheryl Olkes, Public Information Office, OCR, to Sheldon Steinbach, ACE, dated Jan. 15, 1974.

[19] 41 C.F.R. § 60–2.2(b) (1973).

[20] See 41 C.F.R. § 1–1.1203 (1973).

If OCR is dissatisfied with a contractor's performance of his affirmative action obligations, it may announce that fact to contracting agencies, with the likely consequence that contracting officers will withhold findings of responsibility. So long as contracting officers are willing to defer to OCR determinations of noncompliance with Revised Order No. 4,[22] the agency is able to shut off the flow of federal contract money to the offending university for some (unknown) period of time. This technique permits OCR to induce concessions from contractors without incurring the substantial costs of time and resources demanded by formal proceedings. This tactic also allows OCR to demonstrate "progress" in expanding employment opportunities for minority groups and women while relieving the executive branch of the responsibility of taking a clear position on the meaning of affirmative action.

These are only in part the functions for which the contract freeze was designed. It appears that OFCC saw in this technique the means of solving two problems. As described by a Solicitor of Labor, these were:

> First, the compliance agencies frequently ignored the Executive order's mandate that conciliation efforts continue for only a reasonable time, thus permitting dilatory contractor's to protract "conciliation" for a period of several years; and, second, the adversary proceedings contemplated by Section 208(b) of the Executive order, even when promptly instituted, are time consuming and necessarily divert limited compliance resources from other program tasks.[23]

Under the most plausible interpretation of Order No. 4, the discovery that a contractor is deficient in meeting his affirmative action obligations should trigger a thirty day show cause notice as well as a finding of nonresponsibility. If the matter is not resolved during the thirty day period, there should follow a "notice of proposed cancellation of termination of existing contracts or subcontracts and debarment from future contracts and subcontracts. . . . "[24] OCR seems unconstrained by this timetable, apparently feeling free to continue "conciliation, mediation and persuasion" beyond the time periods set by the regulations.[25] The compliance review tends to evolve into a negotiation process with a partly indeterminate outcome. This whole process is quite likely to consume many months and may never reach a definitive conclusion. In this process, show cause notices and the occasional contract freeze serve rather to restore movement to a stalled negotiation than to lend structure to an enforcement procedure leading either to the imposition of the prescribed sanctions or a determination of compliance with a set of ascertainable standards. It would seem that OFCC hoped to provide an informal and expeditious means of resolving compliance problems which could bypass formal hearing mechanisms and proceed to a terminal point within a finite time period.

This objective assumes, however, that the compliance agency's task is primarily an administrative process of monitoring conformance to a set of determinate obligations described by the regulations. In reality, insofar as the regulations defy coherent application in the setting of higher education, the contract freeze comes to function as a pressure tactic in a bargaining process; delay of contracts helps to force agreement with a particular university while case-by-case negotiation of agreements allows OCR to escape the responsibility, which a litigation process might impose, of committing itself to a meaningful conception of affirmative action.

It seems clear that OCR should not be dependent so exclusively on the extreme sanctions of termination, cancellation and debarment. Their very severity seriously inhibits their use. Consequently, it could easily occur that OCR might leave unremedied an instituiton's defaults on a wide range of individual matters because the only sanctions available to the agency seem excessively harsh.[36] It is unlikely, for example, that OCR will seek to debar a university because, in the agency's view, a department has discriminated on grounds of sex in denying tenure to a woman faculty member. On the other hand, to the extent that OCR is prepared to pursue debarment in such cases the university is likely to capitulate out of unwillingness to risk eligibility for contracts on the outcome of litigation over a matter of secondary importance to the institution as a whole.

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[21] *Id.*, at § 1-1.1203(e); 41 C.F.R. § 1-12.8 (1973).

[22] Under 41 C.F.R. §60-2.2(b) (1973) a declaration of nonresponsbility is made by the contracting officer. It is not clear that he is obliged to heed OCR's conclusions on the question of nonresponsibility.

[23] Nash, *Affirmative Action Under Executive Order 11,246*, 46 N.Y.U.L. REV. 225, 253 (1971).

[24] 41 C.F.R. 60-2.2(c)(1) (1973).

[25] According to 41 C.F.R. § 60-2.2(c)(2), "During the 'show cause' period of 30 days every effort shall be made by the compliance agency through conciliation, mediation and persuasion to resolve the deficiencies which led to the determination of nonresponsibility." However, "If satisfactory adjustments designed to bring the contractor into compliance are not concluded, the compliance agency, with the prior approval of the Director, shall promptly commence formal proceedings leading to the cancellation or termination of existing contracts or subcontracts and debarment from future contracts and subcontracts under § 60-1.26(b) of this chapter."

As a practical matter, a university for which government contracts are important will not deliberately risk its eligibility on the accidents of administrative litigation on any but the most gravely significant issue.[37] The present system creates the risks either that OCR obtains less than full compliance or that the agency imposes on institutions a version of their obligations which would not survive the test of litigation.

These unsatisfactory alternatives are partly due to the ambiguous and indeterminate character of the regulations. On one hand, institutions are uncertain as to the nature and extent of their obligation and, on the other, OCR's findings of compliance or noncompliance have a large element of pure discretion. In addition to revision of the regulations themselves, it would seem desirable to seek better definition of the program's requirements through the process of "elucidating litigation." This process will not go forward, however, within the framework of the present system of sanctions. Either OCR will not invoke them or the institution will make the minimum concessions necessary to avert the risk of debarment.

Two reforms seem desirable to correct this situation: (1) OCR should have at its disposal a system of graduated sanctions; (2) OCR should not be able to impose any sanction without an opportunity for prior hearing. The first of these is no simple matter to arrange. Essentially it is a matter of providing by contract for the range and flexibility of judicial remedies.

The penalties for violation of the regulations or departures from an affirmative action program should be heavy enough to discourage frivolous contests for purposes of delay or obstruction but not so overwhelming that institutions feel compelled to abandon genuinely held positions on serious questions. Sanctions should be adequate to deter but not so devastating that they either are not employed or imposed losses out of proportion to the institution's default or coerce compliance to debatable interpretations of the regulations. Depending upon circumstances, sanctions for demonstrated violations have one or more of three functions to perform: (1) to deter future violations of the regulations generally, by the respondent and others, (2) to compel a respondent to conform a continuing cause of conduct to the requirements of the program, (3) to make whole injured persons. A dispute might arise over an institution's recruiting practices, an example of (2) above. If those are shown to fall short of compliance with the institution's obligations under the Executive Order, the indicated remedy is the equivalent of an injunction. On the other hand, if an institution fails in a few individual instances to perform its commitment to advertise openings, an illustration of (1), a monetary penalty, the equivalent of a fine, might be appropriate. Finally, it may be desirable in some cases to provide remedies for individuals—i.e., a promotion or grant of tenure.

The Executive Order, as it stands, does not lend itself to a remedial scheme of this kind. It would be possible for OCR to seek termination or cancellation of a particular contract or a "portion thereof"[38] without attempting debarment as well. This would be a crude solution since it would tie the possible range of remedies to an institution's pattern of contracts and would allow only limited flexibility in the choice of remedy. It would also have undesirable side effects on the institution's activities and employees involved in the contract and on the contracting agency.

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[36] See Fisher, *The Carrot and the Stick: Conditions For Federal Assistance*, 6 HARV. J. LEGIS. 401 (1969), for a description of this dilemma.

[37] 41 C.F.R. § 60–1.24(c)(4) provides: "Where a prime contractor or subcontractor, without a hearing, shall have complied with the recommendations or orders of an agency or the Director and believes such recommendations or orders to be erroneous, he shall, upon filing a request therefor within ten days of such compliance, be afforded an opportunity for a hearing and review of the alleged erroneous action by the agency or the Director." It does not appear that this procedure has ever been utilized. For this there may be several reasons. Contractors dislike challenging the Government for fear of prejudicing the award of future contracts. Action once taken can be difficult to undo later—*e.g.*, a grant of tenure to a complainant. OCR tends to avoid "orders" or "recommendations" in favor of pointing to "deficiencies" (*e.g.*, inadequate workforce analysis, availability not sufficiently established), and the requirements of the program are so vague and open-ended that a contractor can ordinarily assume he is out of compliance. Indeed, it may be doubled that OCR has been entirely satisfied even with those few plans it has approved, to say nothing of OFCC. To contest an order, therefore, invites a retaliatory debarment proceeding, and this poses serious risks.

[38] Executive Order 11, 246, in section 209(a)(5), provides for cancellation, termination or suspension of a contract or "any portion or portions thereof."

More satisfactory would be amendment of the Executive Order to permit promulgation by regulation of a scale of monetary penalties to which institutions would consent in entering into government contracts. These would be imposed for violations either admitted by institutions or proved through the existing hearing procedures (subject to judicial review). Penalties in appropriate amounts would either be imposed, as in cases in which fines are appropriate, or forgiven upon compliance with the obligation established through litigation, as when a change in practice or provision of remedies to individuals is demanded from the institution. The debarment sanction could be retained for cases of continued recalcitrance.

A solution of this kind would work awkwardly or imperfectly in some cases. Since it would almost certainly prove infeasible to specify in advance what penalties would be appropriate for which violations, the question of penalty would often have to be litigated along with the underlying issue of the violation itself. Consequently, OCR might be tempted to claim large penalties to gain bargaining leverage, thereby circumventing the hearing process. Also, such a system would function most effectively with institutions which rely heavily on government contracts, much less well with institutions which contract with the Government only sporadically or for small amounts. Defects like these, however, simply reflect the distortions and anomalies which accompany the use of the government contracts as a regulatory device. As always, proposals have to be judged against existing arrangements and practical alternatives.

The availability of an adjudicative process does not insure that it will be used. As long as OCR can exert significant pressure on institutions outside the framework of formal sanctions, the program's content may continue to depend more on what the agency has the strength to negotiate than on what the regulations can be shown to require. At present, termination or cancellation of contracts and debarment can take place only upon opportunity for prior hearing. However, the agency claims the power simply to declare an institution a nonresponsible bidder for inability to comply with the equal employment opportunity clause, and this technique, by damming the flow of contract funds to the institution, may enable OCR to win concessions which may exceed what can properly be imposed.[29] It is open to doubt whether the compliance agencies actually have authority to make findings of nonresponsibility without affording an opportunity for hearing.[30] However that may be, it would seem desirable as a matter of policy to force OCR to formulate an intelligible conception of the program and demonstrate its legitimacy by channelling enforcement away from the administrative mechanism of the contract freeze and into an adjudicative process.

The same considerations apply to administration of Title IX, forbidding sex discrimination to federally assisted education programs and activities. Section 902 provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity or part thereof, or other recipient as to whom

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[29] The use of the contract freeze to settle dispute over the meaning of the regulations is comparable to resort to strike in preference to arbitration to resolve a question arising under collective bargaining agreements. In both situations a test of strength determines issues of interpretation.

[30] In *Crown Zellerbach Corp. v. Wirtz*, 281 F. Supp. 337 (D.D.C. 1968), the court enjoined the Secretary of Labor from, *inter alia*, temporarily suspending the plaintiff corporation from further business with the government prior to a hearing on the plaintiff's compliance status under Executive Order No. 11, 246.

> such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been refound, or (2) by any other means authorized by law: *Provided however*, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.[31]

HEW's draft regulations under Title IX provide for suspension of assistance while formal proceedings to terminate or deny assistance are pending.[32] To the extent that assistance is critical to the recipient institution, it will be true under Title IX, as under the Executive Order, that interruption of funds will lead to a negotiated outcome, circumventing the procedures of hearing and judicial review afforded by the statute as well as its machinery for legislative oversight. It would seem as desirable in the administration of Title IX as in that of the Executive Order that any cut-off of funds follow, rather than precede, the adjudicative procedure the statute provides.

Precisely the same argument holds for Title VI of the Civil Rights Act of 1961, which Title IX simply repeats in the respect relevant here.[33]

THE DILEMMA OF ENFORCEMENT: UNADMINISTRABLE STANDARDS OF MERIT

The Executive Order forbids discrimination and requires affirmative action. Neither of these terms lends itself to straightforward application. Labor markets are inherently discriminatory; one of their functions is to allocate a good in short supply relative to demand. The formula "discrimination on grounds of race, color, religion, sex or national origin" seems to mean that these attributes are not to figure in the discriminations among persons which employment decisions inevitably effect. On one view, claims of discrimination turn on the question whether or not the employer took these characteristics into account, using them as standards to guide his decisions. Discrimination poses fundamentally a psychological issue, and the employer's intentions are crucial. If it appears that his decisions do not vary depending, for example, on the race of applicants or employees, he cannot be guilty of racial discrimination. What considerations apart from race may determine his decisions is immaterial. The employer can discriminate on any basis he chooses, other than race. If, for example, an employer refuses to hire applicants who have arrest records, his practice is nondiscriminatory even though a larger proportion of blacks than of whites have arrest records. At one time this notion of discrimination as conduct resulting from an intention to discriminate on prohibited grounds seems to have marked the limit of the legal conception of discrimination.[1]

On another view of the matter, racial discrimination need not rest on an intention to discriminate on grounds of race but may exist even where there is an intention not to discriminate in this way. Now claims of discrimination depend on the effects of the employer's practices. If their effect is disproportionately to disadvantage blacks as against whites, the employer has discriminated on grounds of race.

Of course, the question arises, disproportionate with respect to what? One answer might be, with respect to the fraction of blacks in the labor force. Another answer would be, with respect to the relative "merit"—i.e., job performance—of blacks and whites in the labor force. These two answers might come to the same thing if it were the case that capacity for job performance were equally distributed among blacks and whites for all jobs.[2] This is, however, not the case.

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[31] 20 U.S.C. § 1682, 86 Stat. 374 (1972).

[32] 39 Fed. Reg. 22238–39 (1974) (§ 86.63(b)).

[33] 42 U.S.C. § 2000d–1, 78 Stat. 252 (1964).

[1] See, Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co.* and the Concept of Employment Discrimination, 71 MICH. L. REV. 59, 66–75 for an account of the evolution of the legal concept of discrimination.

[2] They would not necessarily amount to the same thing. If, for example, blacks and whites differed in their relative access to employment opportunities—owing to residential patterns and plant location—disproportionately high numbers of blacks or whites might be employed even though the capacity of the two groups was equal.

For example, a lower percentage of blacks than whites possess what society insists upon as a necessary minimum of training for the practice of medicine. The cumulative impact of the black experience in the United States has the consequence that relative capacity across the entire range of jobs in the economy (in the sense of "present" as opposed to "innate" capacity) is not proportionately distributed between the two racial groups. It makes a difference whether discrimination against blacks is defined as, employing a lower proportion of blacks in particular jobs than their proportion of the labor force, or as, employing less able whites than available blacks. The former definition may serve as a measure of discrimination in society, but it is unlikely to furnish a test of unlawful discrimination unless modified to include a standard of minimum qualification.

At least three considerations combine in favor of the latter definition. It serves an interest in efficiency. It gives effect to the view that the person who will perform a job best deserves the job. It rejects race as a criterion of selection. When discrimination is understood in this way, the case of the employer who rejects applicants with arrest records needs to be reexamined. Unless arrest records signal some disqualifying trait for the job in question, this employer discriminates on grounds of race.[3] It is this second concept of discrimination as decisions which, whether or not intentionally, fail to match racial patterns of employment with capacity for job performance that approaches the contemporary legal meaning of discrimination.[4]

This expansion of the meaning of discrimination reduces the scope of affirmative action, as used in the Executive Order. If discrimination meant only knowing or intentional departures from the principle of selection according to capacity for job performance, then a duty to take affirmative action could be used to alter unintentional or inadvertent practices with the same effect. It may be, for example, that an employer's failure to recruit aggressively among minority groups and women is not discrimination. If so, however, a duty to recruit may be imposed as part of a federal contractor's affirmative action obligation.[5] But affirmative action on behalf of minority groups and women reaches its limit at the point of discrimination against whites and men. Although the Constitution may permit the Government to require preferences to members of disadvantaged groups, it appears that federal law at present forbids discrimination for as well as against such groups.

Thus Title VII prohibits discrimination on grounds of race or sex, not discrimination against blacks or women, and the Supreme Court has read the statute as saying that "discriminatory preferences for any group, minority or majority, is precisely and only what Congress has proscribed."[6] Since Title VII covers federal contractors, it is very doubtful that the contractual stipulation for affirmative action could require reverse discrimination.[7] In any case, it seems that the Executive Order itself bans discrimination against whites or males.[8] Although the obligation to take affirmative action is said to require something more than nondiscrimination, the duty not to discriminate for or against persons on grounds of race, color, religion, sex or national origin limits the reach of affirmative action. As the meaning of discrimination comes to take in more ground affirmative action "to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin" comes to be squeezed more and more tightly against the ban on discrimination hostile to persons of any race, color, religion, sex or national origin.

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[3] In *Gregory v. Litton Systems, Inc.*, 472 F. 2d 631 (9th Cir. 1972), the court held that the use of arrest records as a screening device violated Title VII on the grounds that the device disproportionately disadvantaged black applicants and had not been shown to further a reasonable business purpose.

[4] This proposition emerges from decisions establishing the principles that racial imbalance may create a *prima facie* case of discrimination, that findings of discrimination do not require proof of intention to discriminate and that racially neutral selection criteria which adversely effect minority groups are unlawfully discriminatory unless shown to be related to job performance. For a discussion of these principles see Larson, *The Development of Section 1981 as a Remedy For Discrimination in Private Employment*, 7 HARV. CIV. RIGHTS-CIV.-LIB. L. REV. 56, 90–96 (1972).

[5] In *In re Allen Bradley*, CCH EMPL. PRAC. GUIDE ¶¶ 8065, 8070 (OFCC 1968, 1969), recruitment from walk-in applicants was considered to violate the contractor's affirmative action obligation rather than his duty not to discriminate.

[6] *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

[7] See 42 OP. ATT'Y GEN. No. 37 at 11 (1969), *cf.*, *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[8] Thus, the Executive Order does not prohibit discrimination against minority groups and women but discrimination on grounds of race or sex. Order No. 4 provides that "The purpose of a contractor's establishment and use of goals is to insure that he meet his affirmative action obligations. It is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin." 41 C.F.R. § 60–2.30. HEW "Higher Education Guidelines Executive Order 11246" state: "A university contractor must carefully and systematically examine all of its employment policies to be sure that they do not, if implemented as stated, operate to the detriment of any persons on grounds of race, color, religion, sex or national origin." * * * "The *nondiscrimination* requirements of the Executive Order apply to *all* persons, whether or not the individual is a member of a conventionally defined 'minority group.' In other words, no person may be denied employment or related benefits on grounds of his or her race, color, religion, sex or national origin." HEW, "Higher Education Guidelines: Executive Order 11246," 2–3, 8 (1972) (emphasis in original).

The cumulative effect of the duties to refrain from discrimination and to take affirmative action is to compel employee selection according to job performance, actual or predicted. A contractor's failure to employ members of minority groups and women in each job in the proportions indicated by their relative capacity for performance suggests that he has been derelict in taking affirmative action if, indeed, he has not discriminated. On the other hand, to the extent that he has favored minority persons or women over whites or males of superior job performance capacity he has been guilty of reverse discrimination. To be workable at all, the contract compliance program must have an administrable conception of job performance. It is at this point that the program suffers breakdown in its application to faculty employment.

Administration of the contract compliance program is facilitated by certain conditions. The regulations assume that the contractor is an organization characterized by a hierarchical authority structure, with a centralized management capable of establishing a system of personnel rules and monitoring conformance to the rules by subordinates. Entry level jobs require little training, experience or education beyond that widely distributed in the population at large and any additional necessary skills are acquired during employment. The content of jobs is clearly understood, as when the technology of production defines the job, and criteria of performance are subject to objective measurement. There is an effective ceiling on performance imposed by the character of the job itself or, at least, there is an average level of performance defined as successful which is commonly attained. Faculty employment in higher education stands in marked contrast.

In matters of employment and promotion the institution's authority tends to be widely diffused to departments and schools, and there is considerable participation by faculty in faculty personnel matters, amounting at times almost to control. Entry into faculty employment typically follows a lengthy and intellectually demanding period of training, and entry may only serve to commence a probationary period of several years duration, often with no assured outcome. The professor's role is very complex and the variation in performance quite wide. The work is highly specialized, and much of it, especially research, can only be judged by experts. Criteria of performance are vague and subject to dispute. Nevertheless, they tend to produce rankings of people within a field rather than broad groupings. In this setting, it is possible to estimate how well various groups have succeeded, but difficult to determine how much of observed differentials result from illegal discrimination by institutions and how much from varying tastes or preferences and the cumulative effect of such influences as socialization or discrimination in society at large.[9]

A considerable amount of work has been done on the position of women among higher education faculty.[10] This work strongly suggests some degree of sex discrimination. At the same time, it helps to illustrate why the contract compliance "women college faculty are only about half as likely as men faculty to hold a doctorate." [11]

Women are more highly concentrated in lower paying fields, more often indicate primary interest in teaching than in research, publish less and are employed disproportionately in two-year institutions. Women appear less mobile than men, apparently with a negative effect on their salaries. Even after allowance is made for differences between male and female faculty of this kind, however, significant discrepancies remain. The authors conclude that:

> If the same criteria, with the same weights, were applied in awarding rank to women as are applied to men . . . the average compensatory increase in rank would be from slightly below to somewhat above the assistant professor level, an average of one-fifth step. To award women the same

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[9] ACADEMIC WOMEN ON THE MOVE (Rossi ed. 1973), is a convenient collection of material representative of the literature which undertakes to demonstrate the disadvantaged position of women in higher education.

[10] Astin & Bayer, *Sex Discrimination in Academe*, EDUCATIONAL RECORD, Spring, 1972, 101, 103.

[11] *Ibid.*

> salary as men of similar rank, background, achievements, and work settings . . . would require a compensatory average raise of more than $1,000 (1968–69 standards). This is the amount of salary discrimination which is not attributable to discrimination in rank. The amount of actual salary discrimination, attributable to discrimination in advancement, would substantially increase this figure.[12]

Further, some of the choices women make which help account for their lower pay and rank may not be choices at all but additional handicaps imposed by discrimination. Hiring discrimination may restrict their access to better paying institutions, and they may be given fewer opportunities in administration and research than they deserve.[13]

On the other hand, many women may make certain career choices which tend to limit their professional success but which accurately reflect their interests and their perception of their abilities. In any event, some part of the differential between men and women faculty seems not to be the result of failure to apply existing academic standards evenhandedly but rather a consequence of their application. Thus, high scholarly productivity is rewarded, and this tends to favor male faculty. However, the standards themselves may be attacked as unfairly discriminatory. The study just quoted from illustrates a common approach:

> Sex discrimination in academe does not begin when a woman accepts an appointment at a college or university. Rather, its roots reach far back to the cumulative effects of earlier sex differentiation processes and discrimination: early childhood socialization for "appropriate" sex roles, different treatment and expectations accorded to boys and girls by their parents, teachers, and peers throughout adolescence and early adulthood, differential opportunities for access and admission to undergraduate and graduate school, and so forth. As a result, when they enter teaching careers in colleges and universities, most women have interests, aspirations, expectations, educational backgrounds, and life experiences that differ from those of their male counterparts.
>
> Once on the faculty, women experience a second barrier to equality with men: the academic reward system is biased toward behaviors and activities exhibited more often by men than women. Indeed, the content of the academic reward system was established by men, so rewards go primarily to those women who accept and share men's criteria for academic rewards. Thus, administration, research and publications, which men engage in to a greater extent than women, receive higher rewards than teaching, which women devote more time to than men.
>
> This reward system is far from ideal and may even be dysfunctional to the educational objectives of American colleges and universities. Indeed, the system should be examined and restructured.[14]

This passage strikes two themes: the theme of the mute inglorious Milton and that of the ugly duckling. On one side, women are differentiated from men by socialization processes which stultify their innate capacity for intellectual roles; on the other, women are different from men in ways which enhance their capacity for service in higher education, once it is understood that the faculty role should properly be defined by a different set of characteristics than it is at present. Anyone who has worked on a university campus during the past several years must by now be familiar with both these themes, developed in the case of minority groups besides that of women, as well as with the claim that women who perform indistinguishably from men are less well rewarded nonetheless. Considerable evidence can be mustered in support of the last proposition. Neither of the first two is clearly wrong by any means. Together, they set a dilemma for policies aimed at producing "equal opportunity." There is reason to believe that existing standards have not been applied evenhandedly across sex lines in a significant number of cases. It may also be true that one or more groups protected by the Executive Order and legislation might still fare less well, on average and for some period of time at least, than whites and males under a regime of perfect consistency in the application of standards of faculty employment. It might also be true that a reformulation of standards would improve the position, *e.g.*, of women relative to men. Whether they should be reformulated, and how, squarely poses the issue of "merit" in faculty employment and raises, in turn, the question of how the mission, or missions, of higher education should be defined. OFCC's regulations are incapable of speaking to such questions intelligibly. Taken literally, however, the regulations preempt them. This dubious objective they achieve by imposing an impossible burden of demonstration on judgments of academic merit.

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[12] *Id.* at 115.
[13] *Id.* at 116.
[14] *Id.* at 101.

A contractor's obligation to take affirmative action follows from the discovery of underutilization in his workforce. The regulations define "underutilization" as "having fewer minorities or women in a particular job classification than would reasonably be expected by their availability."[15] A notion of availability implies possession of attributes important for successful job performance; a person cannot be said to be available for a position in any meaningful sense if he lacks capacity to perform it. In calculating underutilization, the contractor is to "consider . . . the general availability of minorities [women] having requisite skills in the immediate labor area" and "the availabilities of minorities [women] having requisite skills in an area in which the contractor can reasonably recruit," as well as "the availability of promotable and transferable minorities [female employees] within the contractor's organization."[16] What attributes, or skills, a job demands, however, is no less a judgment than the decision who, among a number of candidates, possesses them in greatest measure. Misevaluation of the requirements of a job and of the job-related characteristics of the persons considered both could be systematically biased against women or minority persons. Where this occurs, it will result in "adverse effect"—technically, "a differential rate of selection (for hire, promotion, etc.) which works to the disadvantage of a covered group."[17]

Misdefinition of the job may lead to underutilization also, but avoid adverse effect in this narrow sense. This will happen if members of minority groups and women who do have "requisite skills" are discouraged from applying (or are not considered) because they possess less often than whites or men the superflour attributes the contractor requires. The regulations take account of this possibility. Contractors are instructed that "special attention should be given to academic, experience and skill requirements to insure that the requirements in themselves do not constitute inadvertant discrimination."[18] Further, "where requirements screen out a disproportionate number of minorities or women such requirements should be professionally validated to job performance."[19] How one determines that a screening effect is disproportionate in impact is left unsaid. However, "Testing and Selection Order Guidance Memorandum No. 7a," recently issued by the Department of Labor, speaks to the general problem with unusual clarity:

12. Q. May a contractor utilize unvalidated selection requirements in deciding the availability of applicants with requisite skills when using Revised Order No. 4 criteria to establish goals?

A. No.[20]

Thus, who is available and, hence, whether there is underutilization (including adverse effect), together with the extent of underutilization, at least partly depends upon selection requirements. To insure detection of inaccurate measures of availability resulting from faulty selection requirements, those requirements must be validated. What is validation?

According to the Guidance Memorandum, "validation is the demonstration of the job relatedness of a selection procedure."[21] Under the Testing and Selection Order, there are three methods of showing the necessary relation between a position and a procedure used to select for it: criterion-related validity, content validity and construct validity.[21a] The regulations provide technical standards for establishing criterion validity and content validity (but not construct validity). Satisfaction of these standards would appear to depend upon the use of "tests," which are defined as follows:

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[15] 41 C.F.R. § 60-2.11(a) (1973).

[16] *Id.*, [illegible] §§ 60-2.11(a)(1)(iv), (v), (vi), 60-2.11(a)(2)(iii), (iv), (vi). See also 41 C.F. [illegible] -2.11(a)(2)(v): "The availability of women seeking employment in the labor or recruitment area of the contractor."

[17] U.S. LAB. DEP'T, EMPLOYMENT STANDARDS ADMINISTRATION, OFCC, *Testing & Selection Order Guidance Memorandum No. 7a*, "Question & Answer 7" (1974).

[18] 41 C.F.R. § 60-2.24(b) (1973).

[19] *Ibid.*

[20] *Testing & Selection Order Guidance Memorandum No. 7a*, n. 17 *supra*, "Questions & Answers" 12.

[21] *Id.*, "Questions & Answers" 3.

[21a] These types of validity are defined as follows:

Criterion-related validity—A statistical demonstration of a relationship between a selection device and the job performance of a sample of workers.

Content-validity—A demonstration that the content of a selection device replicates job duties disclosed in the job analysis, or measures job knowledge, or skills shown to be critical and essential for immediate performance on the job.

Construct-validity—A demonstration that (a) a selection device is a measure of the construct (*e.g.*, honesty) and (b) the construct is related to actual job performance. *Ibid.*

> For the purpose of this order, the term "test" is defined as any paper-and-pencil or performance measure used as a basis for any employment decision. This order applies, for example, to ability tests which are designed to measure eligibility for hire, transfer, promotion, training, or retention. This definition includes but is not restricted to, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interests; and attitudes, personality or temperment. The term "test" also covers all other formal, scored, quantified or standardized techniques of assessing job suitability including, for example, personal history and background requirements which are specifically used as a basis for qualifying or disqualifying applicants or employees, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales and scored application forms.[22]

There may be selection techniques employed which are not "tests." The regulations deal with these in the following manner:

> Selection techniques other than tests, as defined in § 60-3.2, may be improperly used so as to have the effect of discriminating against minority groups or women. Such techniques include, but are not restricted to, unscored or casual interviews, unscored application forms and unscored personal history and background requirements not used uniformly as a basis for qualifying or disqualifying applicants. Where there are data suggesting employment discrimination, the contractor may be called upon to present evidence concerning the validity of his unscored procedures regardless of whether tests are also used, the evidence of validity being of the same types referred to in §§ 60-3.4 and 60-3.5. Data suggesting the possibility of discrimination exists, for example, when there are higher rates of rejection of minority candidates than of nonminority candidates for the same job or group of jobs or when there is underutilization of minority group personnel among present employees in certain types of jobs. . . .[23]

Since selection techniques can only be validated under the criteria given in the regulations for tests, which entail quantification, it is hard to see how any procedure other than a test can be validated. Rather, if validation is necessary, it would seem that a test must be substituted. Confirming this impression, the Guidance Memorandum says:

> Although unscored interviews or applications are not specified in the definition of a test, these procedures also come under the requirements of the Testing and Selection Order if they have the effect of discriminating against minorities or women (sec. 60-3.3). In these cases the contractor must either eliminate the adverse effect or quantify the procedures (i.e., make them into "tests") so that they can be validated. Therefore, all selection procedures are covered by the Testing and Selection Order.[24]

Of course, validation is demanded only when there exists "data suggesting employment discrimination." The Guidance Memorandum states, "If there is no finding of adverse effect, there is no validation requirement."[25] However, under the Testing and Selection Order, an implication of discrimination may be suggested not only by differential rejection rates according to race or sex (adverse effect) but also by the residual phenomenon of underutilization. Underutilization depends upon availability, and availability cannot be determined by unvalidated selection requirements.

How feasible is validation? At best, it seems, validation is difficult and expensive. The cost and difficulty is markedly increased by the requirement that "differential validity" be demonstrated—i.e., that a test be separately validated for groups in the relevant population separated by race and sex. The utility of establishing differential validity seems to be in controversy among psychologists.[26] Otherwise, the criteria of validity may well reflect something approaching a consensus of informed professional judgment on the conditions justifying high confidence in a test; they are taken over from a manual of the American Psychological Association. What is less clear is how widely those conditions may be feasibly achieved.[27] That they can be satisfied at all readily seems doubtful in the case of a great deal of professional employment.

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[22] 41 C.F.R. § 60-3.2 (1973).

[23] *Id.* at § 60-3.13.

[24] *Testing & Selection Order Guidance Memorandum No. 7a.*, n. 17 *supra*, "Questions & Answers" 1.

[25] *Id.* at 6.

[26] See Malbin, *Hiring Practices*, 5 NAT'L J. REPS. 1429, 1433 91973).

For example, take the requirement of a Ph.D. as a condition of employment in academic positions. This might well be considered a "test." Is a university to hire one hundred persons with the degree and one hundred without and then compare the performance of the two groups? Presumably, the definitive comparison would take place after several years—something like the presently established period for tenure review. How would one eliminate the possibility of "supervisory bias" in evaluations? Is it possible the Ph. D. is job related for university positions in the physical sciences but not in foreign languages? In one subfield but not elsewhere in the discipline? If so, is there a sufficiently numerous population appropriately distributed to test the possibility? To demonstrate differential validity?

One must ask what are the elements of the performance under evaluation. At the University of California, for example, faculty members are to be judged on the dimensions of teaching, scholarship, university service and public service. It is probably accurate to say these are classically regarded as analytically separable but, in practice, aspects of a single role. Thus, teaching feeds scholarship and scholarship teaching, while the professor's cultivation of his discipline equips him to contribute to the public interest at the intersections of scholarly inquiry and public debate or policy formation, and the need for reconciling the demands of professional autonomy with the imperatives of coordinating intricately overlapping and opposing activities and interests in a complex organization imposes a citizen's obligation of participation in governance.

No doubt, "scholarship" ranks well ahead of the other components of the faculty member's role. Even though scholarship is crucial to appointment and promotion, however, it receives different weight in relation to the remaining elements in different schools and departments and, additionally, falls subject to varying criteria in one unit as against another. It is not always clear in what exactly scholarly work consists, and the worth of most examples of this genre is proverbially vulnerable to challenge.

Why should not teaching rate higher in relation to scholarship? Many people believe it should. But, whatever its relative weight, how should it be judged? Teaching takes place in many settings and at a number of levels. These include lecture courses for large undergraduate classes, seminars for small groups of undergraduate or graduate students and supervision of a doctoral candidate's research. What is the value of one form of teaching as against another? It is not obvious how to rate a faculty member's performance in any of his teaching functions with sufficient precision to permit accurate and ready comparison with others. Nor is it always clear what point or points in time furnish appropriate moments for judgment.

University service and public service are rather cloudy notions. A conception of public service limited to something like that suggested above—intervention in some public forum on the basis of a scholar's expertise in his academic field—would strike many persons as much too restrictive. Some disciplines may lend themselves to public service more readily than others. A law professor, for example, may have more opportunities to contribute to the public interest, in some conventional understanding of the term, than a professor of Sanskrit. Their actual contributions, however, may stand in inverse relation to their opportunities. What significance attaches to considerations of this kind?

Many faculty members perform little or no service to the public or to the university. Some part of a faculty is made up of poor teachers, another fraction (including, unfortunately, a number of the same individuals), of very indifferent scholars. Many professors emphasize different aspects of the professor's role at different stages of their careers. It is understood that the role of the professor is an abstraction which will not accurately or fully describe the behavior of many professors. What is important is that the resources the university possesses in its faculty collectively supply the university's demands.

Of course, the requirement of a Ph.D degree, where it exists, makes up only a part of the over-all selection process. For certain institutions, possession of the degree is not, in itself, a qualifying. Selection of junior faculty is time-consuming and expensive. Many persons who hold the degree will not be considered at all, for to consider everyone would entail unacceptably heavy commitments of time, effort and expense. Academic employers may rely on various clues to eliminate many potential candidates, reducing the number given serious consideration to manageable proportions. Prominent among these are the institution (and department) granting the degree and endorsements of teachers respected in the field. Theoretically at least, such criteria are not purely arbitrary rationing devices. On the contrary, they function partly to focus attention at the institutions which attract the most able students, identify their academic qualities most accurately and provide the best training. Naturally statements of this kind imply a lengthy series of debatable assumptions. They easily qualify as "unvalidated selection requirements." Choice among the persons who do become serious competitors for a position involves instituitonal judgements which would seem clearly to be procedures "other than tests."

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[27] *Id.* at 1432.

The objective is to predict which person will perform the role of professor so as to contribute most to the discharge of the faculty's collective obligation in the forseeably likely mix of people, resources and responsibilities. In one case, capacity for productive scholarship may almost eclipse performance as a teacher; in another instance, teaching ability may count far more heavily. At times, competence in particular subfields may be decisive. In every case, judgments will be intuitive, discretionary, quite possibly arbitrary; they also may be informed or expert. They can hardly be validated according to the regulations, but such judgments may be indispensable to the conduct of the enterprise.

The regulations do provide an alternative to validation. The Testing and Selection Order provides that, "if the contractor is unable or unwilling to perform such validation studies, he has the option of adjusting employment procedures so as to eliminate the conditions suggestive of employment discrimination." [28] Examples of such conditions, it will be recalled, are "adverse effect"—e.g., "a higher rate of rejection of minority candidates than of nonminority candidates for the same job or group of jobs and "underutilization." It would seem that aggressive recruiting among women and minority groups might generate adverse effect at the same time that it produced equal employment opportunity—enlarging the scale of the recruiting effort gives assurance that no qualified minority or woman candidate has been overlooked but may operate to bring forward many unqualified minority and women applicants. More significantly, to refer to "underutilization" is simply to reenter the same circle travelled above in which underutilization depends upon availability and availability to determinations require validated selection devices.

At this point, it seems the themes developed in the regulations have reached a moment of denouement at which they all stand frozen on the stage awaiting the descent of some deus ex machina, which, however, the management has unfortunately neglected to provide. No one can tell whether equal employment opportunity is present or absent without satisfactory standards of merit, but the criteria of merit are cast in such a way that no one can say what it is or show who has it and who does not. It is understandable that in this setting affirmative action programs would be more negotiated than designed against a set of intelligible criteria.

The regulations fail to address the characteristics of faculty employment. Rather, it is insisted that faculty personnel standards conform to the regulations. Carried to its logical conclusion, this would imply: substitution of objective standards of appointment and promotion to foreclose the possibility of biased judgments, subdivision of the professorial role to facilitate application of objective standards and enlarge the pool of eligible candidates, strengthening of centralized administration to enforce adherence to required procedures for selecting academic staff. These tendencies conflict with academic traditions of peer review, decentralized authority and diffused responsibility and integration of functions—notably, research and teaching. It is precisely these traditions which are widely regarded as central to the academic enterprise. It seems unlikely that such a metamorphosis of butterfly into caterpillar will be seriously attempted. What seems more likely is that administration of the contract compliance program, left to itself, will veer ineffectually between de facto quotas and incipient breakdown, caught between the need to produce results and the inherent defects of the program's design.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES,
Washington, D.C., December 10, 1974.

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[28] 41 C.F.R. § 60–3.13 (1973).

PROPOSED RECOMMENDATION FOR AFFIRMATIVE ACTION FOR EQUAL OPPORTUNITY IN UNIVERSITY FACULTY EMPLOYMENT[1]

STATEMENT

Executive Order 11246, which concerns equal employment opportunity, applies to all contractors with the Federal government. Pursuant to this executive order, the Department of Labor has promulgated only a single set of equal employment opportunity regulations (prohibiting discrimination and requiring affirmative action) to govern all non-construction contractors, including institutions of higher education. These regulations apply to employment in all facilities of the contractors, not just those facilities involved in performance of government contracts. Compliance with regulations, for institutions of higher education, is the responsibility of the Department of Health, Education, and Welfare.

These regulations, especially in their affirmative action aspects, fail to take account of special circumstances involved in the employment of academic personnel, the non-quantifiability of standards for academic personnel (e.g., research, teaching, public service) and the concept of peer review in academic employment practices. The regulations, moreover, are ambiguous and contradictory in such a way as to be incapable of coherent application to institutions of higher education. Application of these non-construction regulations to the employment practices of institutions of higher education has proven unduly burdensome, disruptively inefficient and ineffective.

RECOMMENDATION

1. The Department of Labor, in consultation with the Department of Health, Education, and Welfare, should develop and promulgate equal employment opportunity regulations which are adapted specifically to academic employment in institutions of higher education. Such regulations should give appropriate recognition to: (a) the special aspects of such institutions (e.g., diverse functions, limited pool of qualified applicants, non-quantifiability of qualifications and performance standards). The regulations should also give appropriate recognition to the differences among types of institutions (e.g., community colleges versus research universities).

2. Recruitment and assignment of staff responsible for promulgating and administering regulations applicable to institutions of higher education should reflect a high priority of familiarity with such institutions. The Departments of Labor and Health, Education, and Welfare should arrange for greater consultation with representatives of such institutions and other interested groups.

3. The administration by the Department of Health, Education, and Welfare of equal employment opportunity regulations applicable to institutions of higher education should be centralized within Department headquarters, and regional office staffs should act on the basis of uniform and clearly defined policies.

4. The Department of Labor should develop a system of graduated sanctions for breach of the obligation contained in the equal employment opportunity clause of government contracts with institutions of higher learning.[2] No sanction, including that of declaration of non-responsibility as a contractor, should be imposed except after opportunity for a hearing at which the validity of the claim of breach and the appropriateness of the proposed sanction may be placed in issue.

5. The Department of Health, Education and Welfare should strengthen the coordination of its administration of regulations applicable to higher education with other agencies having overlapping responsibilities, in particular the Equal Employment Opportunity Commission and the Wage and Hour Administration of the Department of Labor.

6. The Department of Labor should review the contract compliance program applicable to other categories of non-construction contractors with a view to determining whether problems of the sort encountered in higher education exist. In conducting such a review, the Department should consider whether (1) variations in the susceptibility of the work to uniform methods of evaluating and predicting performance and (2) variations in policies of recruitment, advancement and other personnel practices suggest a need for regulations more closely adapted to the characteristics of specific occupations or industries.

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[1] This recommendation has been approved by the Committee on Grant and Benefit Programs of the Administrative Conference of the United States. It has not been approved by the entire Conference. It is not to be quoted, attributed or published without reference to this disclaimer.

[2] In this connection the Department should consider Conference Recommendation 71–9: Enforcement of Standards in Federal Grant-in-Aid Programs, and Recommendation 72–6: Civil Money Penalties as a Sanction.

CIVIL RIGHTS OBLIGATIONS OF INSTITUTIONS OF POSTSECONDARY EDUCATION

FRIDAY, SEPTEMBER 20, 1974

House of Representatives,
Special Subcommittee on Education
of the Committee on Education and Labor,
Washington, D.C.

The subcommittee met at 9:30 a.m., pursuant to recess, in room 2261, Rayburn House Office Building, Hon. James G. O'Hara (chairman of the subcommittee) presiding.

Present: Representative O'Hara.

Staff members present: Jim Harrison, staff director; Webb Buell, counsel: Elnora Teets, clerk; Yvonne Franklin, minority counsel.

Mr. O'Hara. The subcommittee will come to order.

This morning the subcommittee continues to take testimony on the civil rights obligations of institutions of postsecondary education.

We are going to begin today by hearing from Dean Frederick M. Hart of the University of New Mexico Law School.

Dean Hart appears in his capacity as chairman of the law school admission council.

Most of the testimony we have heard to date deals with the employment practices of colleges and universities.

Dean Hart will be able to talk to us about admissions policies particularly as they relate to law schools, a subject on which the Supreme Court recently avoided a decision but which remains very much at the center of our attention in this area.

The varying policy positions that we have heard set forth before this subcommittee regarding employment policies would seem to me to be applicable in terms of admissions policies as well. The arguments over group rights, individual rights, affirmative action, equal opportunities and even over the old boy network seem to be as relevant to admission as to employment.

Dean Hart, we would appreciate it very much if you would proceed with your testimony in whatever manner seems to you to be most appropriate.

TESTIMONY OF DEAN FREDERICK M. HART, CHAIRMAN, LAW SCHOOL ADMISSION COUNCIL, UNIVERSITY OF NEW MEXICO

Mr. Hart. Thank you very much, Mr. Chairman.

I have a prepared statement which I furnished copies to you and to members of your subcommittee.

I would like to perhaps highlight that statement and comment upon it rather than reading it.

Mr. O'Hara. Without objection we will enter your prepared testimony in full at this point in the record and you may proceed.

[Mr. Hart's prepared statement follows:]

Prepared Statement of Frederick M. Hart, President, Law School Admission Council, Dean, University of New Mexico School of Law

HISTORY AND ORGANIZATION OF THE LAW SCHOOL ADMISSION TEST AND THE LAW SCHOOL ADMISSION COUNCIL

In the late 1940's, law school admissions offices began to feel pressures resulting from the return of many war veterans who qualified for GI benefits. These returning veterans exposed law schools to wholly new admission problems and, while many of these resulted from sheer pressure of numbers, other factors added to their complexity. Because applicants were appearing with such a wide variety of training and backgrounds, the difficulties in comparing them called for establishing at least one common denominator. A test designed to measure the academic capacities and skills related to law school work would meet the demand for a new index of measurement. With this realization, several law schools joined together in 1947 and started the Law School Admission Test program.

During the years of its development and use, the test has proved responsive to needs beyond those underlying its conception. It has helped to focus the attention of law schools on the need for keeping admissions practices under constant review and, in many instances, has aided in the development of selective admissions programs. It has long been used as a counseling tool both in law school and in college, and through it candidates have been encouraged to undertake general programs of prelegal study which law schools believe desirable. Law schools and, to some extent, colleges have found the test helpful in their efforts to appraise themselves and their students. Because it is common not only to candidates but also to law schools, it has facilitated a wide exchange of information about admissions among schools.

Although the Law School Admission Test is administered by Educational Testing Service (ETS), it is owned by the Law School Admission Council, a non profit educational corporation chartered under the laws of New York State. Law Schools may become members of the Council if they require that substantially all applicants for admission take the test and if they are approved by the American Bar Association. Presently, over 150 law schools are members. Canadian law schools are eligible for associate membership.

Both the authority and the responsibility for carrying on the testing program rests with the Council. In effect, the Council contracts with ETS for the administration of its programs. Meetings of the Council are held once each year and attendance is encouraged by using Council funds to pay the travel expenses of one representative from each member school. From time to time, the Council sponsors admissions seminars under arrangements which permit all law schools, whether members of the Council or not to be represented.

The power and responsibility of running the Council is vested, under New York Law, in the Board of Trustees. For the current year, the Board is composed of the following individuals: Frederick M. Hart, President, University of New Mexico; Norman Penney, Past President, Cornell Law School; William T. Keogh, Chairman, Finance Committee, Stanford University; L. Orin Slagle, Chairman, Legal Affairs Committee, Ohio State University; E. L. Roy Hunt, Chairman, Prelaw Committee, University of Florida; Frank K. Walwer, Chairman, Services Committee, Columbia University; Richard O. Kummert, Chairman, Test Development and Research Committee, University of Washington; Vaughn C. Ball, University of Southern California; Pearl Colvin, University of Colorado; Barbara A. Kulzer, Rutgers; Walter B. Raushenbush, University of Wisconsin; Harry B. Reese, Northwestern University; Russell A. Simpson, Harvard University; James A. Thomas, Yale Law School; Thomas O. White, University of Pittsburgh. The Board meets three times each year: in December, April and June.

There are five standing committees: Finance, Services, Test Development and Research, Legal Affairs and Prelaw, each of which meet three times a year. Recommendations from the committees are made to the Board for action. In all, there are over 50 law school faculty members and admissions officers actively involved in the management of the program.

In addition to the Law School Admission Test, the Council operates the Law School Data Assembly Services which provides analysis of transcripts and reporting of grade point averages, LSAT scores, and predicted first year averages to each of the schools. Through this service, much of the routine paperwork has been centralized and much prior duplication of effort by the law schools and applicants has been avoided.

During 1973–74, expenses of the Council totaled $4,217,700.

In addition to providing services to applicants and the law schools, the Council also has an extensive research program. A brief summary of the Council's research projects over the past 25 years is attached as Appendix A. This year the budget for research is over $200,000. Conferences and training sessions for law school admissions officers are frequently held and the Council publishes the Prelaw Handbook which has a circulation of about 800,000 copies.

THE LAW SCHOOL ADMISSIONS TEST

The LSAT was first administered in 1948 as a five-hour test with ten separately timed sections. In 1951 it was shortened to three and one-half hours after an extensive study of its validity showed that a decrease in testing time would not adversely affect validity. The item types remaining in 1951 and the time allocations for each item were as follows: Reading Comprehension (60 minutes), Principles and Cases (40 minutes), Data Interpretation (35 minutes), Contrary and Irrelevant Statements (15 minutes), and Figure Classification (15 minutes).

In the first four years of the program, 32 distinct item types were tested without success in the hope that the validity of the test could be improved. Five additional item types were tried on an experimental basis in 1954, and on the basis of these studies, several changes were introduced in 1956. A 20 minute test of Error Recognition was introduced, 30 minutes of Reading Recall replaced part of the Reading Comprehension, Principles and Cases was lengthened to 45 minutes, Contrary and Irrelevant Statements was discarded and the test as a whole was lengthened by 10 minutes.

In the mid-fifties, item type research turned in the direction of personality indicators, but the research was not sufficiently promising to indicate any change in the test. However, in 1962 two major changes were made when the test was lengthened substantially to accommodate new tests of Writing Ability and General Background. These tests were scored and reported separately. In 1970, the General Background test was discontinued as studies showed that it did not add to validity and was little used by the law schools as an indicator of applicant's general academic achievement.

Perhaps the most massive and extensive investigation ever undertaken by any testing program was conducted by the Council in 1970, and, as a result, the test is presently undergoing another revision. A new format will be introduced during the coming year which will eventually replace that presently being used. The new form will include the following item types: Logical Reasoning (30 minutes), Practical Judgment (40 minutes), Quantitative Comparisons (15 minutes), and Principles and Cases (40 minutes). The Writing Ability test will remain basically as it is now, but one part of it, Sentence Correction, will be included in scoring both the LSAT and the Writing Ability parts of the test.

Presently two studies are under way involving new item types. In 1972–73, two item types, Issues and Facts and Artificial Language, were administered experimentally. The validity of these will be investigated during the next few months as law school grades of those taking the items become available. During the coming year, two other item types, Analytical Reading and Usage, will be administered experimentally.

Investigation of a new item type is a laborious and expensive proposition. The initial concept may come from another testing program, a law faculty member, research conducted by the Council on the attributes of a good law student or from what is very basic research conducted by psychologists on the learning process. Items must be designed that appear to effectuate the concept, and they must be pretested to determine whether they have any hidden inaccuracies, mistakes or defects. The next step is to experimentally administer the items to a group of law school applicants, and finally, the grades of those applicants must be collected and a validity study conducted. The time span required may be from three to four years, and then at least another year is needed before the items can be made operational. The Council will continue to investigate new item types, but recent experience indicates that there is little hope for any immediate breakthrough that will substantially increase the predictive power of the test.

Another line of research that has been undertaken by the Council involves the methods by which the test can be scored. Since its commencement, the test has been scored on the number of correct responses made by the applicant. There is no "penalty" for wrong answers, and there is no credit given for selecting the "second best" answer. Formula scoring, empirically weighting procedures, a priori option weighting and confidence weighting have also been considered, but rejected in the face of evidence that they would not increase validity.

Recently, the Council has become interested in some new methods of testing that require students to answer different questions based upon how they respond to a previous item. Called "branch testing" or "flexilevel testing," the basic procedure is that the applicant is told to go to a certain question on the test based upon his answer to the question he is then attempting. One study indicates that there is no increase in validity to be gained by this approach, but research does suggest further lines of inquiry that the Council might take.

The Law School Admissions Test is presently scored on a scale of from 200 to 800. During the years that it has been administered, the mean score for all takers during that time is 520. With a standard error of measurement of 30, and a reliability of .90, it clearly falls within acceptable limits for internal consistency. The excellence of the test is assured by pretesting all new items and by routinely conducting an item analysis of each new form. To develop a new form of the test, i.e. a test of all new items of the same type presently being used, costs close to $50,000.

The Writing Ability Test is scored on a scale of 20 to 80, has a standard error of measurement of 4 and a reliability of .84. The mean score is 50.

PREDICTIVE POWER OF THE LSAT (VALIDITY)

The question is often asked whether the Law School Admission Test predicts success in law school, or whether the Council has ever tried to determine whether it predicts law school success. Over the past 25 years, about 400 studies have been conducted to determine whether and to what extent the LSAT predicts law school performance and the answer is that it clearly does. The studies that determine the predicive power of the test are generally referred to as "validity studies," and the word "validity" technically refers to the extent to which the test is effective in predicting law school grades. At the present time, the Council offers as a free service to the law schools a validity study each two years. The studies are generally done on a school by school basis because combining law schools presents statistical problems due to the different grading systems and the different standards of the numerous schools.

The measure of validity—of the predictive power of the test—is called a "correlation coefficient." In effect, the correlation coefficient expresses the relationship between two variables, the test and the grades or height and weight. The coefficient can range between −1.00 and +1.00. The larger the number, irrespective of sign, the stronger the relationship. Thus, if height and weight are correlated +.56, and strength and age correlated −.70, the latter relationship is stronger. A coefficient of .00 shows that there is no relationship between the two variables; a correlation of +1.00 or −1.00 shows that the relationship is perfect. The sign in front of the coefficient (plus or minus) indicates the direction of the relationship. Thus, in the examples given, height increases as weight increases, but strength decreases as age increases.

The last report of the effectiveness of the LSAT as a predictor, based upon studies conducted in 1972–73 for 99 separate law schools, showed that the correlation of the LSAT with first year law school grades (FYA) ranged from .12 to .70 with the median coefficient being .32. This does not mean that the LSAT predicted "correctly" in 12%, 70% and 32% of the cases respectively. The concept of a correlation coefficient is more complicated than that. One way of looking at it is represented by Table 1 which follows:

TABLE 1.—RELATION BETWEEN STANDING ON PREDICTOR AND STANDING ON CRITERION FOR VARIOUS VALUES OF THE CORRELATION COEFFICIENT

Correlation coefficient and standing on predictor	Percent of students standing in each criterion group		
	Bottom ⅓	Middle ⅓	Top ⅓
0.10—			
Top ⅓	16	60.0	24
Middle ⅓	20	60.0	20
Bottom ⅓	24	60.0	16
0.20—			
Top ⅓	13	59.0	28
Middle ⅓	20	60.0	20
Bottom ⅓	28	59.0	13
0.30—			
Top ⅓	10	57.0	33
Middle ⅓	19	62.0	19
Bottom ⅓	33	57.0	10
0.40—			
Top ⅓	7	55.0	38
Middle ⅓	18	64.0	18
Bottom ⅓	38	55.0	7
0.50—			
Top ⅓	4	52.0	44
Middle ⅓	17	66.0	17
Bottom ⅓	44	52.0	4
0.60—			
Top ⅓	2	48.0	50
Middle ⅓	16	68.0	16
Bottom ⅓	50	48.0	2
0.70—			
Top ⅓	1	43.0	56
Middle ⅓	14	72.0	14
Bottom ⅓	56	43.0	1
0.80—			
Top ⅓	.2	35.4	64.4
Middle ⅓	11.8	76.4	11.8
Bottom ⅓	64.4	35.4	.2
0.90—			
Top ⅓	.002	25.2	74.8
Middle ⅓	8.4	83.2	8.4
Bottom ⅓	74.8	25.2	.002

Another manner in which a correlation coefficient can be expressed in operational terms is through the production of an expectancy chart based upon a particular coefficient. Such a chart gives the chances in 100 that an applicant will obtain a particular score. Table 2 is a typical expectancy table. It shows that for the law school under consideration a student who is predicted to earn a 2.0 average in that law school has: a 50% chance of earning at least a 2.0; a 71% chance of earning at least a 1.8, a 29% chance of earning at least a 2.2, etc.

TABLE 2.—CHANCES IN 100 THAT STUDENTS WITH VARIOUS PREDICTED 1ST-YR AVERAGE GRADES (BASED ON LLSAF SCORE AND UNDERGRADUATE AVERAGE) WILL ACTUALLY EARN VARIOUS 1ST-YR AVERAGE GRADES

	Chances in 100 that student will earn a 1st-year average of at least													
	1.4	1.8	1.4	2.0	2.2	2.4	2.6	2.8	3.0	3.2	3.4	3.4	3.8	4.0
Predicted average grade:														
3.4						99	98	95	86	71	50	29	14	3
3.2					99	98	95	84	71	50	29	14	3	2
3.0				99	98	95	86	71	50	29	14	3	2	1
2.8			99	98	95	84	71	50	29	14	3	2	1	
2.4		99	93	93	86	71	50	29	14	3	2	1		
2.4	99	98	95	86	71	50	29	14	3	2	1			
2.2	98	95	84	71	50	29	14	3	2	1				
2.0	95	86	71	50	29	14	3	2	1					
1.6	86	71	50	29	14	3	2	1						
1.6	71	50	29	14	3	2	1							
1.4	50	29	14	3	2	1								

Still a third method is to determine the extent to which the proportion of successful selectees relates to the coefficient. Table 3 is indicative of this approach, indicating, for example, that if a law school selects 20% of its applicants, and if its correlation coefficient is .40, it improves the proportion from 50% (random selection) to 73%.

TABLE 3.—PROPORTION OF SUCCESSFUL SELECTEES AS A FUNCTION OF VALIDITY AND SELECTIVITY [1]

[Percent selected]

Validity	Selectivity					
	5	10	20	30	40	50
0	0.50	0.50	0.50	0.50	0.50	0.50
0.05	0.54	0.54	0.53	0.52	0.52	0.52
0.10	0.58	0.57	0.56	0.55	0.54	0.53
0.15	0.63	0.61	0.58	0.57	0.56	0.55
0.20	0.67	0.64	0.61	0.59	0.58	0.56
0.25	0.70	0.67	0.64	0.62	0.60	0.58
0.30	0.74	0.71	0.67	0.64	0.62	0.60
0.35	0.78	0.74	0.70	0.66	0.64	0.61
0.40	0.82	0.78	0.73	0.69	0.66	0.63
0.45	0.85	0.81	0.75	0.71	0.68	0.65
0.50	0.88	0.84	0.78	0.74	0.70	0.67
0.55	0.91	0.87	0.81	0.76	0.72	0.69
0.60	0.94	0.90	0.84	0.79	0.75	0.70
0.65	0.96	0.92	0.87	0.82	0.77	0.73
0.70	0.98	0.95	0.90	0.85	0.80	0.75
0.75	0.99	0.97	0.92	0.87	0.82	0.77
0.80	1.00	0.99	0.95	0.90	0.85	0.80
0.85	1.00	0.99	0.97	0.94	0.88	0.82
0.90	1.00	1.00	0.99	0.97	0.92	0.86
0.95	1.00	1.00	1.00	0.99	0.96	0.90
1.00	1.00	1.00	1.00	1.00	1.00	1.00

[1] Adapted from Tiffin, 1965, p. 652.

The results of the validity studies undertaken by the Council establish that the test has substantial predictive power in selecting law school applicants. It is far from perfect, but the state of the art is such that perfection, or anything near perfection, should not be expected. The results also demonstrate that it would be unwise to admit students solely on the results they obtain on the test unless there is no other data available. That there is other information about applicants accessible to an admission officer, will be discussed after a brief excursion into the question of whether the test is culturally biased.

CULTURAL BIAS IN THE LAW SCHOOL ADMISSIONS TEST

The question of whether standardized tests such as the LSAT are culturally biased against certain subgroups of the applicant population has been raised for more than a decade. The Council first began a systematic investigation of this question over 10 years ago and has published several studies during the ensuing years. Appended to this statement is a paper completed within the past month by Dr. Robert L. Linn of the University of Illinois reviewing the work done by the Council in the context of more general studies of cultural bias undertaken by other organizations and individuals. (Appendix B)

It should be noted that research in this area is extremely difficult because of the small number of minority students in law schools. This results in the necessity of adopting research designs that are less than ideal. For example, the number of students used in the validity studies of minority students has been about 50, whereas the normal minimum number used in Council validity studies is 100. Also, it has been necessary to "cross years" or to "cross schools" in order to obtain even the small numbers that are used. This means that a challengeable assumption is being made that there is a proper adjustment in the law school grades of several schools so that they are all reduced to a common system, or that there is no change in the grading at a particular school from year to year. As a result of these compromises, studies conducted should be subjected to close scrutiny and conclusions drawn from them only with great caution.

Dr. Linn's paper points out that there has been considerable recent study aimed at defining what is meant by "cultural bias." Most psychometricians reject the proposition that cultural bias exists simply because the mean score of the subgroup, e.g., blacks, is lower than that of the entire population. Beyond that, there is substantial disagreement. Many accept Anastasi's definition: "In the psychometric sense, test bias refers to overprediction or underprediction of criterion measures. If a test consistently underpredicts criterion performance for a given group it shows unfair discrimination or 'bias' against that group." However, recent studies completed by a number of highly respected psychometricians have developed different definitions based upon differing approaches to the problem. Under some of these models, a greater percentage of minority students probably would be admitted.

Assuming that the LSAT is not culturally biased in the Anastasi sense of the term, this is because whatever cultural bias that exists in the test also exists in the first year of law school. Obviously some "bias" is desirable: we want the test and the first year of law school "bias" against those individuals who do not have the abilities to be competent lawyers. There is, however, little agreement as to what constitutes a "competent" lawyer and practically no studies have been done on this subject. It may be that some of the applicants who do not have great promise of being exceptional law students do have abilities to make them outstanding lawyers.

It is clear that the research undertaken by the Council and by others in the area of cultural bias is only a beginning. In a separate paper, Dr. Linn has suggested to the law schools the following lines of inquiry for the future: (1) Replication of the studies comparing minority and majority groups; (2) Investigation of the implications of differential prediction; (3) Comparison of prediction systems for men and women; (4) Investigation of the adequacy of first year grades as a criterion with emphasis on criterion bias, the comprehensiveness of the criterion measure, and the relationship between law school grades and later performance in the profession; (5) Continued research on alternative models of fairness and of new definitions of cultural bias; and (6) the applications of decision theoretic models. It is highly likely that the Council will follow at least some of his suggestions in its future research efforts.

PREDICTING SUCCESS OF APPLICANTS FROM THE LAW SCHOOL ADMISSION TEST UNDERGRADUATE GRADE POINT AVERAGE AND OTHER AVAILABLE DATA

The discussion so far has been confined to the Law School Admission Test which is but one of several pieces of "hard data" that operate to predict the success an applicant will have in law school. An applicant's undergraduate grade point average is used by all schools in attempting to predict his success. In fact, this is normally a better indicator of law school performance than is the LSAT and if a school had to choose to use only one predictor it would use the undergraduate grade point average (UGPA). An obvious deficiency in the use of UGPA is that there is no uniformity among undergraduate college grading systems. Frequency distribution of grades, standards, mean ability of the student body and many other factors which would go into the letter or numerical grade that a student would get differ widely from college to college. The Council has on several occasions tried to provide a system for "adjusting" undergraduate grade point averages so that they would all be on a common scale. Only marginal success has been achieved and that through the "LCM" which is simply the mean Law School Admission Test score that all applicants from a particular college receive over a specified period of time. The last piece of hard data generally used by law schools is the Writing Ability score from the LSAT which is reported separately from the general LSAT score. Thus, there are four items of "hard data" that can be used in obtaining a predicted first year average (PFYA) for applicants.

Schools differ in the manner in which they determine which predictor will be used in the formula that will determine the predicted first year average of their applicant. During 1973–74, 46 law schools used a combination of two predictors; 21 used three predictor formulas involving UGPA, LSAT and Writing Ability; 17 schools used UGPA, LSAT and the LCM; 25 schools used a combination of all four predictors; and one school used UGPA only.

In addition to determining which predictors it will use, a law school must also determine the weight to be given to each predictor. Most schools decide this after consideration of the latest validity study done for that particular school because the validity study has as one of its components the production of "regression equations" which determine the optimal weighted combination of the various predictors. Table 4 is a report to the University of New Mexico School of Law based upon a validity study done this past summer.

TABLE 4.—INTERCORRELATIONS, MEANS, AND STANDARD DEVIATIONS OF 1ST-YEAR AVERAGE GRADE IN LAW SCHOOL, UNDERGRADUATE AVERAGE, LSAT, WRITING ABILITY, AND OTHER PREDICTOR(S) BASED ON THE RECORDS OF THE 1973 ENTERING CLASS, UNIVERSITY OF NEW MEXICO SCHOOL OF LAW, STATISTICAL ADMITS

	83 students							
	FYA	LGPA	LSAT	WA	LCM	MMDG	Mean	S.D
1st-yr average	....	0.18	0.14	0.18	0.18	−0.34	2.87	0.38
Undergraduate average	0.18	....	−.33	.03	−.24	−.10	3.31	.41
Law school admission test	.14	−.33	....	.38	.41	−.07	624	55
Writing ability test	.18	.03	.38	....	.25	−.31	60.2	7.8
LSAT college mean	.18	−.24	.41	.25	....	−.15	527	41
1 equals NM 0 equals other	−.34	−.10	−.07	−.31	−.15	....	.36	.48

Two predictors (UGPA and LSAT):
Multiple correlation coefficient, 0.28 (0.23 shrunken).
Standard error of estimate, 0.37.
Regression equation predicted FYA equals 0.2309(UGPA) plus 0.0016 (LSAT) plus 1.1328.

Three predictors (UGPA, LSAT, and WA):
Multiple correlation coefficient, 0.29 (0.23 shrunken).
Standard error or estimate, 0.37.
Regression equation predicted FYA equals 0.2137(UGPA) plus 0.0012 (LSAT) plus 0.0050 (WA) plus 1.0831.

Four predictors (UGPA, LSAT, WA, and LCM):
Multiple correlation coefficient, 0.33 (0.25 shrunken).
Standard error of estimate, 0.37.
Regression equation predicted FYA equals 0.2363(UGPA) plus 0.0009 (LSAT) plus 0.0039 (WA) plus 0.0016(LCM) plus 0.4710.

Three predictors (UGPA, LSAT, and LCM):
Multiple correlation coefficient, 0.32 (0.27 shrunken).
Standard error of estimate, 0.37.
Regression equation predicted FYA equals 0.2307(UGPA) plus 0.0011 (LSAT) plus 0.0017(LCM) plus 0.4685.

Five predictors (UGPA, LSAT, WA, LCP, and MMDG):
Multiple correlation coefficient, 0.43 (0.36 shrunken).
Standard error of estimate, 0.35.
Regression equation predicted FYA equals 0.2090(UGPA) plus 0.0010 (LSAT) minus 0.0003 (WA) plus 0.0013(LCM) minus 0.2264(MMDG) plus 0.9957.

It should be emphasized that judgmental decisions must be made at this point of the admissions process even though the end result appears to be based upon mathematical certainty. A few comments about the choices that our law school had to make in this regard may be illustrative. Our first reaction to the data supplied by the validity study was to select the regression equation which provides the highest correlation coefficient. That would be the fifth one which makes use of five predictors. However, the computer program used to crank out predicted first year averages on students will not accommodate five predictors. Hence, that one could not be used. However, it is possible to go to a two regression equation system, separating the group of applicants into two subgroups based upon the fifth predictor used in the five predictor formula (the distinction here would be between UNM undergraduates and non UNM undergraduates because that was the basis of the fifth predictor). The five predictor equation also presents an anomaly that occurs not infrequently. It shows that an applicant's Writing Ability score ought to receive a negative weight. In other words, the higher his score on the Writing Ability portion of the LSAT, the lower his predicted first year average. Although this is a correct statistical result, it runs against the grain of most admissions offices to discount an applicant's predicted first year average because he or she did well in that portion of the test.

The two formulae that use LCM also present difficulties because studies have shown that use of LCM, even though it adds to the predictive power of the equation, may skew the admissions policy by making it practically impossible for someone to gain admission when he or she comes from a college with a low median law school admission test score even though that person as an individual has very high credentials. In these two formulae, that would probably not happen because the weight given to LCM is relatively low in a comparison to the other predictors. However, many admissions offices discard the use of LCM unless if substantially adds to the correlation coefficient and even then they may decide not to use it. That leaves the two predictor formula and the three predictor formula using the Writing Ability score. The choice we had basically came down to which of those two we would use.

Because the weighting of the LSAT, vis a vis, the undergraduate grade point average and the two predictor formula was more consistent with national norms and with our prior experience, we decided to use that. We did however make an adjustment for whether the student attended the University of New Mexico as an undergraduate or another school by going to a two formula system and varying the constant, depending upon whether he or she attended the University of New Mexico. Appendix C is a memorandum sent to the law school along with the validity studies attempting to explain some of the considerations that should be brought to bear upon the selection of a prediction equation. It shows the differences that can occur in the ranking of applicants with specific credentials, depending upon which of several formulae are selected.

Once a decision has been made about the regression equation that will be used by a school, this determines how applicants will be ranked by that law school. The equation is transmitted to Educational Testing Service and when a student registers for the Law School Data Assembly Service, sending his or her transcript and LSAT score, Educational Testing Service will combine the predictors in accord with the equation selected by the school and report to the school the predicted first year average of the applicant. Applicants can then be ranked according to that number. It would appear that some people believe that the only "fair" procedure that can be adopted by a law school is to start at the top of the ranking and go down the list until it has accepted sufficient people to fill its first year class. This approach clearly neglects the limited value of the information condensed into a predicted first year average and also the use that may be made of "soft data" about an applicant.

In most law schools there is an attempt by the admissions office and the admissions committee to improve prediction by a careful review of an applicant's entire file. Any catalog of the types of information that would be helpful in making a determination of whether the computer's calculation of an applicant's PFYA is accurate would be incomplete but a few illustrations can be given:

1. Where there has been a significant period of time between an applicant's graduation from college and his application to law school, a poor college record coupled with a very high LSAT may indicate that the student is likely to do better in law school than the PFYA assigned by the computer. The reason is that the applicant may have been immature or disinterested in academic work when he attended college, resulting in a poor UGPA. However, it is possible and perhaps likely that he has matured since graduation and that the LSAT is a more direct test of his "abilities" and may be a better predictor than the two combined.

2. If an applicant has a very high undergraduate grade point average and a low LSAT, inspection of his record may show that he went to a relatively weak college and that he majored in a subject with little academic content. Here again the judgment may be made that the LSAT is a better predictor than a combination of the two.

3. If the student has a very high UGPA but a low LSAT and he can substantiate that he was ill when he took the test or that he has a history of doing poorly on standardized tests, the UPGA may be a better predictor than a combination of the two.

4. If a student began his college career as a pre-med student then transferred into the social sciences, it may be that his early college work should be discounted because of his apparent lack of interest in the pre-med program.

SELECTION OF A LAW SCHOOL STUDENT BODY

In addition to attempting to predict the success of applicants, law schools apply policy considerations in determining which students will be admitted. This is a separate process and one in which an applicant's predicted performance is only one of many factors given consideration. For years some of the "national" law schools have sought broad geographical representation in the student body, thereby discriminating against applicants from the more populous states. State schools have favored citizens of their own state, thereby discriminating against applicants from the more populous states. State schools have favored citizens non-residents. Some schools have favored the children of alumni, of generous donors, or of politicians. A school may give preference to those who are likely to practice in rural areas of a state, or in the ghetto or the barrio. Any one of these policies has the effect of "discriminating" against those who have predicted first year averages higher than those accepted because of the policy followed.

Consider another specific situation. An applicant may be given extra consideration because he or she has a Ph.D. in Urban Planning. Studies have shown that an applicant's grades in graduate school do not operate to predict success in law school, nor does the fact that the applicant has received an advanced degree. A decision to accept the applicant over others who have a better PFYA is "discriminatory" against those with higher PFYS's who have been denied admission. The same is true when a person's employment with the government or in business gains him or her a place in the class.

Still, these kinds of decisions do make sense in view of the fact that there are significant limitations on the effectiveness of the PFYA. Most people are repelled at the thought that selections must be determined solely by a computer printout and there is a general recognition that the law schools have a very real responsibility to make rational judgmental decisions.

It appears to me that selection policies adopted by a law school should be tested against two broad standards: (1) selection should be such as to assure that the class is populated with individuals who themselves will enrich the educational experience of law school by their talents and viewpoints; and (2) selection should be designed to accept those who will best serve society upon graduation. Particularization of the elements of these standards is difficult but it would seem clear that diversification would qualify as a reasonable goal.

"QUALIFIED" APPLICANTS AND QUOTAS

Much of the rhetoric surrounding the admission of applicants from minority backgrounds centers about the words "qualified applicants" and "quotas." The way in which the words are used in the context of law school admissions indicates a lack of understanding of the admissions process and of the situation facing law schools at the present time.

Definition of the word "qualified" or "more qualified" can be approached in several ways. Who is qualified for admission to the University of New Mexico School of Law? One answer is that everyone is qualified who has a baccalaureate degree and who has taken the LSAT because those are the only stated qualifications stated in our catalog. Another way is to look at the past history of the school to see who was actually admitted. For example, we might seek to see whether anyone with an LSAT of under 500 is "qualified." Our records show the following percentages of the first year class was composed of students with LSAT's of less than 500 over the past ten years: 1964—37%; 1965—31%; 1966—27%; 1967—27%; 1968—27%; 1969—26%; 1970—18%; 1971—8%; 1972—13%; 1973—14%. It would appear from our prior admissions action that we could not say that a qualification for admission is an LSAT of over 500. Another way of looking at it is to say that everyone who has a better than 50—50 chance of making it through law school is "qualified" or everyone who has a 75% chance meets that definition. The important conclusion that any law school would come to is that it has more qualified applicants than it can possibly accept.

With regard to one applicant being "more qualified" than another, one can act blindly and say that a person with a 2.34 predicted first year average is "more qualified" than one with a 2.31 PFYA. Any such conclusion, however, is sheer madness and indicates nothing more than a slavish adherence to meaningless differences.

The word "quota" simply is not descriptive of anything that is going on in law school admissions today. Obviously we are not using quotas in the negative sense. Neither are we using them in a positive sense, for that use of the word carries the unmistakeable impression that we are committing a certain proportion of our entering class to minority students irrespective of all the other factors that go into an intelligent admissions decision. That, so far as I know, is not an accurate description of any law school's admission procedure. This is not a mere semantic quibble. Our admissions processes remain intelligent and both professionally and educationally responsible. A minority admissions decision, like all other admissions decisions, involves the thorough consideration of a range of factors and of an overall judgment about the applicant's educational and professional prospects.

RACE AS A DETERMINANT IN THE SELECTION OF APPLICANTS

Frequently asked is the question of whether the race or ethnic origin of an applicant is presently being used as an element in determining whether he or she will be admitted to law school. The answer is clearly yes, but both the question and the answer is far more complicated than it would appear to be. I should like to indicate to you a number of ways in which race may become a factor in an admissions decision. Some of these approaches may overlap and become confused with one another, but that is because the admissions process is not a series of clearly discrete steps but rather it is like any decision making process: complicated and somewhat disorderly.

1. The race of an applicant may influence a committee to believe that the regression equation has underpredicted his first year average because of some initial disadvantage suffered which has been overcome. Thus, if a black applicant has a poor college record during his first year of college but improves steadily from there on, and if the applicant appears to come from a high school where there was a weak academic program, the committee may disregard his early college work on the ground that he needed the first year of college to adjust to the more difficult work expected. Of course, the same consideration would be shown to a white applicant, but the fact of the matter is that it is much more likely that the black applicant was faced with this situation and the fact that he is black would trigger the inquiry into his background. A statutory provision that prohibited law schools from having "any criteria for admission which accord any preference or pose any disadvantage to any applicant on account of race, color, national origin, or sex" might be read to prohibit an admissions committee from singling out applications from minority candidates for the type of investigation needed to determine whether he or she was in fact disadvantaged. If this were proscribed, it would mean that the law schools would have to close their eyes to the fact that there is a reasonable likelihood that minority applicants often do come from elementary and high schools where the preparation for college is inadequate.

2. A similar, but somewhat distinct situation is presented where an application from a member of a minority is carefully scanned to determine whether his or her record may show something not tested by the LSAT: motivation. In some cases, it is a reasonable conclusion that the work done by a person from a disadvantaged background, although not as good as that done by others, evidences a far greater amount of work and devotion simply because the disadvantaged applicant had to work so much harder. In such cases, it is also reasonable that the candidate will continue to "overachieve" because of his or her motivation. Again, this principle applied equally to whites, blacks, Chicano, etc., but the fact that minority groups are more often disadvantaged should prompt the admissions officer to look into their records routinely to determine whether the situation exists.

3. Although summer pre-law programs such as CLEO are open to all disadvantaged persons, the proportion of minority group representatives is very high. This is understandable for it has been the minority group member who has the least opportunity in our society. Law schools often take into account the performance of an applicant during the summer program in the belief that a person's performance in a law school setting is the best indicator of success. Since many schools have only minority candidates from the summer programs, race would be an indirect factor in admission of those candidates.

4. In some cases admissions committees may have less confidence in the traditional predictors of success when the applicant is from a minority group. In effect, this is a judgment that the LSAT and UGPA are culturally biased. Although there is no solid evidence to support this, the evidence to the contrary is certainly not overwhelming, and one could make a reasonable decision that cultural bias does exist. Also, the models of cultural bias proposed by Cole, Thorndike, Darlington and others all require separate treatment of members of subgroups. It should be emphasized that these models are based upon purely psychometric considerations, not upon a policy decision to favor minority applicants.

5. In a more direct way, race may be considered for the purpose of obtaining a more diverse student body or a more diverse membership in the profession. Let me pose a rather typical situation. Assume that there is only one seat left to be filled in the entering class and there are a half dozen files that are still open. None of the remaining candidates will have particularly high predicted first year averages; if they did, they would have been accepted earlier. And the predicted

averages for all of them will be similar, perhaps ranging from 2.2 to 2.5 where the "clear admit" lower limit for the school is 2.7. The likelihood that anyone of the applicants would succeed in law school is high. Each will have something "unusual" in his or her file. One may have a Ph.D., another several years of experience in a government agency.

A third may be a person who was president of his or student body in undergraduate school, and the fourth may be blind. Assume that the fifth is Chicano. The committee would like to admit all of the applicants as each would add something to the class and probably to the profession. If the school has already admitted others with Ph.D.'s ,who are blind, student body presidents, and government officers, but has no Chicanos in the entering class, the decision may be to prefer the Chicano for this last remaining seat.

The reason is that the committee feels that the Chicano will add to the experiences of all students in the class because he will bring something different to the school. The same committee, following the same policy, would admit the Ph.D. instead if several Chicanos had already been admitted, but there were no students with advanced degrees in the class.

8. Race may also be used as a determinant under a theory suggested by *Griggs* v. *Duke Power Company*. The holding in the Griggs case is essentially narrow and would appear to be inapplicable to the law school admissions process as it now exists. However, the tone of *Griggs*, and the underlying rationale of that holding would appear to be applicable. In essence, the case seems to say that whenever a test or admissions process is operating in fact to prevent members of a minority group from gaining access to [illegible] job or a profession, the process is subject. As a result, it should be carefully scrutinized and modified to avoid a result that works against the opportunities of the minority groups.

Many of us who have worked in the admissions field believe that there must be something wrong with a process that produces so few lawyers who are members of minority races. In 1970, about 1% of all lawyers were black in spite of the fact that 12% of the population was black. In 1968, there were over a half million American Indians in this country, but you could count the number of lawyers who identified as Indians on the fingers of one hand. These facts cry out for action by the law schools and by the legal profession. If we in the law schools turned our back on this obvious problem, or if we simply made excuses or if we relied upon unsophisticated statistical studies to prove that we did not discriminate, we would be shrinking our responsibilities.

It is our job to test the fairness of our admissions system as it applies to minority applicants. One way of doing this, perhaps the only way, is to "take a chance" on some blacks, Chicanos and Indians whose predicted performance indicates that there is some risk that they will not succeed. At least we will be able to accumulate data if we follow this course, and we will have the possibility of determining what, if anything, makes it so difficult for a minority person to become a lawyer.

RESULTS OF LAW SCHOOL EFFORTS TO ATTRACT AND GRADUATE MEMBERS OF MINORITY GROUPS

It is difficult for those outside the law school world to realize or understand the effects of the increase in applications on minority admissions. Table 5, below, shows the dramatic increase in the number of individuals seeking admission to law school. Ten years ago, there were two seats for every three people taking the Law School Admission Test. Since some who took the test decided against going to law school, practically everyone who applied was accepted at some school. Last year, there was one seat for every three test takers, and it is a reasonable guess that only about a half of those who wanted to attend law school actually had the opportunity to enroll.

The effect that this increase in applicants has had on minority groups can be exemplified by a hypothetical that will mirror the actual situation at many law schools.

Suppose a law school with room for 200 students in its entering class receives 300 applications. Suppose further that about 10% of the applicants are from minority races and that on the basis of academic predictors these 30 applicants are evenly distributed among the pool. On the basis of usual admissions factors (excluding race) the school determines that ⅔ of the applicants are qualified, in the sense of having a better than even chance of succeeding at law study. Two hundred applicants then will be admitted, and the class will contain 20

TABLE 5.—LEGAL EDUCATION AND BAR ADMISSION STATISTICS, 1963-73

Year	Total	Enrollment, women	1st year	LSAT candidates	J.D. or LL. B. awarded	New admissions to the bar
1963	49, 552	1, 883	20, 776	30, 528	9, 638	10, 788
1964	54, 265	2, 183	22, 753	37, 598	10, 491	12, 023
1965	59, 744	2, 537	24, 167	39, 406	11, 507	13, 109
1966	62, 556	2, 678	24, 077	44, 905	13, 115	14, 644
1967	64, 406	2, 906	24, 267	47, 110	14, 738	16, 007
1968	62, 779	3, 704	23, 652	49, 756	16, 077	17, 764
1969	68, 386	4, 715	29, 128	59, 050	16, 733	19, 123
1970	82, 499	7, 031	34, 713	74, 092	17, 183	17, 922
1971	94, 468	8, 914	36, 171	107, 479	17, 006	20, 485
1972	101, 707	12, 173	35, 131	119, 694	22, 342	25, 086
1973	106, 102	16, 760	37, 018	121, 262	27, 756	....

Note: Enrollment is that in American Bar Association approved school as of Oct. 1. The LSAT candidate volume is given for the test year ending in the year stated. Thus, 121,262 administrations of the LSAT occurred in the test year July 1972 through April 1973. J.D. or LL. B. degrees are those awarded by approved schools for the academic year ending in the year stated. Thus, 27,756 degrees were awarded in the year beginning with the fall, 1972 term and ending with the summer, 1973 term. Total new admissions to the bar are for the 1972 calendar year and include those admitted by office study, diploma privilege, and examination and study at an unapproved law school; the great bulk of those admitted were graduated from approved schools.

minority students. This means that when minority applicants are evenly distributed in the applicant population, and when all qualified applicants are admitted, the same percentage of minority applicants will be in the class as were in the applicant population (10%). This we would regard as an ideal situation, and one in which the race of an applicant would not have any special relevance in the admissions decision.

Now, to make the hypothetical more realistic, suppose the following year the school receives 3000 applications instead of 300. Further, suppose that the number of minority applicants has not grown at the same rate, so that there are only 60 minority applicants (5%) evenly distributed in the total applicant population. On precisely the same standards used the prior year, the school determines that ⅔ of the applicants are qualified. But of course it does not have room for the 2000 qualified students (including the 40 minority qualified students).

How should the school select the 200 students it can hold? Assuming race is not used as a factor, the school will select one out of ten applicants, producing a class of 196 nonminority students and 4 minority students. Observe the consequence. Compared to the first year, the school has not changed its standards. While the number of minority applicants has doubled (from 30 to 60) and while the qualifications of the minority applicants has not changed, yet the class has a minority component of only 2% rather than 10%.

The hypothetical could be made even more realistic if one relaxed the assumption that minority applicants were evenly distributed in the applicant population. If the school ranks applicants in terms of academic predictors it may find that, for a variety of historical reasons, minority applicants are not evenly distributed. In the first year of our example, suppose that the 30 minority applicants clustered around the middle and lower end of the rankings so that only half of them were judged qualified as compared to the ⅔ of the applicants generally. That year, then 15 would be admitted, or about 7%. In the following year, when there are 3000 applicants (including 60 minority applicants, 30 of whom are qualified) the chances are excellent that no minority applicants would be accepted, since they may be unrepresented in that narrow band of applicants at the top of the applicant ranking for whom there is space in the entering class. The result is to exclude minority students who are fully qualified and who would have been admitted the prior year. Again, nothing has changed except the size of the total applicant population.

The law schools have attempted to avoid the undesirable effects of these number peculiarities by taking race into account in the admissions decision. In the face of growing applicant populations, it is the only way the schools can achieve the racial and ethnic diversity necessary for meeting our educational and professional goals.

In spite of substantial efforts by the law schools to attract minority candidates, only modest progress has been made. Table 6 which follows indicates the number of minority students in law school during the past four years. The gain is impressive, but in 1973 blacks still constituted only 4.5% of all law students; Chicanos, 1.2%, Indians, .2% and all minorities combined only 7%. Clearly, the oftenheard charge that the only people who get into law school are minorities simply is not true.

TABLE 6.—1973 SURVEY OF MINORITY GROUP STUDENTS IN LEGAL EDUCATION: MINORITY STUDENTS ENROLLED IN APPROVED LAW SCHOOLS

	1st year	2d year	3d year	4th year	Year not stated	Total
Black American:						
1973–74	1,943	1,443	1,207	101	123	4,817
1972–73	1,907	1,324	1,106	74	12	4,423
1971–72	1,716	1,147	761	55	65	3,744
1969–70	1,115	574	395	44		2,128
Chicano (Mexican-American):						
1973–74	539	386	271	63	0	1,259
1972–73	480	337	238	17	0	1,072
1971–72	403	262	170	11	37	883
1969–70	245	113	54	0		412
Puerto Rican:						
1973–74	96	47	32	5	0	180
1972–73	73	40	25	5	0	143
1971–72	49	25	18	2	0	94
1969–70	29	14	13	5		61
Other Hispano-American:						
1973–74	94	70	59	4	34	261
1972–73	96	72	60	3	0	231
1971–72	74	62	35	3	5	179
1969–70	35	18	19	3		75
American Indian:						
1973–74	109	65	44	3	1	222
1972–73	79	48	44	2	0	173
1971–72	71	46	18	2	3	140
1969–70	44	17	10	1		72
Asian-American:						
1973–74	327	297	202	19	5	850
1972–73	298	218	144	20	1	681
1971–72	254	142	72	7	5	480
Other, 1969–70	84	55	42	4		185
Group not stated:						
1973–74	6	5	1	0	0	12
1972–73	1	2	2	2	0	7
1971–72	0	23	25	0	0	48
Total minority group students:						
1973–74	3,114	2,313	1,816	195	163	7,601
1972–73	2,934	2,041	1,619	123	13	6,730
1971–72	2,567	1,707	1,099	80	115	5,568
1969–70	1,552	791	533	57		2,933

APPENDIX A

MAJOR RESEARCH EFFORTS OF THE LAW SCHOOL ADMISSION COUNCIL (1948–73), FREDERICK M. HART, UNIVERSITY OF NEW MEXICO SCHOOL OF LAW

(This paper was prepared as a handout for a speech that Fred Hart gave at the 1973 AALS meetings. It is not quite up to date since some of the studies referred to as ongoing are now complete. However, for the purposes of this conference the paper should provide a good overview of the research that has been conducted for LSAC over the past 25 years.)

I. INTRODUCTION

Since the LSAT was first offered in 1948, the Law School Admission Council (LSAC) has continuously conducted research in the admissions field. During the past ten years, the pace and volume of this research has accelerated and has included attempts to improve the LSAT and its use, as well as research on undergraduate records and upon other possible predictors of academic success.

Full reports of the Council's research efforts are included in the various Annual Reports of the LSAC. The Council has also published and distributed to all law schools the Summary of LSAT Research which contains brief summaries of all research reports. The following is necessarily brief and there is the concomitant danger that comments will be misleading.

II. USE AND USEFULNESS OF TRADITIONAL PREDICTORS

A considerable amount of the research done by the Council is aimed at developing better means for using the standard predictors of the law school success: the Law School Admission Test (LSAT) and undergraduate grades (UGPA). Validity studies are done for each individual school on a regular basis if the school wishes them. These validity studies have two purposes: (1) to ascertain how well the predictors are in fact predicting; and (2) to develop a multiple regression equation for each school showing the optimum weights to be given the predictors in order to obtain the best prediction for applicants to the school.

From the validity studies provided each of the schools, it is possible to determine how well the LSAT and UGPA are predicting success generally. For the last round of validity studies, completed in the fall of 1972 for 99 schools, the correlation coefficients for the relationship between the best combination of two predictors (LSAT and UGPA) and first-year law school grades (FYA) ranged from approximately .18 to approximately .73. The median coefficient for all 99 schools was .43. Although this is far from perfect prediction, it does show that the predictors are highly useful and that the LSAT is at the ultimate level of refinement in the present state of the art.

The Council has also sponsored a number of studies looking at particular aspects of the use of the standard predictors. For example, in 1966 the Council funded the first of three "Discrepant Predictor Studies." Prior to these studies, some admissions officers intuitively believed that applicants showing wide discrepancies between their undergraduate grade point averages and LSAT scores ought to be treated differently from those who had LSAT and UGPA scores in the same general range. For example, a multiple regression equation might predict the same law school first-year average for an applicant having a 700 LSAT score and a bare C average and for another applicant with a 575 LSAT and B average. Admissions offices doubted whether these two applicants showed the same promise. The first two Discrepant Predictor Studies, one reported in the 1968 Annual Council Report and the other in the 1970 Annual Council Report, addressed themselves to this question. Both studies showed that applicants with discrepant predictors should be treated no differently than those with consistent predictors. Another study along the same lines questioned whether applicants who had significant differences between the morning LSAT score and the Writing Ability score ought to be treated differently than other applicants. The report on that study, published in the 1970 Annual Council Report, showed that they should not.

In June of 1969, the Council funded a study designed to investigate how predictors should be used: the "Discriminant Function Analysis in the Prediction of Law School Performance." This study was aimed at developing a different way in which to conduct validity studies. Traditionally, validity studies ascertain the applicants based upon the prediction equation is perfectly represented by first-perfect correlation coefficient of 1.00 would indicate that the rank ordering of extent to which the variables predict a rank ordering of the applicant. Thus, a perfect correlation coefficient of 1.00 would indicate that the rank ordering of applicants based upon the prediction equation is perfectly represented by first-year grades, i.e., the person who predicted highest actually was first in the class; the person who predicted second, was second in the class; etc. This is an extremely rigorous test of predictors and is not necessary for admissions purposes. The concept of the discriminant function analysis was to attempt to draw two lines and categorize applicants among three basic classifications: (1) those who would be in the top 10% or 20%; (2) those who would be in the bottom 10% or 20%; and (3) those who would be in the middle. For many schools, the critical point might be the line between those who are in the bottom and those who are in the middle.

It was thought that this approach might lead to different weightings of predictors and that the different weightings might better predict into which of the three groups a student would fall. The study, reported in the 1972 Annual Council Report, shows that this type of analysis is no better than the traditional validity study approach.

The Committee undertook two new studies in this general area in 1972. The first study investigated the desirability of deriving part scores from the tests. The hope was that validity might be improved if the global LSAT score for the morning test were divided into parts. The draft of the report on this study shows that this approach fails to improve predictors. The final report will appear in the 1974 Annual Council Report.

The other study undertaken in 1972 was designed to explore whether the relationship between predictors and law school grades is curvilinear or linear. Normally validity studies assume that the relationship between predictors and first-year averages is linear in form. In other words, that there is a regular and continual progression such that as the combination of predictors increases, there is a corresponding progression in the expected first-year performance of the applicant. It is possible, however, that the progression may not be regular. For example, it may be that at the higher end of the curve there is a tailing off so that once a particular index or predicted first-year average is reached, everyone over that predicted first-year average should be expected to do equally well even though there is a difference in the prediction index. The pilot study was completed in 1973 and is reported in the 1973 Annual Council Report. From the pilot study it appears that relationship is curvilinear and a second phase of the study is underway.

III. RESEARCH ON THE PREDICTION OF APPLICANT SUBGROUPS

More than ten years ago, the Law School Admission Test Council became aware of possible problems law schools might have in predicting the success of applicants from subgroups of the total population. This interest led to the formation of the Special Committee on Student Background Factors in 1963. When that committee was discontinued in 1970, responsibility for research in this area was transferred to the Test Development and Research Committee. Initially the concern was principally whether the traditional predictors, LSAT and UGPA, were as valid for black applicants as they were for white applicants. Gradually research of this type has been expanded to other subgroups, e.g., chicanos and women.

In an article, entitled "The Law School Admission Test and the Minority Student," Charles E. Consalus reviewed much of the early literature that has been written in this area. (Vol. 1970, University of Toledo L.R. 501). In that article he stated:

> Although there is no sound statistical or other scientific evidence which demonstrates that the LSAT is per se prejudicial to minority and disadvantaged students, most admissions offices and professors can cite example where the criticism appears to be true and those anecdotes often pass for proof. It is perhaps natural for critics to place primary blame for the current shortcomings of society and the profession on the test . . . furthermore, the fact that the test is the element common to virtually all applicants for admission makes it a natural subject for vilification.

As Mr. Consalus points out in his article, no area of research has received as high a priority as that dealing with subgroups during the past several years. Yet, the difficulties inherent in this type of research have made progress slow and may give the appearance that the Council may not have been as diligent as it should have been in determining whether the test is in fact culturally biased.

There have been two basic problems inherent in research studies focusing on subgroups: (1) the number of students in the subgroups is small; and (2) law school students and applicants are not neatly classifiable into subgroups. Compounding the problem of this type of research is the difficulty of gathering data from individuals and from law schools.

If there were sufficient data, it would be relatively easy to design a research project that would determine whether the test is culturally biased, at least in the way the words "cultural bias" have been used traditionally. Students in one class at one law school would be divided into subgroups and a validity study would be conducted on each subgroup. For example, a class would be divided into black students and white students and separate validity studies done on each of the two subgroups. The validity studies would yield a correlation coefficient and a regression equation. The coefficient would show how the test predicts and the regression equation would show how the predictors, e.g., LSAT and UGPA, should be weighted to produce the best result in predictions. In order to assure that the results were statistically significant, they would be cross-validated; *i.e.*, the regression equation obtained would be used on another sample to see whether it predicts that other sample the same as it did for the sample from which it was derived.

In such a project three factors would be investigated: (1) the standard error of estimate; (2) the slope of the regression equation; and (3) the intercepts.

The standard error estimate shows the extent to which it can be expected that persons have the same predicted first-year average will vary from that prediction. The slope of the regression equation shows the way in which two or more predictors should be weighed and the intercepts show whether or not the same combination of predictors will yield the same predicted first-year average. If all three of these are the same, the test is predicting equally for the two subgroups.

Ideally, here should be at least 100 students in each of the subgroups. Thus, it would be necessary to find a law school that has 100 black students and 100 white students in one entering class in order to conduct this type of a project in the traditional manner. So far, there has been no school that has met this criteria.

Even if one school met the criteria, it is unlikely that the subgroup would be a homogeneous group. Some would be women and some men. It is conceivable that the LSAT predicts differently for males than it does for females. Also, some might come from rural areas, others from the city, and others from suburbia. It is conceivable that these differences among those in the subgroups might have an effect upon the way in which the predictors operate.

The first research project involving subgroups was funded in 1964 by the Council and was entitled "The Interpretation of Law School Admission Test Scores for Culturally Deprived and Non-White Candidates." This is usually referred to as the "1966 Cultural Deprivation Study." An important objective was to focus this study on black applicants, but there were far too few black students then in law schools to produce a statistically sound subsample. A study of cultural deprivation, thought to be characteristic of black applicants, was therefore mounted. A somewhat arbitrary subgroup of those who were "culturally deprived" was obtained by having students in 16 law schools complete a questionnaire which produced measures in three general areas: socio-economic, educational, and composite. This yielded two subgroups, one of which was "culturally deprived" in relation to other students in the schools. The results of this study, published in the 1966 Annual Council Report, indicated that the LSAT and UGPA predicted the same for each of the groups. A separate study done by Professor Garrett Flickinger at the University of Kentucky threw some doubt on the results as did a replication of his initial research. (See Annual Council Report of 1968 and 1969.) A replication of the 1966 Cultural Deprivation Study was funded by the Council in 1968. The report on this study, published in the Annual Council Report, supported by the finding of the original LSAC study that there was no significant difference in prediction of the two groups.

In 1970 the Council approved funding of a study entitled "Predicting Law School Grades for Negro-American Law Students." This study, often referred to as the "Black/White Validity Study," presented significant problems both in accumulating sufficient numbers of students to conduct the study and in defining the subgroup. The subgroup was ultimately defined as "black students," irrespective of their background. Since no school had sufficient black students in one class to conduct a validity study, it was necessary to cross years. Five schools were found that had sufficient black students over three or four years to form an adequate subgroup. When the study was designed it was thought that it would be possible to combine students from different years at the same law school without loss of statistical significance.

The report on the pilot portion of this study is published in the 1973 Annual Council Report. It shows: (1) there is more difficulty in combining students from different years than was originally thought: (2) the standard error of estimate appears to be somewhat lower for black students than for white students; (3) the slope of the regression equation appears to be the same for the same two subgroups; and (4) there appears to be a statistically significant difference in the intercepts for black and white students. The main part of this study is presently underway. Preliminary findings tend to confirm the results of the pilot study, and a full report should be included in the 1974 Annual Council Report.

A similar study was commissioned by the Council in June of 1972 where women formed the subgroup. This study is presently in progress, but preliminary findings indicate that the same phenomenon, namely that the slopes and errors of estimate are the same, but that the intercepts are different. A final report of this study should be available in the 1974 Annual Council Report.

Another method of obtaining sufficient students to form a subgroup is to combine students from different law schools. This presents an additional problem as grades earned at the several law schools must be equated before any comparisons can be made. Several studies combining students from different schools were undertaken several years ago with discouraging results, but the development of new techniques led the Council to fund a series of new studies in June of 1972. The studies were designed to compare the following subgroups, subject to the availability of adequate numbers of cases: (1) males versus females; (2) black males versus white males; (3) black females versus white females; (4) black males versus black females; (5) white males versus while females; (6) black students versus white students versus chicano students versus Oriental-American students versus all other students; (7) students 22 and younger, 23 through 25, and over 25; (8) humanities majors versus social science majors versus natural science majors versus business and commercial major versus English majors versus majors in other areas of study. These studies are presently in progress.

The 1972 Annual Council Report contains two reports of another approach to questions involving subgroups. One report describes an item analysis of the Law School Admission Test comparing the answers of male and female candidates on each of the items in the test. The purpose of this project was to determine whether any of the items appeared to be biased against either men or women. Briefly stated, the study shows that the 1,150 white men used as a comparison group had a mean LSAT score of 539 and a mean Writing Ability score of 49.3 compared with 1,165 white women in the study who had a mean LSAT score of 549 and a mean Writing Ability score of 56.7. Women did better on 4 of the 6 sections in the LSAT: reading comprehension, reading recall, error recognition, and sentence correction. Men did better on one section, data interpretation, and the two groups scored about equally on the principles and cases section. The second report describes a similar item analysis comparing various subgroups, e.g., black applicants, white applicants, chicano applicants, etc. The study concluded that the results provided no basis for any suspicion that any items were biased against any group relative to other items of the same type.

Another study seeking to discover whether the LSAT is biased against black students, funded by the Council in 1969, is entitled "A Study of Speededness as a Source of Test Bias." Based upon information that black candidates apparently did not finish the test in as large a proportion as do white candidates, at those centers where the fee was waived, the study was designed to determine whether this resulted in unfairness to the black candidate. A report of the pilot study is found in the 1971 Annual Council Report. The results of the analysis showed: (1) the test is somewhat more speeded for candidates taking the test at the fee-free (predominantly black) centers than it is for regular candidates; (2) reducing the amount of speededness produces higher scores for both regular (22 scaled score points) and fee-free (33 scaled score points) center candidates; and (3) reducing speedidness is not more beneficial (in terms of increasing the number of items answered correctly) to fee-free than to regular center candidates.

Since this project appeared to have positive results, a more complete study of speededness was undertaken in June of 1971. The original study was limited by two factors: (1) the subgroup of black students all came from the fee-free centers and it is possible that these were not representative of other black students; and (2) the experimental form of the test was constructed somewhat artificially in order to present the issue of speededness. The new study avoided both of these problems by use of a broader sample and a different design.

The report of the extended speededness study, found in the 1973 Annual Council Report, concluded that the test was not appreciably speeded for any of the groups in the sense that most candidates had an opportunity to consider most of the items. Score differences between groups of the same sex and cultural background who took the test under different time constraints were consistently small.

In another project relating to subgroups, the Council approved a project in June of 1971 entitled "Proposal to Study Relationships Between Characteristics of Minority-Group Students who Entered Law School in 1968, 1969, and 1970." This study was designed to provide data descriptive of minority students. Previously, CLEO had funded a project using ETS personnel to establish a data bank on minority students in law schools. Their funding permitted them only to establish the bank without doing any studies of the relationships among the students. The Council, in cooperation with CLEO, funded this project to permit some preliminary analysis of the students in the data bank. The analysis has recently been completed and a final report of the study will appear in the 1974 Annual Council Report.

Another proposal involving subgroups studied the application and acceptance ratios for me nand women law school applicants. The impetus for the study was the fact that 13% of all LSAT candidates in 1970 were women but only 11% of first-year law students in the fall of 1971 were women. The study found that 16.25% of the LSAT candidates in 1971–72 were women and that law schools accepted 18.58% of those applicants who were women. Hence, the ratio of acceptances for women was higher than that for men.

Any report of the LSAC's research efforts in connection with subgroups of applicants, must be considered in the context of the increasing psychometric literation on test bias. Most of the early work accepted the view of T. A. Cleary that a test is biased:

> If the criterion score predicted from the common regression line is consistently too high or too low for members of the subgroups. (Clearly, Test bias: Prediction of grades of Negro and white students in integrated colleges. Journal of Educational Measurement, 1969, 5, 115–124.)

New approaches to the question by R. L. Thorndike, N. S. Cole, R. D. Darlington, R. L. Linn and R. R. Reilly indicate that the question is far more subtle than was initially believed and that there are several psychometric, as well as policy, dimensions to the question. (See, Linn, Fair Test Use in Selection, Review of Educational Research, 1972, Vol. 43, No. 2, 139, and Reilly, A Note on Minority Group Test Bias Studies, 1973, Vol. 80, No. 2, 130.)

IV. RESEARCH INVOLVING THE APPLICANT POPULATION AND DEMOGRAPHIC INFORMATION

In 1962, a study, partially supported by the Law School Council, was completed by the National Opinion Research Center. It resulted in a book entitled "Lawyers in the Making" by Seymour Warkov and Joseph Zelan which described the applicant population and students then in law school. Among other findings, it highlighted the need for more financial assistance to law students and the almost insignificant number of minority students attending law schools at that time.

In June of 1970, the Council approved a similar study in cooperation with medical schools and graduate schools. The study entailed two questionnaires, one of which was administered to college seniors during the spring of 1971. Approximately 62,000 questionnaires were distributed with somewhat less than half being returned. The total number of students who anticipated going to law school within the group amounted to over 900. The questionnaire, besides asking for demographic information, concentrated upon the student image of the various professions and graduate and professional schools, the manner in which the student decided to select one profession or school rather than another, and the respondent's experience with the admissions policies of the various schools. A second questionnaire was administered in the spring of 1972 to first-year law students. Many of the questions were similar to those asked in the first questionnaire and an attempt will be made to ascertain whether the students' expectations were fulfilled.

The results of the first survey were recently published as a monograph entitled "The Graduates" by Leonard L. Baird, who was the principal investigator. The most striking feature of the data on law school applicants is its similarity to that existent in 1960 when the last such study was completed. The results of the second survey are presently being compiled and are undergoing analysis.

V. RESEARCH ON PREDICTORS OTHER THAN THE LSAT AND UGPA

It is appropriate that the Law School Admission Test Council search for predictors other than the undergraduate grade point average and the traditional cognitive items that form part of the LSAT. Interest in other types of tests that might be administered to applicants led, in 1961, to the inclusion of the test of Writing Ability and a separate test of General Background as part of the LSAT. These tests were administered in the afternoon until the 1971–72 testing year at which time experience indicated that the General Background test did not add to prediction and was not used by these law schools in any significant way to determine the admissibility of students. Hence, the General Background test was eliminated. Because other studies showed that both the morning test and the Writing Ability test could be shortened, it was possible to administer both tests in the morning.

Another important study sponsored by the Council investigated noncognitive predictors. This was completed in 1965. Entitled "Personality Differences in

Student Survival in Law Schools," a full report was published in Volume 19 of the Journal of Legal Education at page 460. In this study, the Myers-Briggs Personality Indicator was administered to 896 students in 4 schools. This instrument, based upon the taxonomy of personality developed by Jung, divides students into 4 quasi-dichotomous dimensions of personality: (1) extraversion- introversion; (2) sensation-intuition; (3) thinking-feeling; and (4) judging-perceiving. The most important statistically significant finding of the study was that "thinking" types tended to drop out of the law school voluntarily more than did "feeling" types.

Another study of non-traditional predictors was funded by the Council through the Individual Research Grant Program of the Committee. Entitled "New York University Admissions Interview Study," this project investigated the validity of interviews as a predictor of academic success. A report of the study is found in the 1969 Annual Council Report. The study showed that interviews, although perhaps useful for other purposes, did not contribute to the prediction of an applicant's success in law school.

For several years, the LSAC through its Services Committee worked toward the development of a standard law school recommendation form that might be adopted by a number of law schools. In June of 1970, the Council approved a pilot study recommended by the Committee aimed at determining whether such a form might have predictive value. A final report of the study was published in the 1971 Annual Council Report. Several tentative conclusions regarding the Standard Recommendation Form were reached as a result of that study: (1) it appears that the scales as they are used are highly interdependent and that this interdependence or homogencity probably results from something akin to the "halo" effect usually associated with rating forms; (2) in the data study only one rating scale. Effectiveness of Oral Communication, appeared to offer any promise for the prediction of first-year averages; and (3) the data suggested that a rescaling of the scale categories was probably not in order.

In spite of the limited usefulness of recommendations indicated by the study, undergraduate faculty ratings, through a standard recommendation form or through some other device, the Council still had hopes that faculty ratings might produce a new independent predictor or, in the alternate, that they might be useable as a substitute for the UGPA in the event that undergraduate schools moved toward a pass/fail type of transcript. In June of 1971, a proposal for "Development of Rating Scales in the Law School Setting," was approved by the Council. Based upon a technique used in a study funded by the graduate business schools, the project envisioned the development of a number of scales that could be used to rate students. The use of specific observable instances of student behavior were used to anchor the scales. From the results of other studies, this appeared to decrease the "halo" effect. A number of law schools used these new forms for students entering in the fall of 1973. Unfortunately, preliminary analysis shows that the reliability of the rating is so low that it is very doubtful whether the study should be continued.

The Study of Moderator Variables also falls into this general classification of research. The pilot Moderator Variable was approved by the Council in June of 1966 and a report on that portion of the study was published in the 1967 Annual Council Report. The basic concept of moderator variables is that there are certain variables in applicant backgrounds that do not directly predict success in law school but which might divide the applicant population into subgroups, each of which would be more predictable if a specific regression equation were developed for the subgroup. For example, although age may not be a predictor of success in law school, it may be that if the applicant population were divided into those who were below 25 and those who were 25 or over, and if a different weighting of undergraduate grade point average and LSAT were used for each group, better prediction would be possible. The report on the pilot study indicated that there was promise of success along these lines.

A report on the Advanced Moderator Variable Study appears in the 1973 Annual Council Report. The study concluded that certain groups, such as those who are older, are more predictable than other groups, but that separate regression equations for the various subgroups did not increase prediction.

VI. RESEARCH INVOLVING UNDERGRADUATE GRADES OF APPLICANTS

The LSAT has always been but one of the two major predictors of law school success, the other being the applicant's undergraduate grade point average. All of the validity studies have shown that a combination of these two predictors yields the highest correlation coefficient and most validity studies have shown that if a school had to choose between the two, the undergraduate grade point average would give somewhat better prediction that would the LSAT alone.

Probably the most helpful device that could be afforded admissions offices is a manner in which grades received from various colleges could be adjusted to reflect the severity of grading at the several undergraduate schools. Most admissions offices believe, instinctively, that an A received at a particular college is not the equivalent of A's received at another college. In the early 1960's, the Law School Admission Test Council approved a proposal entitled "Adjusted Undergraduate Average Grade as Predictors of Law School Performance," wherein an attempt was made to adjust undergraduate averages. This study, completed in September of 1964, found little optimism regarding the effectiveness of grade adjustments for improving predictions under the conditions then existing. There is no published report of this study.

In the validity studies done for the individual schools in 1969, the LSAT mean for the student's undergraduate college taken from the LSAT Statistical Summary by Undergraduate Colleges Attended was included as a predictor in the belief that this would operate as an adjustment for college grades. This has been only moderately successful and has some significant disadvantages.

With the advent of the Law School Data Assembly Service (LSDAS), it is both easier to collect data on undergraduate college averages and the data is in better form. Also, new statistical procedures have been developed giving rise to the expectation that grade adjustment might be feasible at this time. For these reasons, the Council approved a new study in June of 1972. In spite of the new procedures and data, the results were again negative and no way, other than the LCM, was found for adjusting college grades.

In June of 1970, the Council approved a pilot project entitled "Transcript Study." The purpose of this study was to investigate whether selected information from an applicant undergraduate transcript might afford a better predictor than his cumulative grade point average. The final report is found in the 1971 Annual Council Report under the heading "Contributions of Selected Transcript Information to Prediction of Law School Performance." This pilot study indicated that certain parts of the applicant's transcript might indeed constitute a better predictor than the applicant's cumulative average. The study was conducted only at two law schools and was hardly conclusive. A replication and extension of the study is reported in the 1973 Annual Council Report. The basic conclusion is that an applicant's cumulative undergraduate grade point average is a better indicator of success than any other factor found in the applicant's undergraduate transcript.

VII. RESEARCH INVOLVING LAW SCHOOL GRADES

Law school grades constitute the criteria against which the effectiveness of predictors are measured. For several years it has been thought by the Committee that investigation of the criteria might well result in a better test design, and, several projects have looked at law school grades.

In 1966, a brief study was completed showing that grades in the several first-year courses at a law school tended to correlate very highly. That same year, the Criterion Study was funded by the Council. In the Criterion Study, 16 professors at 16 different law schools used the same examination question as part of their final examination in contracts. The examination was graded as a part of the student's grade and the professors selected 5 answers which were used to form a pool of 80 answers. The 80 answers were then graded by the 16 professors to determine whether there were different "schools of thought" about what constituted a correct answer to the question. The report of the study, published in the 1968 Annual Council Report, reached the following conclusions among others: (1) students tend to be consistent in thei rperformance on different essay questions used in law schools; (2) the level of agreement among professors and how they graded a single typical essay was high enough to expect that law school grades are potentially quite predictable; (3) although the basis for the professors' agreement was not clear, they did have a marked preference for longer answers and those written by brighter students; and (4) individuals who had no law training generally assigned the same grades to the papers as did the professors.

A second study using the same data was funded by the Council in the same year and was completed in 1970. The second study was an effort to determine why law school professors agreed in their grading and involved physically separating each paper by topic or issue. The conclusion reached by the second part of the study, which bears the title "The Nature and Correlates of Law School Essay Grades" and is reported in the 1970 Annual Council Report, were as follows: (1) the agreement among professors was generally better for issues judged to be of major importance; (2) the students appeared to get better over-all grades if their answer identified the major issues, limited their answers to them, presented their arguments in an orderly manner, pushed for a particular conclusion strongly while arguing both sides of the issue, used legal jargon and wrote neatly and did not make composition errors. In an attempt to follow up on the second study, a conference was held involving a number of the professors who worked in the original study along with other professors and ETS personnel. The conference attempted to ascertain how professors graded and to develop item types for the LSAT. Several potential item types were developed, one of which was experimentally tested during the 1970–71 test year.

In June of 1971, the Council authorized study to look at the criterion. Entitled "Factor Analysis of Law School Grades," the primary purpose of this study was to ascertain whether different courses in law schools tend to require different abilities. A similar study done in the graduate business school indicated that there was only one "factor" or cluster of abilities required for all courses, and the final report of the LSAC study reached the same result. The report can be found in the 1973 Annual Council Report.

VIII. DEVELOPMENT OF NEW ITEM TYPES

During the early days of the Law School Admission Council, primary emphasis was on the development of the LSAT. A significant number of items were tested to determine which were the most useful as predictors, and the test quickly assumed the basic form that it has today. The last significant change in composition occurred in 1971 when the Figure Classification items and Organization of Ideas items were discontinued and the Editing Portion of the Writing Ability test was reduced from 30 minutes to 20 minutes. At the same time, the General Background portion of the test was discontinued. These changes were made as a result of the Factor Analysis of the LSAT which indicated that changing the test in this manner would not reduce either reliability or validity.

Although there have been relatively few changes in the test over its history, there have been a number of research projects designed to produce new types of items. For example, in September of 1966, the Council approved a project investigating a series of experimental tests of intellectual ability. A final report on that study, found in the 1968 Annual Council Report under the title "An Examination of the Validity of Nine Experimental Tests for Predicting Success in Law Schools," indicated that one of the types tested had some potential for increasing validity. Unfortunately, there were significant problems in adapting that type of an item to a machine gradeable format and the item has never been made operational.

Another study, approved by the Council in 1968, explored the possibility of developing a branching test: that is, a test in which the presentation of test items is made contingent upon the previous responses of the examinee. A report of the study is found in the 1969 Annual Council Report. Although the results were negative this may have been because the design was such that only a significant increase in validity would give a positive result.

During the 1969–70 academic year, the Committee reviewed several new item types which seemed promising and in June of 1970, the Council authorized the pretesting of several experimental item types. These are described in the 1971 Annual Council Report and include: (1) a common word item type; (2) an extended reading recall item type; (3) a quanitative comparison item type; (4) a logical reasoning item type; (5) a practical judgment item type; and (6) a new approach to the principles and cases item type. Extensive validity studies showed that several of the experimental items increased prediction significantly, and these will become operational within the next year.

IX. THE ULTIMATE CRITERION

During the past two or three years there has been increased interest in trying to predict how an applicant will succeed in the legal profession, rather than simply to predict how he or she will succeed in law school. Perhaps the most significant difficulty in undertaking research involving the "ultimate" criterion is the problem of defining success in the profession. As a first step in this direction, the LSAC has joined with the AALS, the American Bar Foundation and the National Conference of Bar Examiners to conduct a study of the relationships among law school admission factors, law school grades and bar examination results. The Advisory Committee to this study, composed of representatives of the sponsoring organizations, has undertaken the responsibility of going beyond the narrow confines of the study and of addressing the problem of defining and measuring the quality of professional performance.

APPENDIX B

TEST BIAS AND THE PREDICTION OF GRADES IN LAW SCHOOL

(By Robert L. Linn,* University of Illinois)

During the past several years the number of students seeking admission to law schools has grown much more rapidly than the capacity of the nation's law schools. A rough indication of the increased demand can be gleaned by comparing the number of persons taking the Law School Admission Test (LSAT) and the number of first-year law students over the course of several years.[1] For example, 50,793 persons took the LSAT in 1967–68. In 1971–72 the corresponding number was 121,871, an increase of 140% in four years. Over the same period of time, however, the number of first-year law students increased by only 47%; from 25,746 in 1967–68 to 37,724 in 1971–72.[2]

The tremendous increase in applicants to law school has put considerable pressure on the admissions procedures and has tended to make the already fairly selective admissions requirements increasingly selective. As a consequence of this greater selectivity, the average LSAT score and average undergraduate grade-point average (UGPA) of first-year law students has increased substantially at many law schools.

At the same time that many law schools were forced to deny admission to increasing numbers of applicants because of the mushrooming demand for legal education, many of these same schools were making efforts to expand the enrollment of members of some minority groups (e.g., Blacks, Chicanos, Puerto Ricans). These efforts to increase the number of minority group students in law school were stimulated by many considerations, including the disproportionately small number of lawyers from minority groups. There is no question that members of the target minority groups have been grossly underrepresented among the ranks of lawyers. For example, in 1970, there were 355,242 lawyers in the United States, yet only 3,845 were black, or scarcely more than 1%.[3]

The efforts of law schools to recruit more minority group students have met with at least some measure of success. There were almost as many black students enrolled in law schools during the 1971–72 academic year (3,732) as there were black lawyers in 1970 (3,845).[4] The desire to enroll more minority students, however, sometimes appears to conflict with the need to be more selective. Indeed, the conflict is quite marked if only the common numerical indices provided by the LSAT and the UGPA are used as major selection tools unless provision is made for special evaluation of these indices for members of minority groups.

Even if minority and majority groups had equivalent distributions of scores on the LSAT and the UGPA, the goal of increasing the proportion of law students from minority groups probably would be in conflict with the goals of requiring high values on these indices and of requiring the same scores regardless of group membership. This is so because the average scores of these numerical indicators are lower for some minority groups than for the majority group and because the number of minority group applicants is a small fraction of the total number of applicants.[5] Thus, if these numerical indicators are given a heavy weight in the admission decision and group membership is not taken into account, the goal of increasing the number of minority group law students will be thwarted.

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[1] The number of students taking the LSAT and number of first-year law students are not strictly comparable because not all schools require the LSAT. Students may take the LSAT more than once, and not all test takers would attend law school even if admitted. Nonetheless, the numbers give a rough indication of the increased demand. The increase has started to level off, but the demand continues to far exceed the available spaces.

[2] These figures were supplied by Educational Testing Service, Princeton, New Jersey.

[3] *1972–73 Prelaw Handbook: Official Law School Guide*, published by The American Association of Law Schools and The Law School Admission Council, pp. 7 and 9.

[4] *Ibid.*

[5] Swineford, F. "Law School Admission Test: Comparisons of Black Candidates and Chicano Candidates with White Candidates." Statistical Report SR–72–19, Princeton, New Jersey: Educational Testing Service, 1972.

One response to the above conflict is to reject the numerical indicators for purposes of considering minority group applicants. Although it may be conceded that the LSAT and UGPA have predictive value for the majority group, it is frequently argued that these indicators (particularly the LSAT) are not useful for members of minority groups, or that they they will tend to underestimate the actual performance of minority persons. In the case of the test itself, it is argued that it is a reflection of the culture of the white majority and is inappropriate for members of other cultural groups. In short, the test is said to be biased. Although seldom done with equal force, a similar charge could be made against the UGPA.

The charge of test bias is not unique to the LSAT. It has been leveled against standardized aptitude tests generally and has resulted in a fairly substantial literature about the topic of test bias in the last 10 years. This literature spans a wide range including theoretical discussions of the meaning of test bias, empirical investigations, logical and psycholinguistic analysis of test content, and much heated rhetoric. The literature about test bias and that describing empirical investigations involving other tests provides a background for examining the available evidence about measures commonly used in making law school admissions decisions.

The following sections of this paper focus on the use of the LSAT and UGPA for members of minority groups. Questions such as the following are addressed: Do these numerical indices have predictive value for members of minority groups? Is the LSAT biased? What are the consequences of using a single prediction equation for all individuals regardless of group membership? In addressing these questions, heavy reliance will be placed on the empirical results of a few recent studies supported by the Law School Admission Council. The results of these studies, however, will be discussed within the context of related research on admissions tests used at the undergraduate level and in the context of current thinking on the issue of what constitutes test bias or, conversely, what is fair test use? Some broader issues will be touched, but no attempt will be made to deal adequately with larger questions such as: What importance should be given the predicted grades in admissions decisions? Do first-year grades provide a fair criterion for minority group persons? If law school grades have little relevance to future performance as a lawyer or are biased against members of particular groups, then none of the models that are discussed below are adequate for evaluating potential bias in the LSAT or other predictor variables. Issues of criterion relevance and fairness are of primary importance, and in no way are the narrower considerations that are discussed herein a substitute. At best, the following material may provide information that is relevant to consideration of the broader issues and the formulation of policy.

CONCEPTS OF TEST BIAS

Group Differences in Average Scores

In order to decide whether the LSAT (or any instruments and procedures that are used to predict grades in law school) is biased, it is necessary to have some agreement on what constitutes bias. Unfortunately, this seemingly simple first step is a major stumbling block. It appears that there are many different answers to the simple question, what is test bias? Thus, it may be useful to consider this question before attempting to review the empirical investigations of the LSAT and other predictors of first-year law school grades.

The most straightforward definition of test bias is that a test is biased if the average test score of one population of individuals is greater than that of another. Such a definition rests on the *a priori* assumption that the populations do not differ on the characteristic that the test purports to measure, and hence any differences in average test scores must be due to imperfections or bias in the measuring instrument. According to this definition, any existing aptitude test could undoubtedly be shown to be biased against some groups of people. Even if the test was modified so that some got the same average, other groups still might differ.

To most people who are professionally involved with testing, differences in average test scores do not necessarily imply that the test is biased. It may be that groups differ on the characteristic being measured and that the test merely reflects the difference. Accepting the possibility that the groups may differ on the characteristic being measured rather than only on the average test scores is repugnant to many people, in part, because test scores frequently are loaded with surplus meaning. Too often, test scores are used to infer differences in "inherent ability" and, even more broadly, differences in "personal worth" of individuals or groups of people.

No claim should be made that the LSAT measures an individual's "inherent ability" or "mental capacity." A reasonable and more modest claim is that the LSAT is a usefully valid indicator of probable performance in law school (primarily as measured by first-year grades). It is admittedly influenced by an individual's background and educational experience. Thus, one would expect different average LSAT scores for groups of persons who had quite different backgrounds and experience. Indeed, it would be surprising if, in this society where members of minority groups have been denied opportunities over an accumulation of many years, these groups did not show a lower mean score on the LSAT than members of the majority group.

It also should be recognized that the LSAT is not given to a cross section of any group. Persons electing to take the LSAT have already survived several stages of selection [illegible] means of external barriers and self-selection. Hence, group differences in LSAT scores may be partially due to differential preselection in different groups.

Equality of Prediction Systems

Given the premise that differences in average test scores are not sufficient grounds for concluding that a test is biased, then some other basis for determining bias is needed. One approach to the question would be through a content analysis of the test items. By this approach it might be shown that the item content is more familiar to the majority group than to a minority group. Whether this should be considered as evidence of bias depends on the purpose of the test. For an achievement test that was intended to be equally appropriate to the experiences of both groups, a content analysis would be extremely relevant.[6]

For a test that is designed primarily to predict a particular criterion, the results of a content analysis are, however, less central because it may be that the content of the criterion is itself more familiar to members of a particular group. For the test to perform well as a predictor of such a criterion, it may be necessary to use content that is less familiar to one group than to another.

The primary concern for a test such as the LSAT is how good a job it does at predicting later performance. An LSAT score is of little interest in its own right but derives its value from the relationship of these scores to grades in law school. Thus, it is natural that the issue of test bias should be evaluated in terms of the predictive value of the test for members of different groups.[7]

Over- and Under-Prediction

The definition of test bias that has been most widely accepted among test specialists is quite consistent with the above notion. According to Anastasi, "In the psychometric sense, test bias refers to overprediction or underprediction of criterion measures. If a test consistently underpredicts criterion performance for a given group it shows unfair discrimination of 'bias' against that group."[8] This definition, or some minor variant of it, has been the most widely accepted definition of bias within a predictive context. It is basic in the conceptualization of test bias found in the work of Bartlett and O'Leary, Cleary, Pothoff, and Temp, as well as many others.[9] It is the view of test bias that Bray and Moses express in the *1972 Annual Review of Psychology*—"The key question turned out to be whether test scores meant the same thing in terms of their predictions of job performance for those who were disadvantaged and those who were not."[10] It also can be found in Humphreys' chapter of the *Annual Review of Psychology* 20 years earlier.[11]

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[6] Substantial increases in the relative performance of black students have been found on some achievement tests when the number of items involving cultural contributions of blacks is increased: Medley, M. D. and Quirk, T. J. "Race and subject matter influences on performance on general education items of the National Teacher Examinations." *Journal of Educational Measurement*, in press.

[7] Studies of differential effects of test speededness and of possible interactions between items and group membership have been conducted for the LSAT. These studies are important for purposes evaluating testing practices and possibly identifying potential sources of group differences, but they are not directly relevant to the issue of bias within a predictive framework. Hence, these studies are not reviewed here. The interested reader should see: Evans, F. R. and Reilly, R. R. "A study of speededness as a source of test bias." *Journal of Educational Measurement*, 1972, *9*, 123–131; Evans, F. R. and Reilly, R. R. "The LSAT Speededness Study revisited," Appendix to the LSAC Annual Report, 1972; Cowell, W. and Swineford, F. "Law School Admission Test: Comparisons of test analysis data for white male candidates with white female candidates." LSAC Annual Report, 1972, pp. 379–384; and Swineford, F. "Law School Admission Test: Comparisons of black candidates and Chicano candidates with white candidates." Statistical Report SR–72–19, Princeton, New Jersey: Educational Testing Service, March, 1972.

[8] Anastasi, A. *Psychological testing.* (3rd ed.) New York: Macmillan, 1968, p. 559.

Predictive validity studies have typically used a linear model to investigate the relationship between the predictors and the criterion.[12] Given a predictor (e.g., the LSAT, UGPA, or a combination of these) and a criterion variable (e.g., first-year grades in law school), and assuming a linear model for two groups that are to be compared, the prediction systems for two subgroups can differ in three important ways: (1) The variability around the repression lines can be unequal for the two groups; (2) the slope of the regression lines can be different; (3) and/or the intercepts of the regression lines can differ. Two groups can have prediction systems that are identical in all three of these characteristics yet have different validity coefficients (i.e., the correlations between the predictor and the criterion can be different for the two groups). This point has sometimes been overlooked, and differential validities have been discussed as if they implied test bias. A simple comparison of validity coefficients is not sufficient for evaluating test bias. Different validity coefficients can occur for two groups even though the groups have identical prediction systems because one group has a greater variability in test and criterion scores.

Standard Errors of Estimate

If two groups have equal slopes and intercepts but differ in variability around the regression line (i.e., have different standard errors of estimate), the same prediction equation is applicable for both groups, but the accuracy of prediction is better for one group than the other. In this situation, it might not be considered unfair to use the regression equation for one group to make predictions for members of the other group. There would be no systematic errors since the regression equations are identical. For individual members of the group with the larger standard error, however, there would be a greater likelihood of large errors.

The effect of different standard errors of estimate can be seen in the hypothetical results shown in Table 1. The chances in 100 that a student will receive a first-year grade average of at least 2.0, 2.5, 3.0, or 3.5 are shown for four levels of LSAT scores within two groups that differ in standard error of estimate. The figures in Table 1 are based on hypothetical results where it is assumed that the regression of grades on LSAT is the same for both groups and that the two variables have a bivariate normal distribution[13] within each group.

Equal Risk

Although the results in Table 1 are hypothetical, they are not out of line with what might be approximated in practice. In any event, the results in Table 1 can be used to illustrate some of the implications of different standard errors of estimate. Consider, for example, an individual with an LSAT score of 450. The predicted first-year average for this person is 2.5 regardless of whether the person is a member of Group A or Group B. Suppose, however, that the admission policy was to admit anyone who was predicted to have one chance in four or better of making at least a 3.0 average. Given such an admission policy, a person from Group B with an LSAT score of 450 would be accepted due to the larger standard error of estimate, whereas a person from Group A with an LSAT of 450 would not be accepted. To treat a score of 450 the same, regardless of group, would be fair in the sense that the probability of having a grade of at least 3.0 depends on the group to which the individual belongs.

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[9] Bartlett, C. J. and O'Leary, B. S. "A differential prediction model to moderate the effects of heterogeneous groups on personnel selection and classification." *Personnel Psychology*, 1969, *22*, 1–17; Cleary, T. A. "Test bias: Prediction of grades of Negro and white students in integrated colleges." *Journal of Educational Measurement*, 1968, *5*, 115–124; Potthoff, R. F. "Statistical aspects of the problem of biases in psychological tests." Unpublished manuscript, Institute of Statistics Mimeo Series No. 249, University of North Carolina, 1966; and Temp, G. "Test bias: Validity of the SAT for blacks and whites in thirteen integrated institutions." *Journal of Educational Measurement*, 1971, *8*, 245–251.

[10] Bray, D. W. and Moses, J. L. "Personnel selection." *Annual Review of Psychology*, 1972, *23*, 545–576, p. 548.

[11] Humphreys, L. G. "Individual differences." *Annual Review of Psychology*, 1952, *3*, 131–150. Also see Turnbull, W. W. "Influence of cultural background on predictive test scores." In Anastasi, A. (Ed.), *Testing problems in perspective: Twenty-fifth anniversary volume on topical readings from the Invitational Conference on Testing Problems*. Washington, D.C., American Council on Education, 1966, 458–464.

[12] Recent studies of nonlinear models for predicting grades in law school suggest that little, if anything, would be gained by using a nonlinear prediction system. See Schrader, W. B. and Pitcher, B. "Extension of the study of the possibility of curvilinearity in law school validity study data." Report to the Law School Admission Council, May, 1974.

[13] A bivariate normal distribution is a theoretical distribution that is mathematically convenient and provides a useful approximation to many observed bivariate frequency distributions. For a brief explanation, see, for example, Glass, G. V. and Stanley, J. C. *Statistical methods in education and psychology*. Englewood Cliffs, New Jersey: Prentice-Hall, 1970, pp. 105–107.

TABLE 1.—HYPOTHETICAL ILLUSTRATION OF THE EFFECT OF DIFFERENT STANDARD ERRORS OF ESTIMATE ON PROBABILITY OF VARIOUS LEVELS OF PERFORMANCE [1]

Group	Within-group standard error of estimate	LSAT score	Chances in 100 that student will receive a 1st-year average of at least—			
			2.0	2.5	3.0	3.5
A	0.5	750	99.9	98.0	84.0	50.0
B	.8	750	97.0	89.0	73.0	50.0
A	.5	600	97.0	84.0	40.0	16.0
B	.8	600	89.0	73.0	[illegible]	27.0
A	.5	450	84.0	50.0	16.0	2.0
B	.8	450	73.0	50.0	27.0	11.0
A	.5	300	50.0	16.0	2.0	.1
B	.8	300	50.0	27.0	11.0	3.0

[1] Table entries are based on the assumption that actual and predicted grades have a bivariate normal distribution within each group. It is further assumed that the regression of 1st-year average on LSAT is the same in both groups with a slope of 0.00333 and an intercept of 1 but with different standard errors of estimate.

Possible differences in standard errors of estimate, as well as in slopes and intercepts, led Einhorn and Bass to propose a model for test bias based upon the probability of success rather than only on the predicted scores.[14] Their model is consistent with a definition of test bias suggested by Guion[15] that Cole[16] and Petersen and Novick[17] have discussed under the heading of "The Equal Risk Model." To be fair according to the equal risk model, persons with equal probabilities of success should have equal probabilities of being selected.

From the example in Table 1 an admissions policy that required a person to have at least 27 chances in 100 of obtainig at least an average grade of 3.0 would require an LSAT score of 450 or higher from members of Group B but a score of approximately 506 or higher for members of Group A. On the other hand, if a different admission standard were applied, a higher score might be required for members of Group B than for members of Group A. For example, if persons were to be admitted who had at least 73 chances out of 100 of obtaining an average grade of at least 2.0, then a score of approximately 394 or higher would be required for a person in Group A as opposed to a score of 450 or higher for a person in Group B.

Equality of Slopes

If the standard errors of estimate can be assumed to be equal, then the equal risk model will lead to the same decisions as would be obtained if admissions decisions were based on criterion scores that are predicted by the equation appropriate to each group. That is, people with equal predicted scores will have approximately the same probability of having a criterion score above any specified point. The regression equations may be different, however.

If the slopes of the regression lines are not the same for the two groups, then the effect of using the regression equation of one group to make predictions for members of the other group will depend upon the level of the predictor scores. In Figure 1, two hypothetical regression lines are illustrated. Suppose the regression line for Group A is used to make predictions for members of Group B, as might happen if these groups were respectively the majority and the minority groups. The Group A equation would underestimate the average performance for Group B members with test scores below the intersection of the regression lines (Score Level II in Figure 1) and overestimate the average performance of members of Group B with test scores above the intersection. Thus, on the average, the predictions using the Group A regression line would be "biased" in favor of Group B members with high test scores (above Level II) and "biased" against members of Group B with low test scores (below Level II). The average effect for Group B as a whole depends on the location of the test score distribution. If the mean test score for Group B is at Score Level I, then the bias would be against Group B overall; on the other hand, if the Group B mean is at Score Level III, the bias would tend to be in favor of Group B.

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[14] Einhorn, H. J. and Bass, A. R. "Discrimination in employment testing." *Psychological Bulletin*, 1971, *75*, 261–269.

[15] Guion, R. "Employment tests and discriminatory hiring." *Industrial Relations*, 1966, *5*, 20–37.

[16] Cole, N. S. "Bias in selection." *Journal of Educational Measurement*, 1973, *10*, 237–255.

[17] Peterson, N. S. and Novick, M. R. "An evaluation of some models for test bias." ACT Technical Bulletin No. 28, Iowa City, Iowa: American College Testing Program, 1974.

Equality of Intercepts

If the standard errors of estimate and the slopes are the same but the intercepts are different, there would be a constant error if the regression equation for one group was used to make predictions for members of the other group. Instead of intersecting lines, as depicted in Figure 1, the regression lines for the two groups would be parallel with one line above the other as depicted in Figure 2. For any test score the equation for Group A in Figure 2 would overpredict the average performance of members of Group B by a constant amount. Conversely, the equation for Group B would underpredict for members of Group A.

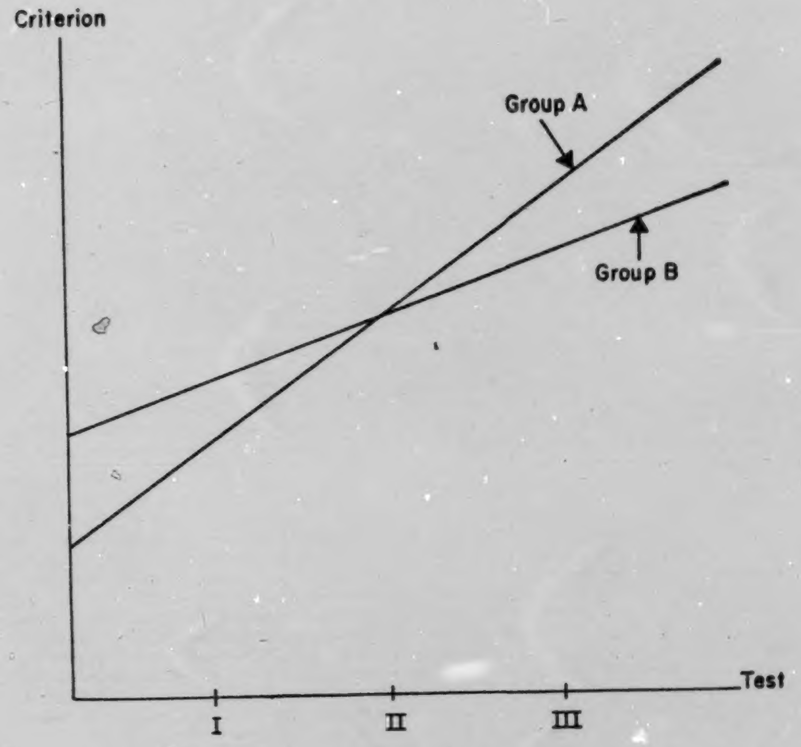

Figure 1

Illustration of regression lines with unequal slopes

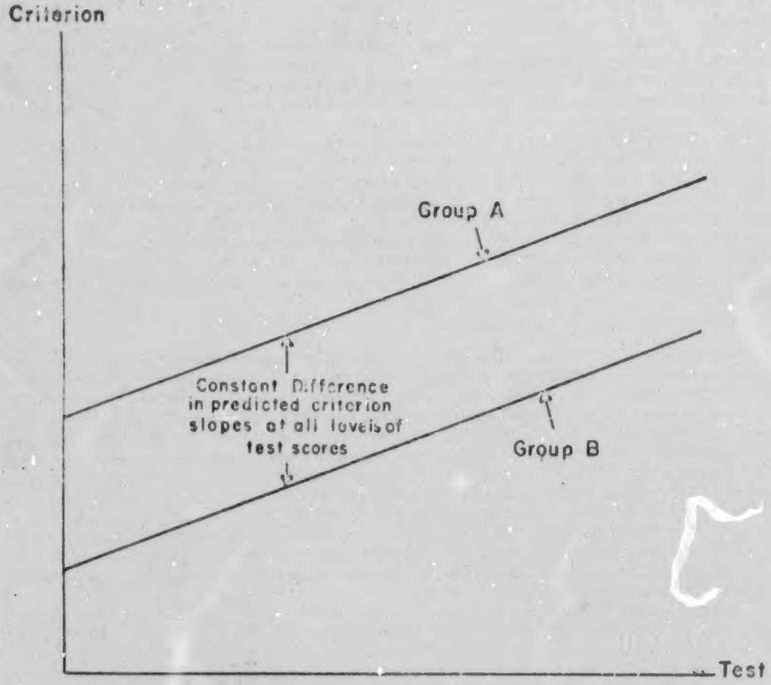

Figure 2

Illustration of regression lines with equal slopes but unequal intercepts

The possibility of different intercepts has some correspondence to the frequently voiced expectation that tests are unfair to minority groups in the sense that they underestimate their performance on the criterion variable. In terms of Figure 2, this expectation would be represented if Group A was the minority group and Group B the majority group. Commonly used prediction equations are dominated by the majority group because the number of minority group persons for whom criterion data are available is typically a small fraction of the total group. Thus, if the above expectation is accurate, minority group members would be expected to perform above their predicted performance on the average, and if separate prediction equations were obtained, the intercept for the minority group would be expected to be above the intercept for the majority group.[18] As will be seen below, however, this expectation is not supported by the data.

Technical Issues

If it is agreed that test bias for a predictive measure should be evaluated in terms of a comparison of the prediction systems for the different groups, then studies of bias are seemingly relatively straightforward. Unfortunately, however, the slopes of the regression lines are influenced by the reliability[19] of the test. As Linn and Werts have shown, lack of reliability in the test typically will tend to make a majority group regression equation predict higher criterion scores for persons in groups with low average test scores than would be the case if the test were more reliable.[20] This effect may work in the direction of making a majority group regression equation overestimate the performance of minority group members rather than underestimate it as commonly anticipated.

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[18] The expectation that actual performance of minority students would be underpredicted follows from the work of Clark, K. B. and Plotkin, L. *The Negro student at integrated colleges*. New York: National Scholarship Service for Negro Students, 1964. It is also consistent with the charge that tests and other standard predictors are biased against minority group members.

Another complicating factor in the evaluation of bias is that a predictor that is found to overpredict or underpredict when used in isolation may do the opposite when used in conjunction with another variable.[21] Reilly has argued that differences between groups on an outside variable that is related to the test, to the criterion, and to group membership may be expected to make the majority group regression equation overpredict the performance of minority group members.[22] Thus, there appear to be technical phenomena that tend to result in overprediction for groups of individuals that score low on the predictor, e.g., minority groups.

Alternative Models of Test Fairness

The general approach outlined above for evaluating fairness in a test or other variable used mainly for purposes of prediction was not seriously questioned in the psychometric literature until 1971. Although there are distinctions between simply comparing prediction equations and the equal risk model, the two are reasonably compatible and in practice are usually investigated in the same manner (i.e., groups are compared in terms of standard errors of estimate, slopes, and intercepts). In 1971, however, an article by Thorndike and one by Darlington were published in the *Journal of Educational Measurement* which suggested that there were alternative ways of defining fairness in test use.[23] Furthermore, these alternative formulations, as well as an additional one recently suggested by Cole,[24] are incompatible with the traditional formulations considered in the preceding section in the sense that a procedure that is fair from one perspective will be unfair from another.[25]

Petersen and Novick have recently completed an evaluation of the various models of fair test use that have been proposed.[26] In the process they introduced six additional models, some of which are the logical converses of previously proposed models. Most of the previous and newly introduced models are rejected as being inappropriate, however. Only the equal risk model and the regression model that requires that predictions be based on within-group prediction equations survive their analysis, and even they are considered appropriate only in very specific situations, with the equal risk model generally being the most useful. They argue that the remaining models contain logical contradictions because they are based on the wrong conditional probabilities. They do indicate, however, that these models contain important ideas that might be reformulated in ways that would avoid their objections.

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[19] There are different types of reliability estimates, but they all attempt to measure the degree to which scores on a test result from systematic differences among examinees. For a discussion of reliability, see, for example, Ebel, R. L. *Essentials of educational measurement*, Englewood Cliffs, New Jersey: Prentice Hall, 1972, Chapter 15.

[20] Linn, R. L. and Werts, C. E. "Considerations for studies of test bias." *Journal of Educational Measurement*, 1971, 8, 1–4.

[21] *Ibid.*

[22] Reilly, R. R. "A note on minority group bias studies." *Psychological Bulletin*, 1973, 80, 130–133.

[23] Darlington, R. D. "Another look at 'culture fairness'." *Journal of Educational Measurement*, 1971, 8, 71–82; Thorndike, R. L. "Concepts of culture fairness." *Journal of Educational Measurement*, 1971, 8, 63–70.

[24] Cole, N. S., *op. cit.*

[25] The conflicting definitions of what constitutes fair test use are recognized in the 1974 revision of the *Standards for Educational and Psychological Test*, Washington, D.C.: American Psychological Association. The *Standards* were prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education. According to The Standards, ". . . there are different definitions of fairness, and whether a given procedure is or is not fair may depend on the definition accepted [p. 44]." Discussions of the alternate definitions of fairness may be found in Humphreys, L. G. "Implications of group differences for test interpretation," *Proceedings of the 1972 Invitational Conference on Testing Problems*. Princeton, New Jersey: Educational Testing Service, 1973, pp. 56–71; Schmidt, F. L. and Hunter, J. E. "Racial and ethnic bias in psychological tests: Divergent implications of two definitions of test bias." *American Psychologist*, 1974, 29, 1–8; and Linn, R. L. "Fair test use in selection." *Review of Educational Research*, 1973, 43, 139–161.

[26] Petersen, N. S. and Novick, M. R., *op. cit.*

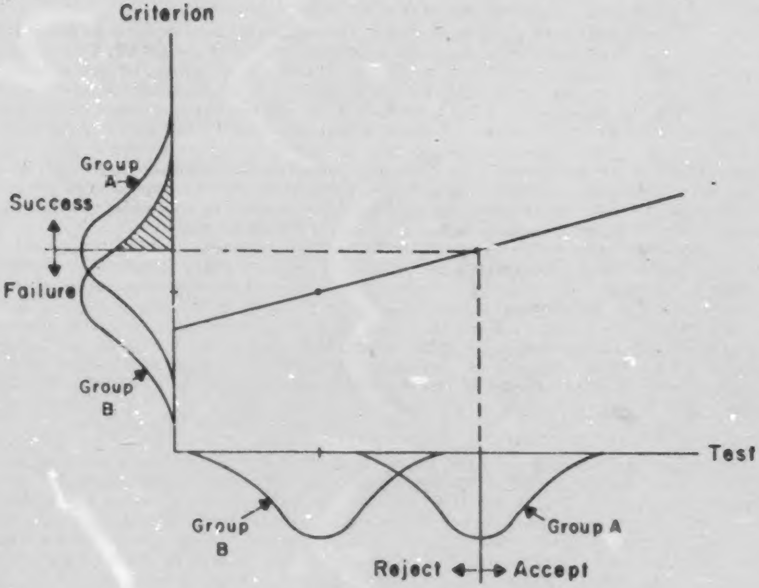

Figure 3
Illustration of Thorndike's Alternate Definition of Culture Fairness

The two models that are not rejected by Petersen and Novick are special cases of a decision-theoretic model. This model would require that utilities (i.e., the degree of value) be assigned to each possible outcome in the admissions process. The utilities attached to different outcomes might vary from group to group. Petersen and Novick prefer the general decision-theoretic model to the special case of the equal risk model, with the latter being appropriate only when the utilities in the two groups are identical.

More detailed consideration will be given the various alternative models in the third major section of this paper. Before further discussion of the various alternative models, however, it may be desirable to review the empirical evidence that is available regarding the possibility of bias in the prediction of first-year average grade in law school. This seems desirable for two reasons. First, the bulk of the available evidence regarding the use of the LSAT, UGPA, and the Writing Ability Test (WA) for members of minority groups falls within the framework of the regression or equal risk models. Secondly, these are the traditionally accepted models.

EMPIRICAL INVESTIGATIONS OF BIAS IN PREDICTION OF GRADES IN LAW SCHOOL

The focus of the review in this section is on the results of five studies that have investigated the use of LSAT, UGPA, and WA for prediction of first-year grades in law school for members of minority groups. All of these studies have been completed within the last two years, and some of the reports are still in draft form.

General Predictive Value of Standard Numerical Indicators

Before considering the prediction of law school grades for members of minority groups, a few brief comments about the predictive value of the LSAT, UGPA, and WA may be in order. There is substantial evidence in the form of hundreds of validity studies to support the practice of using a weighted combination of LSAT and UGPA or the LSAT, UGPA, and WA to obtain the predicted first-year average (PFYA). The degree of relationship between PFYA and actual first-year average (FYA) and the magnitude of relative weights assigned to LSAT and UGPA in the prediction vary from one law school to another and from year to year within the same law school. Some variability is to be expected on purely statistical grounds due to sampling variability, and some is undoubtedly attributable to real differences among schools and/or student populations.

In any event, the PFYA is typically found to correlate about .40 with FYA.[37] A correlation of this magnitude is sufficiently high to make predictions worthwhile for purposes of selecting students who are most likely to be academically successful. The prediction is obviously far from perfect. Many factors not measured by the LSAT or the UGPA contribute to a student's first-year grades in law school. Furthermore, the general usefulness says nothing about the value of the PFYA or its components for particular groups of individuals that make up relatively small fractions of the student bodies of most law schools, such as Blacks, Chicanos, or women.

Survey Results

Schrader has recently reported on the results of a survey of law schools conducted in the spring of 1971.[38] This study was not designed to investigate possible bias in the LSAT, UGPA, or WA for the prediction of FYA. Its purpose was to obtain descriptive information about the enrollment of minority students in law school that might be useful in evaluating the effectiveness of the efforts of law schools to encourage more members of minority groups to obtain legal educations. Some of the results of the survey have, at least, a tangential bearing on the issue of bias, however.

A total of 98 of the 142 law schools surveyed actually supplied data. Thus, the results are not necessarily representative of all law schools. Furthermore, as noted by Schrader, relationships obtained when data from various law schools are combined may be influenced by differences between schools and therefore may not be similar to relationships within schools. Even acknowledging these limitations, the survey results lend some support to the proposition that the traditional predictors (LSAT, UGPA, and WA) have relevance for the prediction of grades in law school for minority group students.

The law schools were asked to provide rank-in-class based on first-year law school grades, LSAT scores, WA scores, and a number of other items of information for each minority group student who had enrolled in 1968, 1969, or 1970. Rank-in-class data were supplied for a total of 624 minority students by 72 law schools. Across the 72 law schools, it was found that a minority group student who had an LSAT score of 550 or above was over four times as likely to rank in the highest fifth of the class as a minority student who had an LSAT score below 450. Conversely, a student with a score below 450 was over twice as likely to rank in the bottom fifth of the class as student with a score of 550 or above. Similar results were obtained for the three specific minority groups with large enough numbers of students to make the analysis feasible. These groups were made up of students reported by their law schools to be Black American (385 students), Mexican American (131 students), or Asian American (50 students). Similar results were also obtained when separate analyses were conducted for minority students enrolled in the 33 schools with LSAT means of 570 or above.

A clear relationship between WA scores and rank in class was also obtained for the combined group of minority students and within each of the three specific minority groups listed above. The magnitude of the relationship was comparable to that observed for the LSAT.

As previously indicated, these results do not speak directly to the issue of bias. The relationships may be affected by between-school differences. Furthermore, even if the relationships hold within schools, the students may be performing better (or worse) than would have been predicted from within-school prediction equations that are based primarily on prior experience with majority group students. At best, the results are only suggestive that the LSAT and WA are useful predictors of first-year grades for minority students.

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[37] Schrader, W. B. and Pitcher, B. "Summary of validity studies, 1949–1971." In Law School Admission Council, *Annual Council Report*, 1972, pp. 423–431. It might be noted that the correlation between the LSAT and grades would be expected to be higher if the LSAT was not used for admissions purposes.

[38] Schrader, W. B. "Relationships between characteristics of minority groups students who entered law school in 1968, 1969, and 1970." Report to the Law School Admission Council, dated April, 1974.

Comparison of Prediction Systems

In the remaining studies, within-school data were used to compare the prediction system of a specified minority group to the prediction system of "other students," "nonminority students," "white students," or "male students."[29] The studies followed a very similar pattern. If the smaller of the two groups to be compared included at least 50 students, then significance tests were conducted for equality of standard errors of estimate, equality of slopes, and equality of intercepts.[30] Where the smaller group had less than 50 students only the slopes and intercepts were tested for equality.[31] In each case, separate significance tests were conducted with UGPA alone, LSAT alone, WA alone, UGPA and LSAT together, and UPGA, LSAT, and WA together.[32]

LSAT as the Only Predictor

For purposes of evaluating the practical implication of group differences for predicting grades, the most critical comparison is the one for that combination of predictors that is actually used in a school. Frequently this would be LSAT and UGPA, or these two in combination with WA. However, since the LSAT may be especially suspect as a variable that might underestimate actual performances for members of minority groups, I will first look at results from the four studies for the LSAT alone and then review the results where combinations of variables are used.

In Table 2, significance test results from the four studies conducted by Pitcher and by Schrader and Pitcher are summarized. In Study I, prediction equations at five law schools are compared for students who were identified as "culturally deprived" with equations for "other" students in those schools.[33] In Study II, regression equations for black students are compared with those for their white counterparts at five schools.[34] Comparisons of equations for black students with those for nonminority students are made in seven additional schools in Study III.[35] Comparisons of equations for Mexican American and nonminority students at three schools are also made in Study III. Finally, prediction equations for males and for females are compared in Study IV.[36]

The first column of Table 2 identifies the study and the school within each study, using the letters that were used in the original reports to identify schools. The second and third columns report the number of students in each group where this information was available. In the case of Studies II and III, this is limited to a report of 50 or more students (GT50) or less than 50 students (LT50). Columns 4, 5, and 6 list the results of the significances tests for the equality of the standard errors of estimate, the equality of the slopes, and the equality of the intercepts, respectively. These significance tests are sequential; that is, the test of slope is ambiguous if the errors of estimate are significantly different, and the test for intercepts is ambiguous if either the errors of estimate or slopes are significantly different. The last column of Table 2 simply states whether or not there is a significant difference between the groups on at least one of the significance comparisons.

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[29] Schrader, W. B. and Pitcher, B. "The Interpretation of Law School Admissions Test scores for culturally deprived candidates." LSAC Annual Report, 1972, pp. 432–462; Schrader, W. B. and Pitcher, B. "Predicting law school grades for black American law students." LSAC Annual Report, 1973, pp. 530–569; Schrader, W. B. and Pitcher, B. "Prediction of law school grades for Mexican American and black American students." Report to Law School Admission Council (to be published in the LSAC Annual Report, 1974); Pitcher, B. "Predicting law school grades for female law students." Report to Law School Admission Council (to be published in LSAC Annual Report, 1974).

[30] Significant test procedures that were used with group sample sizes of at least 50 are described in Gulliksen, H. and Wilks, S. S. "Regression tests for several samples." *Psychometrika*, 1950, *15*, 91–114.

[31] Significance tests, used where the smaller sample size was less than 50, are described in Williams, E. J. *Regression analysis*. New York: Wiley, 1959.

[32] In Pitcher's study of prediction for women (June, 1974) equations using the mean LSAT score for an applicant's undergraduate institution were also investigated.

[33] Particular responses to 28 multiple-choice questions were used as indicators of cultural deprivation. A student who selected one of the keyed responses to 8 or more of the 28 items was classified as "culturally deprived" for purposes of the analyses.

[34] The Study II results, summarized in Table 2, used the "white proportional" group as the basis for comparison (i.e., the proportion of students from each entering class was made the same for both groups).

[35] The Study III results, summarized in Table 2, are for the "proportional comparison group."

[36] Although not a minority in the general population, women are a minority in law school and in the legal profession.

TABLE 2.—TESTS OF EQUALITY OF REGRESSIONS: LSAT ALONE

Study and school [1]	Number of students [2]		Errors of estimate	Slopes	Intercepts	At least 1 significant difference
	CD [3]	Other				
I-A	47	252	(4)	(5)	(5)	No.
I-B	49	248	(4)	(5)	(5)	No.
I-C	39	245	(4)	(5)	(5)	No.
I-D	25	180	(4)	(5)	(5)	No.
I-E1	21	130	(4)	(5)	(5)	No.
I-E2	14	135	(4)	(5)	(5)	No.
	Black	White				
II-A	GT50	GT50	(5)	(5)	(6)	Yes.
II-B	LT50	GT50	(4)	(5)	(6)	Yes.
II-C	GT50	GT50	(6)	(7)	(8)	Yes.
II-D	LT50	GT50	(4)	(5)	(6)	Yes.
II-E	GT50	GT50	(5)	(6)	(8)	Yes.
	Black	Nonminority				
III-D	GT50	GT50	(5)	(5)	(6)	Yes.
III-E	GT50	GT50	(5)	(6)	(8)	Yes.
III-F	LT50	GT50	(4)	(6)	(8)	Yes.
III-G	LT50	GT50	(4)	(5)	(6)	Yes.
III-H	LT50	GT50	(4)	(5)	(6)	Yes.
III-I	LT50	GT50	(4)	(5)	(6)	Yes.
III-J1	LT50	GT50	(4)	(5)	(6)	Yes.
III-J2	LT50	GT50	(4)	(5)	(6)	Yes.
	Mexican American	Nonminority				
III-A	GT50	GT50	(6)	(7)	(8)	Yes.
III-B	LT50	GT50	(4)	(6)	(8)	Yes.
II-C	LT50	GT50	(4)	(5)	(6)	Yes.
	Women	Men				
IV-A	97	495	(5)	(5)	(5)	No.
IV-B	65	461	(5)	(5)	(5)	No.
IV-C	55	400	(5)	(5)	(5)	No.
IV-D	64	245	(5)	(6)	(7)	Yes.
IV-E	71	237	(6)	(7)	(8)	Yes.
IV-F	80	204	(6)	(8)	(8)	Yes.
IV-G	67	211	(5)	(5)	(5)	No.
IV-H	68	183	(5)	(5)	(5)	No.

[1] Studies are coded I for Schrader and Pitcher (September 1972), II for Schrader and Pitcher (March 1973), III for Schrader and Pitcher (May 1974), and IV for Pitcher (June 1974). The letters designating schools correspond to the letters used in the original reports.

[2] In studies II and III the numbers of students within each school were not reported. Sample sizes are denoted GT for 50 or more students and LT for less than 50 students.

[3] CD refers to students who individually were identified as "culturally deprived" according to responses provided by the student on a 28-item questionnaire.

[4] Tests of errors of estimate were not conducted if either group had less than 50 students.

[5] Not significant at 0.05 level.

[6] Significant at 0.05 level.

[7] Not significant, but test is questionable due to significance of prior significance test.

[8] Significant, but test is questionable due to significance for prior significance test.

As can be seen, the results of the significance tests reported in Table 2 follow a rather clear pattern. None of the six comparisons between the "culturally deprived" group of students and "other" students is significantly different. It should be noted, however, that the number of students in the "culturally deprived" group is rather small in all cases, and the direction of the differences was consistent with results in Study II. Also, the group identification is rather ambiguous in Study I.

In all 13 comparisons of equations for black students with those for white students and in all three comparisons of Mexican American students with white students, the prediction systems were significantly different in at least one respect. The results for the comparison of equations for males with those for females are not consistent with significant differences in three schools and with no significant differences in the remaining five schools.

One major conclusion that can be drawn from the results in Table 2 is that, when first-year grades in law school are predicted from the LSAT alone, the prediction system for majority students *cannot* safely be assumed to be the same as the one that would result from data based on minority group students. This conclusion is particularly applicable where the minority group consists of black students or Mexican American students, but it also holds where the "minority group" consists of women. The lack of differences for "culturally deprived" versus "other" students is difficult to interpret due to the ambiguity of the categories and the small sample sizes.

The results for the LSAT are consistent with previous results obtained at the undergraduate level. When the Scholastic Aptitude Test (SAT) or the American College Testing Program tests (ACT) are used to predict undergraduate grades, significant differences in prediction systems have frequently been found for black students in comparison to white students. For example, comparisons of the regression of undergraduate grades on SAT for black students with that for white students were significantly different in 14 of 22 colleges included in the results reviewed by Linn.[37] In the case of sex differences, there are fewer significant differences for the LSAT than have typically been found at the undergraduate level for the SAT or ACT.[38]

Given the conclusion that prediction systems should *not* be assumed to be equal, there remains an important question about the direction and magnitude of the difference. This will be considered in detail below, but first the results of comparisons of group prediction systems where the LSAT is used in combination with other predictors will be briefly reviewed.

LSAT in Combination with Other Predictors

A table similar to Table 2 could be constructed for UGPA alone, WA alone, UGPA and LSAT combined, and for UGPA, LSAT, and WA combined. But, the results of the significance tests are so nearly identical to those for the LSAT alone that such detail does not seem warranted in this review. The detailed results are available in the reports of the original studies conducted by Schrader and Pitcher.

Since UGPA and LSAT, or these two plus WA, are usually used in combination to predict first-year grades, the significance tests for the multiple regression system are of particular interest. In Table 3, the results of these tests are summarized for the same schools and students for whom results were reported in Table 2. As sugested above, the significance tests for the multiple regression systems lead to the same conclusion that was reached where the LSAT was used as the only predictor. That is, it is *not* safe to assume that data for different groups of students within a single school would lead to the same prediction system. In particular, separate prediction systems are usually indicated for black or Mexican American students in comparison to nonminority students.

TABLE 3.—SUMMARY OF TESTS OF EQUALITY OF MULTIPLE REGRESSION SYSTEMS

Study	Groups compared	Number of comparisons of regression system	Number of comparisons with at least 1 significant difference [1]
	LSAT and UGPA as predictors:		
I	CD [2] and other	6	0
II	Black and white	5	5
III-1	Black and nonminority	8	8
III-2	Mexican-American and nonminority	3	3
IV	Female and male	8	4
	LSAT, UGPA and WA as predictors:		
I	CD and other	6	0
II	Black and white	5	4
III-1	Black and nonminority	8	6
III-2	Mexican-American and nonminority	3	3
IV	Female and male	8	3

[1] A significant difference may be in standard errors of estimate, slopes, or intercepts.

[2] CD refers to "culturally deprived" as defined by responses to a questionnaire.

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[37] Linn, R. L., *op. cit.*

[38] *Assessing students on the way to college: Technical report for the ACT assessment program*, Vol. 1. Iowa City, Iowa: American College Testing Program, 1973, pp. 229–319.

Implications of Using a Common Versus Separate Prediction System

The statistical comparisons summarized in the preceding section indicate that separate prediction equations would provide better predictions than a single equation. It is important, however, to understand the implications of using a separate prediction equation based on within-group data rather than using a common regression. Many schools do not enroll enough students from a particular minority group to make the development of separate prediction equations very feasible. Even those schools that have sufficient numbers of students from one minority group to develop a separate equation will generally lack data for another group. For this and other reasons it is desirable to know whether a common prediction equation usually underestimates or overestimates the actual grades of minority group members.

Although the common expectation is that a single prediction system, based on all students or only on majority students, would underpredict the actual grades of black or Mexican American students, the result is uniformly in the opposite direction. That is, on the average, law school grades of black students or of Mexican American students are overpredicted by the equation for white students or by a common equation based on both groups of students. This is true at every school that was included in the two studies conducted by Schrader and Pitcher.[39] These results are summarized in Table 4.

In Table 4, the predicted grade for a hypothetical person with UGPA and LSAT scores equal to the within-school mean for black students, or the mean for Mexican American students, is obtained by using the equation for the combined group of students. The resulting predicted average grade, which is reported in column 2 of Table 4, can be compared to the actual average grade (column 3). The predicted and actual grades would be equal if the predictors had been based on the minority group regression equation. Using the prediction equation, based on the combined group, results in overprediction of the minority group grades on the average (column 4 of Table 4).

Similar result scould be displayed by using either UGPA, LSAT, or WA alone, or the three predictors combined. The only difference is that the amount of overprediction tends to be somewhat larger when predictions are based on a single predictor. The tendency for the overprediction to be less for multiple predictors than for a single predictor might be anticipated on the basis of Reilly's analysis.[40]

TABLE 4.—PREDICTED AND ACTUAL GRADES FOR BLACK AND MEXICAN AMERICAN STUDENTS [1]

Study and school	Predicted average grade [2]	Actual average grade	Amount of over-prediction
Black students:			
II-A	39	36	3
II-B	42	37	5
II-C	40	38	2
II-D	40	36	4
II-E	40	38	2
III-D	36	33	3
III-E	39	36	3
III-F	39	37	2
III-G	44	42	2
III-H	40	36	4
III-I	38	33	5
III-J71	40	35	5
III-J72	40	36	4
Mexican-American students:			
III-A	40	36	4
III-B	49	44	5
III-C	41	38	3

[1] The predictions are based on UGPA and LSAT using the combined group consisting of the total black or Mexican-American sample and the proportional white sample. Studies are code II for Schrader and Pitcher (March 1973) and III for Schrader and Pitcher (May, 1974).

[2] Grades were scaled to have a mean of 50 and a standard deviation of 10 for the combined group of students within each school. Predictions are for UGPA and LSAT scores at the mean of black or Mexican-American students within each school.

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[39] Schhrader, W. B. and Pitcher, B., 1973, *op. cit.;* Schrader, W. B. and Pitcher, B., 1974, *op. cit.*

[40] Reilly, R. R., *op. cit.*

Although overprediction is contrary to many people's intuitive expectations, the result is quite consistent with the typical finding at the undergraduate level. For example, in the studies reviewed by Linn, the equations based on white students overpredicted the average grades of black students in 18 of 22 schools.[41] Overprediction is also a common finding in comparative studies of predicted job performance.[42]

The implication of the overprediction result is that, if separate equations are used for black students or for Mexican American students, the predicted grade is apt to be lower than if a single equation was used for all students. If students were admitted solely on the basis of predicted grades, the implication is that higher scores on the LSAT and/or UGPA would be required for black or Mexican American applicants than for white applicants. Clearly, the predicted grade average should not be the only consideration in an admissions decision, but inasmuch as it is one of the important considerations in the decision for minority group members as well as majority group members, then using separate prediction systems is apt to lower rather than raise the likelihood of admission of a black or Mexican American student.

Such an implication obviously runs counter to the goal of increasing the number of minority persons in the legal profession, one of the considerations that stimulated the investigations of possible bias in the first place. Although the implication that there might be a justification for requiring higher UGPA and LSAT scores for admission of black and Mexican American students than for admission of white students conceivably could be of concern in future litigation, there are a number of grounds on which this implication can be rejected. To begin with, as has already been indicated, predicted grades in law school are only one of many factors that need to be considered in an admissions decision. In addition, the grades may themselves be biased.

They may have different relationships and degrees of importance to later performance as a lawyer for minority group members than for majority group members. Yet another consideration is that special steps are required because of the accumulation of the effects of past discrimination. To treat everyone "alike" would contribute to the process of continued discrimination ". . . by enforcing its consequences and excluding the victim because he has been wronged in the past by others."[43]

It was the recognition that the blind use of predicted performance without regard to group membership can have undesirable consequences that led to the formulation of alternative concepts of fair test use by Thorndike, by Darlington, and by Cole.[44] These alternative models of fairness along with the more recent work of Petersen and Novick are discussed in the next section, but first the implications of using single sex versus combined group predictions are briefly reviewed.

Table 5 reports the results of using a combined group regression equation to predict for a person with UGPA and LSAT scores at the mean for women students. The actual average grades achieved by women and the difference between predicted and actual grades are also listed in Table 5. The results are mixed. In

TABLE 5.—PREDICTED AND ACTUAL GRADES FOR WOMEN STUDENTS[1]

Study and school	Predicted average grade[2]	Actual average grade	Predicted minus actual grade
III–A	50.4	50.8	−0.4
III–B	49.2	47.1	2.1
III–C	50.1	49.7	.4
III–D	49.7	51.1	−1.4
III–E	50.3	52.7	−2.4
III–F	50.0	51.7	−1.7
III–G	50.6	49.9	.7
III–H	50.5	50.8	−.3

[1] The predictions are based on UGPA and LSAT, using the combined group of men and women in each school. The results are from Pitcher (June 1974).

[2] Grades were scaled to have a mean of 50 and a standard deviation of 10 for the total group of students within each school.

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[41] Linn, R. L., *op. cit.*

[42] See, for example, Bray, D. W. and Moses, J. L., *op. cit.;* Campbell, J. T. "Principal results of study and conclusions." In L. Crooks (Ed.), *An investigation of source of bias in the prediction of job performance . . . a six-year study. Proceedings of Invitational Conference.* Princeton, N.J.: Educational Testing Service, 1972, 9–77.

[43] Reese, H. B. Brief of Law School Admission Council Amicus Curiae, DeFunis v. Odegaard, No. 72–235, p. 25.

[44] Cole, N. S., *op. cit.;* Darlington, R. D.; Thorndike, R. L., *op. cit.*

five cases the average grade is slightly overestimated, and in three cases the average grade is slightly underestimated. Thus, whether a combined equation works in favor of or against women depends on the school. In none of the schools are the differences very large, nor are the differences in average predictor scores large relative to those typically observed between minority and majority groups.

ALTERNATIVE MODELS OF FAIR TEST USE

The Thorndike Model[45]

The usual definition of test fairness in terms of regression equations is fair to the law school in the sense that it provides the school with a way of selecting students whose average first-year grade is maximum. It is also "fair" to individual members of the groups under consideration because grades are not systematically over- or underpredicted for members of any group. Nonetheless, Thorndike clearly demonstrated that a test that has equal regression equations for the two groups ". . . is 'unfair' to the lower scoring group as a whole in the sense that the proportion qualified on the test will be smaller, relative to the higher-scoring group, than the proportion that will reach any specified level of criterion performance."[46]

Thorndike has argued persuasively that the traditional way of looking at test fairness in terms of equality of the prediction systems is not the only perspective that should be considered. Figure 3 illustrates the problem with the traditional definition that Thorndike has so clearly identified. A situation is depicted in which the regression of the criterion (e.g., grade average) on the test is identical in the two groups (shown by the solid line with a slope equal to .25). Thus, the test would be considered "fair" from the traditional psychometric point of view and according to the *EEOC Guidelines.*[47] Note, however, that the difference in means on the test is substantially larger than the difference on the criterion variable.

Now suppose, for purposes of illustration, that the mean of Group A on the criterion variable corresponded to what was considered minimum acceptable performance (i.e., those with grade averages above that point are considered successes, and those below it are considered failures). As can be seen in Figure 3, about 50% of the hypothetical Group A have criterion scores above this cutting point and about 20% of Group B (shaded area of the Group B distribution curve) have criterion scores above the cutting point. Since criterion scores are not known in advance, it is the predicted criterion scores that are used for selection. If only those individuals with predicted scores equal to or above the success-failure point on the criterion variable were accepted, then approximately 50% of Group A would be accepted, but essentially none of Group B members would be accepted. This is the phenomenon that Thorndike was referring to when he said that, while the traditional approach with equal regression equations is "fair" to individual members of the minor group, it is "unfair" to the minor group as a whole. ". . . in the sense that the proportion qualified on the test, will be smaller, relative to the higher scoring group, than the proportion that will reach any specified level of criterion performance."[48] In the illustration depicted in Figure 3, the relative proportions in Groups A and B that are qualified on the test are .50 and essentially zero, respectively, whereas the proportions above the success-failure point on the criterion variable are approximately .50 and .20, respectively.

Thorndike proposed that: "An alternate definition (of fairness) would specify that the qualifying scores on the test should be set at levels that will qualify applicants in the two groups in proportion to the fraction of the two groups reaching a specified level of criterion performance."[49] Thus, we have two conflicting definitions of fairness. The only time that the equal regression definition and Thorndike's definition are in agreement occurs when the validity is perfect. The difference between the traditional and Thorndike definitions of fairness is not merely of theoretical interest. The two models would suggest quite different predictor score requirements for admission.

In summary, Thorndike has identified a consequence that he views as undesirable that is apt to result from application of the traditional definition of "fairness." His formulation suggests that we should be looking at the implications for the proportions of students admitted as well as at the regression lines. For a case with the same regression equations so that illustrated in Figure 3, different cutting scores would be required to make the proportions qualified on the test equal to the proportions successful on the criterion. In particular, a lower cutting score on the test would be required for the hypothetical Group B in Figure 3 in order to satisfy Thorndike's alternate definition.

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[45] Portions of this section have been adapted from Linn, R. L., *op. cit.*

[46] Thorndike, R. L., *op. cit.*, p. 63.

[47] Equal Employment Opportunity Commission. Part 1607—Guidelines on employee selection procedures. Code of Federal Regulations, Title 29, Chapter XIV, 1970.

[48] Thorndike, R. L., *op. cit.*, p. 63.

[49] *Ibid.*, p. 63.

The problem that Thorndike identified is implicit in some earlier discussions. For example, Cooper and Sobel seem to be referring to this problem in their discussion of tests with low, but significant, validity. They argue that where such tests have an ". . . adverse impact on blacks, use of test scores as a major factor in employment decisions is likely to be unnecessarily prejudicial to blacks."[50] More than one sense of fairness seems implicit in Cooper and Sobel's comment.

Limitations of the Thorndike Model

Thorndike made a major contribution to thinking on the problem of fair test use by pointing out the need to consider the problem from more than one perspective. Petersen and Novick, however, have recently argued against the application of the Thorndike model, which they refer to as the Constant Ratio Model.[51] They object to the model on both theoretical and practical grounds.

The theoretical objection is that the Thorndike model is based on what they judge to be the wrong conditional probability. As a consequence, the model leads to what may be considered a logical contradiction and can lead to undesired results in some instances.

To demonstrate the logical contradiction Petersen and Novick introduce what they call the Converse Constant Ratio Model. Whereas Thorndike's Constant Ratio Model focuses on persons who would be considered successful and persons who are accepted, the Converse Constant Ratio Model focuses on the rejected and the unsuccessful. In Thorndike's Constant Ratio Model, the ratio of the success rate to the selection rate would be required to be equal for all groups. In the Converse Constant Ratio Model, the ratio of the failure rate to the rejection rate is required to be the same for all groups.

The Converse Constant Ratio Model is logically just as defensible as the Constant Ratio Model. Indeed, as noted by Petersen and Novick, the two models can be arrived at by the same logic. But, the two models are inconsistent, i.e., a selection strategy that is fair according to one model will generally not be fair according to the other one.

Due to this inconsistency Petersen and Novick argue that neither the Constant Ratio Model nor its converse should be used. The Constant Ratio Model and its converse, however, might be viewed as appropriate under two different value systems in the decision process. In the Constant Ratio Model, primary importance is attached to the success rate in comparison to the selection ratio, whereas the failure rate in comparison to the rejection ratio is of primary importance in the Converse Model. It may be that the different values expressed by these models can be accommodated in a decision theoretic framework.[52] In any event, a decision theoretic formulation should have the advantage of making explicit the differential values attached to various outcomes.

Conditional Probability Model and Its Converse

Cole proposed another definition of fair test use that differs from the previously considered models.[53] Her model is based on the conditional probability of being selected, given performance on the criterion at or above some specified level. A selection procedure would be fair, according to Cole's model, if the probability of being selected, given satisfactory performance, is the same for all groups.

Cole's Conditional Probability Model differs from the traditional regression model and from Thorndike's Constant Ratio Model on practical as well as theoretical groups. For situations where the majority group regression equation tends to overpredict for minority group members, as was found above for the predictors of grades in law school, then strict applications of the three models would result in the fewest minority students selected according to the regression model and the most selected according to the Conditional Probability Model. The fact that the Conditional Probability Model would tend to justify the selection of more minority students in typical situations may be seen as a great advantage of the model. It seems to provide a rational justification for procedures that will usually be consistent with achieving a goal seen as desirable by many. Of course, the result for a particular situation is no tadequate justification per se, for any model.

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[50] Cooper, G. and Sobel, R. B. "Seniority and testing under fair employment laws: A general approach to objective criteria." *Harvard Law Review,* 1969, *82,* 1598–1679, p. 1662.

[51] Petersen, N. S. and Novick, M. R., *op. cit.*

[52] Personal communication from Nancy S. Cole indicates that she, Richard L. Sawyer, and James W. L. Cole are working on a general decision theoretic model in which each of the proposed models can be expressed as different utilities in the decision process. She believes that the Constant Ratio Model and the Conditional Probability Model, as expressed here, may be approximations to proper decision theoretic solutions.

[53] Cole, N. S., *op. cit.*

Petersen and Novick introduced the Converse Conditional Probability Model to illustrate that the two models that can be derived from the same logic are generally incompatible. They argue that the Conditional Probability Model uses the wrong conditional probability which results in the contradiction between the model and its converse. They also question whether it is fair to students to select them when they have little chance of success, as can happen with the Conditional Probability Model.

Although the Conditional Probability Model and its converse yield inconsistent results, it might be argued that the inconsistency is due to implicit differences in values attached to various outcomes under the two models. Under the Conditional Probability Model, the concern is with the potentially successful students and no concern is given to the potential failures. Again, however, a decision theoretic formulation has the advantage of making the differential values, or utilities, explicit.

Decision Theoretic Model

The lack of general agreement on what constitutes fair test use creates real discomfort for anyone who would like to have a well-specified set of procedures to follow in order to insure fairness. This desire for a definite and mechanical answer may, in fact, be part of the problem, however. The question of what constitutes fairness or how admissions decisions should be made for members of different groups apparently is not amenable to a strictly technical solution.

As noted by Darlington, ". . . there is often a conflict between the two goals of low cultural discrimination and high validity, and no simple mechanical resolution of this conflict is generally possible, since an optimum balance between the two goals necessarily depends on a subjective judgment concerning their relative importance."[54] In deciding how to pursue the goal of increasing the number of minority persons in law schools and the goal of admitting to law school those students with the highest probability of excellent academic performance, it is necessary to look beyond a technical resolution of the problem. Competing values must be weighed.

Although the problem of balancing the pursuit of conflicting goals cannot be solved by purely technical means, there are approaches which can make the process of weighing the competing goals explicit. Darlington has suggested one way of doing this by explicitly acknowledging that a given grade average for a member of a minority group is to be valued just as highly as a somewhat higher grade average for a member of the majority group. This, in effect, would be like adding a constant to the predicted grade average of minority group applicants before comparing it to the predicted grade averages of majority group applicants. Although this is done implicitly now in some schools, there may be advantages to making the procedure explicit and furthermore, as Anderson suggests, public.[55]

The most satisfactory means to weigh the competing values explicitly is to formulate the admissions problem in decision theoretic terms. For situations in which it is reasonable to dichotomize the criterion into success and failure and the predictor into accept and reject, values attached to each of the four outcomes (accept-success, accept-fail, reject-would succeed, and reject-would fail) need to be considered.[56] Separate consideration of these four possible outcomes for members of a minority group and for members of the majority group yields a total of eight outcomes to which values need to be attached.[57] A complete treatment would require that values be assigned to each of the eight outcomes and that the selection rules be identified that would maximize the overall value. Discussions of fair test use would benefit from explicit consideration of the values attached to all eight outcomes even if formal maximization procedures were never employed.

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[54] Darlington, R. D., *op. cit.*, p. 78.

[55] Anderson, W. R. "The admissions process in litigation." *Arizona Law Review*, 1973, *15*, 81–115.

[56] In setting the utilities for the two-by-two table for each group, there are really only two evaluations that need to be made because the zero point and scale are arbitrary. Thus only the difference between row utilities are important (M.R. Novick, personal communication). For a discussion or related work see Novick, M. R. and Lewis, C. *Problems in criterion-referenced measurement*. CSE Monograph Series in Evaluation No. 3, Los Angeles: Center for the Study of Evaluation, University of California.

[57] This idea was first suggested to the author by Robert F. Boldt (personal communication). The approach has been developed by Gross, A. L. and Su, W. "A decision theory approach to test bias." Unpublished manuscript, 1973.

A more complete decision theoretic formulation has recently been developed by Petersen and Novick.[58] By explicitly specifying the utility that would be assigned to each possible outcome, the decision theoretic approach provides a solution that maximizes the overall utility. The goal of increasing the enrollment of minority group students could be accommodated within the decision theoretic approach by attaching utilities to the outcomes for minority group members that are different from those attached to the same outcomes for majority group members.

Although the competing values of increased minority group enrollment and of high grade averages can be accommodated within a decision theoretic model, many practical problems would need to be resolved. Decisions about who is to determine the utilities to be used must be made, and a justification of the choice of any particular set of utilities would be required. The latter may be particularly difficult if different utilities are to be attached to the same outcome for members of different groups.

CONCLUSIONS

Messick and Anderson have distinguished between (1) the adequacy of a test as a measure, and (2) the value judgment of whether a test should be used in a particular context.[59] Predictors of first-year grades is law school that have acceptable validities for one group have generally been found to have acceptable validities for other groups. In addition, the expectation that UGPA and LSAT would underpredict first-year grades of minority group members has not been supported. On the contrary, overprediction for black or Mexican American students was found in every school studied. Thus, from the standpoint of technical adequacy, the traditional predictors of law school grades are usually found to be about as adequate for minority persons as for majority persons, and the use of a single prediction equation usually favors the minority group member.

The above generalization, although consistent with results obtained for the prediction of undergraduate grades, is not intended to suggest that further investigations are unnecessary. There seems to be enough variation from one situation to another to require that differential validity studies should be conducted when technically possible.

Of possibly greater importance, however, is the realization that studies of predictive bias depend upon the acceptance of a criterion measure. Inasmuch as grades are as inadequate criterion measure, then the absence of predictive bias is of little value. The first-year grade average may be thought to tap too narrow a range of behaviors; it may lack reliability, or it may itself be subject to systematic errors for members of one group (i.e., it may be biased). Greater emphasis needs to be placed on the selection and development of criterion measures that go beyond first-year grades.

Even if the predictors are judged to have adequate validity and first-year grade average is considered an acceptable criterion, it is undesirable to use the predicted first-year grade average in isolation. Predicted grades should be used along with other sources of information, and the implications of various uses should be evaluated from several perspectives. The implications of a procedure that excludes or results in an underrepresentation of a minority group must be evaluated in those terms. It is not sufficient to consider only the expected performance levels on the criterion measure. Ideally, the utility of every possible outcome would be evaluated for different groups of people and these utilities explicity used in the admissions process.

APPENDIX C

THE USE OF VALIDITY STUDY PREDICTION EQUATIONS AS ADMISSIONS INDEX FORMULAS IN THE LSDAS SYSTEM

The Law School Data Assembly Service (LSDAS) system has been designed so that one of the equations resulting from a Validity Study Service (VSS) study can be used as an Admissions Index formula.[1]

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[58] Petersen, N. S. "An expected validity model for 'optimal' selection." ACT Technical Bulletin No. 24. Iowa City, Iowa : American College Testing Program, 1974.

[59] Messick, S. and Anderson, S. "Educational testing, individual development, and social responsibility." *The Counseling Psychologist*, 1970, 2, 80–88.

[1] Under certain conditions two equations resulting from a VSS study could be used. For example, two subgroups might be categorized by undergraduate institution, perhaps your own versus all others. Thus, there would be two formulas: one for applicants from the undergraduate college of your own university and another formula for applicants from all other institutions.

Most law schools that have had new validity studies will probably want to consider using one of their new equations as an Admissions Index formula in the LSDAS system during 1974–75. The information and examples set forth in this memorandum may be helpful to you in reaching a decision concerning the use of a validity study prediction equation as an Admissions Index formula for your law school.

PREDICTION EQUATIONS IN YOUR VALIDITY STUDY REPORT

The validity study report for your school, which is enclosed (following page 32 of the pamphlet *Law School Validity Study Service* or, if this is your school's first Validity Study Service (VSS) study, inserted in the red notebook following page 32 of the general section), sets forth two or possibly more equations. Please refer to these equations. They are labeled "regression equation" and appear in the reports on the pages with "Table 4" (also Tables 5 and 6 if your study includes subgroups).

The first equation is based on the optimally weighted combination of the undergraduate grade point average (UGPA) and of the LSAT score for predicting first-year law school average grades (PFYA) for the particular class whose records were used for the study.

The second equation is similar to the first except that it includes the Writing Ability score (WA) in addition to the UGPA and the LSAT.

All Validity Study Service reports include these first two equations. If your study used optional predictors, such as LSAT College Mean (LCM) or some other predictor of your choice, two o rthree additional equaltions are included.

II. COMPARING WEIGHTS FOR UGPA AND LSAT

Suppose a law school wishes to compare the amount of weight for the UGPA and the LSAT in a prediction equation as produced by its validity study. There are two ways this may be done. One way is the relative predictive weight method. Another is the per cent approach.[2]

A. Relative Predictive Weights

The relative predictive weights method is illustrated by the following example. Assume that a prediction equation for Law School A is:

Predicted first-year law school average (PFYA) = 0.2247 (UGPA) + 0.0021 (LSAT) + 0.7515.

Set the multiplier for the LSAT (e.g., 0.0021) equal to 1. This is done by dividing the multiplier for the LSAT and the multiplier for the UGPA by the multiplier for the LSAT.

$$\text{e.g., } \frac{0.2247}{0.0021}\text{ (UGPA) } + \frac{0.0021}{0.0021}\text{ (LSAT)}$$

$$107\text{ (UGPA)} + 1\text{ (LSAT)}$$

Thus the relative predictive weight would be:

107 for the UGPA

and

1 for the LSAT

This means that a difference of 107 points in the LSAT score would produce the same amount of difference in the predicted first-year average (PFYA) as a difference of 1 point in the UGPA would produce.

Thus—if applicant X has a 3.0 UGPA,
and applicant Y has a 2.0 UGPA, 1 point lower,
and X has a 500 LSAT,
and Y has a 607 LSAT, 107 points higher,
they will both have the same predicted grade.

For X, 107 times the UGPA (3.0) is 321,
1 times the LSAT (500) is 500,
321 plus 500 is 821.

For Y, 107 times the UGPA (2.0) is 214,
1 times the LSAT (607) is 607,
214 plus 607 is 821.

The effective range of numerical values for the UGPA is generally from 1.0 to 4.0. The range for the LSAT scores is 200 to 800 (i.e., the UGPA multiplied by 200 produces numbers the same as the LSAT range). Thus, there is a sense in which one can say that a weight of about 200 for UGPA is roughly equivalent to a weight of 1 for the LSAT. Therefore, if the relative predictive weight which is produced by taking the steps above is

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[2] These methods, although based on the results of a regression analysis, are highly simplified and not precise.

200 for the UGPA

and

1 for the LSAT

then the two predictors are being weighted approximately equally. Since in our example the UGPA was weighted 107, the UGPA has less predictive value than the LSAT. If the predictive weight for another school were more than 200 for the UGPA, then in that school's case the UGPA would have *more* predictive value than the LSAT.

The Admissions Index formulas for the 46 law schools that used a single formula based on the two predictors, UGPA and LSAT, during 1973–74 were looked at in this way:

> The median weight for the UGPA turned out to be about 200 (i.e., about equal weight to the UGPA and the LSAT).
>
> The lowest weight was under 100 (more weight to the LSAT than to the UGPA).
>
> The highest weight was over 300 (more weight to the UGPA than to the LSAT).

Weights were also computed in this manner from the two-predictor (UGPA and LSAT) equations in 115 Validity Study Service (VSS) studies in 1972–73 and 1973–74:

> The median weight for the UGPA was 136 (more weight to the LSAT than to the UGPA).
>
> The lowest weight was 35 (much more weight to the LSAT than to the UGPA).
>
> The highest weight was over 600 (much more weight to the UGPA than to the LSAT).

Thus, there is a great variation in the relative weights for the UGPA and the LSAT that law schools are using or that result from their validity studies.

B. Per Cent Approach

A second way of comparing the amount of weight given to the UGPA and the LSAT in a prediction equation is the per cent approach. In this approach one needs not only the prediction equation but also the standard deviations of the predictors. (The standard deviations for a school's Validity Study Service report are found in Table 4.)

This second method of comparing the weights is shown in the following example. Assume again the prediction equation for Law School A is:

Predicted first-year law school average (PFYA)=0.2247 (UGPA)+0.0021 (LSAT)+0.7515

Further assume that Law School A had a standard deviation of 0.41 for the UGPA and 70 for the LSAT. The procedure is illustrated in the following example:

First, multiply each weight by the corresponding standard deviation:

> Multiply the weight for the UGPA (e.g., 0.2247) by the standard deviation for the UGPA (e.g., 0.41). The result for this example is 0.092127.
>
> Multiply the weight for the LSAT (e.g., 0.0021) by the standard deviation for the LSAT (e.g., 70). The result for this example is 0.147.

Add the two results together. 0.092127+0.147=0.239127.

Then compute the per cent that each is of the total (0.239127), as shown below:

$$\text{UGPA} \left(\frac{0.092127}{0.239127}\right) \quad 39\%$$

$$\text{LSAT} \left(\frac{0.147}{0.239127}\right) \quad \frac{61\%}{100\%}$$

This method of comparing the weights for Law School A's equation leads to the same conclusion that the first method did. That is, the LSAT score has more predictive value than has the UGPA at Law School A.

A serious limitation of the second method of comparing the relative predictive effectiveness of the UGPA and the LSAT is that it may be misleading to the untrained user, since it implies that the combination of the two predictors accounts for 100 per cent of the effectiveness in predicting the first-year average grade in law school. The numerical prediction is far from being a perfect index of what an applicant will do in law school. Many other factors, such as motivation to become a lawyer and perseverance, for instance, would have an important effect on a student's performance but are not included in the prediction equation. However, the correlation coefficient in all cases makes it clear that the prediction is not perfect. If it were perfect, the correlation coefficient would be 1.00, whereas a typical coefficient from the law school validity studies is .43 (for UGPA and LSAT used in combination).

A major advantage of the first method is that it enables a law school to compute an Admissions Index that has numerical values that do not look like actual law school grades.

III. RELATIVE PREDICTIVE WEIGHTS FOR A TWO-PREDICTOR EQUATION

Some law schools desire to make direct use of a prediction equation (also called "regression equation") resulting from a validity study to compute Admissions Indexes for their applicants in term of the predicted first-year average. Others prefer to use numbers that bear a relationship to the first-year average but which are not on the same numerical scale. One way to get numbers that look different from your law school's grading scale and, at the same time to get weights for the UGPA and the LSAT that are easier to think about than the 4-decimal place numbers given in the prediction equation is to use relative predictive weights. To do this you would follow the relative predictive weight method as illustrated in II.A above. You will recall that the results for that example for Law School A turned out to be 107 for UGPA and 1 for LSAT.[3]

To get a feeling as to how these relative predictive weights relate to individual predictions or computations of Admissions Indexes, it may be useful to consider some illustrative examples. Suppose we have nine applicants with grades and scores, as follows:

Applicant	Undergraduate grade point average	LSAT score
Ann	4.0	700
Joe	3.0	700
George	2.0	700
Jack	4.0	600
Jim	3.0	600
Alice	2.0	600
Henry	4.0	500
Mary	3.0	500
Tom	2.0	500

It is obvious that these examples have been selected so that there are three different values of undergraduate GPA (2.0, 3.0, 4.0) and three different LSAT scores (500, 600, and 700) represented.

Example I Law School X

If Law School X, by taking one of its prediction equations, produces through the methods illustrated a relative predictive weight of about 200 for the UGPA and 1 for the LSAT (i.e., about equal weight to both), then, for example, Ann's Admissions Index would be computed by the following steps:

Her UGPA is 4.0.

The UGPA weight (200) times the UGPA (4.0) is 800, which becomes the weighted UGPA.

Her LSAT score is 700.

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[3] If you wish to refer to the validity study report for the law school whose equation was used in the example, please turn to page 10 of *Law School Validity Study Service*, enclosed, where you will find a "Table 4" for "Sample A College of Law." In the following discussion reference will be made to results for "Sample A College of Law," whose VSS report tables are on pages 7–10, and "Sample B School of Law," whose tables are on pages 11–16 of the general section of your enclosed report. Appreciation is extended to these two law schools that have very kindly granted their permission to use their results as examples. School A selected only the basic study; B used LCM, another additional predictor, and divided its class into two subgroups.

The LSAT weight (1) times the LSAT score (700) is 700, which becomes the weighted LSAT.

Thus. her weighted UPGA (800) plus weighted LSAT (700) is 1500, which becomes the Admissions Index.

Similarly, Alice's Index would be 1000 and George's would be 1100. With weights of 200 and 1 it turns out that Henry, with an LSAT score of 500 and an undergraduate grade point average of 4.0 would have the same Admissions Index (1300) as Joe (1300), whose LSAT score of 700 is 200 points higher than Henry's and whose undergraduate grade point average of 3.0 is one point lower. A table showing the sample Admissions Indexes computed from the formula 200 UGPA + 1 USAT follows:

Undergraduate GPA	LSAT score					
	500		600		700	
4.0	Henry	1,300	Jack	1,400	Ann	1,500
3.0	Mary	1,100	Jim	1,200	Joe	1,300
2.0	Tom	900	Alice	1,000	George	1,100

Example 2 Law School Y

If the prediction equation for Law School Y produces through the above method weights of 100 and 1 (i.e., more weight to the LSAT score), then the table for the same applicants would look like this:

Undergraduate GPA	LSAT score					
	500		600		700	
4.0	Henry	900	Jack	1,000	Ann	1,100
3.0	Mary	800	Jim	900	Joe	1,000
2.0	Tom	700	Alice	800	George	900

In this second example Henry, Jim, and George have the same computed Admissions Indexes (900).

Example 3 Law School Z

If in Law School Z the weights were 300 to 1 (more weight to UGPA) you could compute a third table in the same way that the two tables above were computed. For example, Alice's Admissions Index using 300 UGPA + 1 LSAT would be 1200; Henry's would be 1700.

SUMMARY

It is clear from these examples that the use of relative predictive weights as different as 200 to 1 and 100 to 1 would make a noticeable difference in the ranking of some individuals. In these examples, the rankings from high to low, based on the Admissions Indexes computed in Examples 1 and 2 above, would turn out as follows:

	Score
200 UGPA plus 1 LSAT	
Ann	1,500
Jack	1,400
Henry and Joe	1,300
Jim	1,200
Mary and George	1,100
Alice	1,000
Tom	900
100 UGPA plus 1 LSAT:	
Ann	1,100
Jack and Joe	1,000
Henry, Jim, and George	900
Mary and Alice	800
Tom	700

In both examples the person with the highest UGPA and LSAT, Ann, ranks first, and, correspondingly, Tom, with the lowest UGPA and LSAT given in the examples, ranks lowest. Since the formula using a relative predictive weight of 100 gives more weight to the LSAT score than does the formula using a relative predictive weight of 200, there is a noticeable difference in rank for Joe and George, with LSAT scores of 700, compared with Henry and Mary, whose LSAT scores are 500—200 points lower.

IV. SAMPLE PREDICTION TABLE

To relate this way of looking at prediction equations or Admissions Index formulas back to the type of information that is provided by a Validity Study Service report, a sample prediction table for Law School A is given on the next page. The original prediction equation whose relative predictive weights were found to be 107 and 1 was used to prepare the table. In the original example for Law School A the prediction equation was

$$PFYA=0.2247\ (UGPA) + 0.0021\ (LSAT) + 0.7515$$

Assume you wish to compute a predicted first-year law school avearge for Alice whose:

UGPA was 2.0
LSAT was 600

The UGPA weight of 0.2247 times the UGPA of 2.0 is 0.4494, the weighted UGPA.

The LSAT weight of 0.0021 times the LSAT score of 600 is 1.2600, the weighted LSAT.

The weighted UGPA plus the weighted LSAT is 1.7094, plus the additive constant of 0.7515 is 2.4609.

Thus, Alice's predicted grade, rounded to 1 decimal place, is 2.5, which is located in the sample prediction table under the column heading of 600 for LSAT score and on the line for an undergraduate average (UGPA) of 2.00. Although the numbers computed from using weights of 107 and 1 or from using the prediction equation in the form in which it is given in a Validity Study Service report look very different, they would rank the students in the same order.

Since the UGPA weight of 107 in Law School A is very close to the rounded value of 100 used in example 2 above, an increase of about 100 points in the LSAT score and a decrease of 1.00 in the undergraduate average (or an increase of 1.0 in the undergraduate avearge and a decrease of 100 in the LSAT score) should result in essentially the same predicted first-year law average grade, except for rounding differences. This may be seen by examining the entries in the sample prediction table. Two sets of examples (UGPAs of 4.00, 3.00, and 2.00, paired with LSAT scores of 550, 650, and 750, respectively, and 3.60, 2.60, and 1.60, paired with 400, 300, and 600, respectively) have been marked to emphasize this relationship.

Two notes of caution concerning the examples given here must be kept in mind. The first concerns the empirical determination of prediction equations. The second concerns the use of such equations to predict individual applicants' performance in law school.

First, although a prediction equation of the kind given in the example for Law School A is objective, empirically determined, and, from a statistical viewpoint, the "best" equation that can be determined from the data on the particular set of predictors and grades for the particular class on which the study is based, there is no assurance that equations developed on data for another class, even at the same school, would be the same. There would necessarily be a certain amount of statistical fluctuation, or sampling error, as it is called, even if the two classes were admitted under the same policy, taught the same first-year courses by the same teachers, and were otherwise treated as similarly as possible. Although one would expect more variation from one law school to another than from one class to another at the same school, part of the difference in relative predictive weights from one law school to another is also due to sampling error.

SAMPLE PREDICTION TABLE—PREDICTED 1ST-YEAR LAW AVERAGE GRADES FOR STUDENTS WITH VARIOUS UNDERGRADUATE AVERAGES WHO EARN VARIOUS LSAT SCORES BASED ON THE RECORDS OF THE 1971 ENTERING CLASS—SAMPLE A COLLEGE OF LAW, 150 STUDENTS

Undergrad average	Predicted 1st-year average grade for student whose LSAT score is—												
	200	250	300	350	400	450	500	550	600	650	700	750	800
4.00	2.1	2.2	2.3	2.4	2.5	2.6	2.7	2.6	2.9	3.0	3.1	3.2	3.3
3.80	2.0	2.1	2.2	2.3	2.4	2.6	2.7	2.8	2.9	3.0	3.1	3.2	3.3
3.60	2.0	2.1	2.2	2.3	2.4	2.5	2.6	2.7	2.8	2.9	3.0	3.1	3.2
3.40	1.9	2.0	2.1	2.3	2.4	2.5	2.6	2.7	2.8	2.9	3.0	3.1	3.2
3.20	1.9	2.0	2.1	2.2	2.3	2.4	2.5	2.6	2.7	2.8	2.9	3.0	3.2
3.00	1.6	2.0	2.1	2.2	2.3	2.4	2.5	2.6	2.7	2.8	2.9	3.0	3.1
2.80	1.8	1.9	2.0	2.1	2.2	2.3	2.4	2.5	2.6	2.7	2.9	3.0	3.1
2.60	1.8	1.9	2.0	2.1	2.2	2.3	2.4	2.5	2.6	2.7	2.8	2.9	3.0
2.40	1.7	1.8	1.9	2.0	2.1	2.2	2.3	2.4	2.6	2.7	2.8	2.9	3.0
2.20	1.7	1.8	1.9	2.0	2.1	2.2	2.3	2.4	2.5	2.6	2.7	2.8	2.9
2.00	1.6	1.7	1.8	1.9	2.0	2.1	2.3	2.4	2.5	2.6	2.7	2.8	2.9
1.80	1.6	1.7	1.8	1.9	2.0	2.1	2.2	2.3	2.4	2.5	2.6	2.7	2.8
1.60	1.5	1.6	1.7	1.8	2.0	2.1	2.2	2.3	2.4	2.5	2.6	2.7	2.8
1.40	1.5	1.6	1.7	1.8	1.9	2.0	2.1	2.2	2.3	2.4	2.5	2.6	2.7

Note: The following equation, derived from the best-weighted combination of undergraduate average and LSAT score used in the multiple correlation of these predictors with 1st-year average grades, was used to prepare this table: predicted FYA = 0.2247 (UGPA) + 0.0021 (LSAT) + 0.7515.

Second, as has been stated in all law school validity study reports prepared at Educational Testing Service during the past twenty-five years, a predicted grade (or, in the LSDAS context, an Admissions Index) computed from the kind of equation resulting from a validity study is only an estimate, not an exact forecast, of what an applicant will do in his or her first year of law school.

Accompanying every prediction table ("Table 2" in each validity study report) is an expectancy table ("Table 3" in each report) that may be used to determine the chances in 100 that an entrant will earn a first-year average grade equal to or higher than any selected average grade. If you will refer to page 9 in *Law School Validity Study Service*, enclosed, you will see from Table 3 for Sample A College of Law that a student would have a 50–50 chance of earning exactly the grade that was predicted for him or her. A student predicted to make a 3.0 average, for example, would have more than 50 chances in 100 (i.e., 88 chances in 100) of earning an average of at least 2.6 but fewer chances (i.e., 12 chances in 100) of earning an average of at least 3.4.

V. SELECTING AN APPROPRIATE EQUATION FOR YOUR LAW SCHOOL IN 1974–75

The following material is designed to assist you in selecting an appropriate equation to use in calculating Admissions Indexes for applicants to your law school during 1974–75.

The Validity Study Service report for your school contains two or more prediction equations. Please refer to the report for your school and, for illustrative purposes, the report for Sample A College of Law (set forth in Table 4 on page 10 of the *Law School Validity Study Service*).

On purely statistical grounds, an equation accompanied by the highest "shrunken multiple correlation" (which appears in parentheses in each Validity Study Service report)[4] would be the best one to pick. This is so, since, other things being equal, it would yield the most accurate predictions of the first-year average grades that students would be expected to earn. When the multiple correlation is higher, "the standard error of estimate" (which also appears in each Validity Study Service report) [5] is lower, another indication of greater accuracy of prediction.

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[4] The term "shrunken multiple correlation" will be a new one for many admissions officers. This brief memorandum is intended to provide you with a simplified, basic understanding of such statistical terms. Please refer to pages 2–4 of the enclosed *Law School Validity Study Service* for further background information regarding the concept of correlation and its use in validity studies.

Briefly stated, a *correlation coefficient* expresses a relationship between two measures, such as height and weight, or LSAT scores and first-year average grades in law school. A *multiple correlation coefficient* is used to evaluate combinations of predictors, such as the two-predictor combination of UGPA and LSAT or the three-predictor combination of UGPA, LSAT, and WA. In comparing multiple correlation coefficients based on different numbers of predictors you should use the *shrunken multiple correlation coefficient*, which adjusts the multiple correlation coefficient to take account of different numbers of predictors and therefore improves the statistical precision of the comparison.

ILLUSTRATIVE EXAMPLES

The two law schools whose results were selected for use as examples in the *Law School Validity Study Service* were chosen because their results were typical, or near the middle of the distribution of all of the study results from the 90 studies carried out in 1972–73.

Sample A—College of Law (page 10)

In Sample A College of Law both the two-predictor combination of UGPA and LSAT and the three-predictor combination of UGPA, LSAT, and WA yield the same shrunken multiple correlation coefficient (.43) and the two standard errors of estimate are identical (0.35). (It should be noted that the Writing Ability test score has a small negative weight in the three-predictor equation, which may raise policy questions about its use, because a higher WA score would be associated with a lower predicted first-year average, and vice versa. To avoid this anomaly, most schools in the position of Sample A College of Law would probably want to use the two-predictor equation.)

Sample B—School of Law (page 14)

Sample B School of Law's study included the LSAT College Mean (LCM) as one of the predictors. (Note that, although Sample B School of Law used a fifth predictor (ADP) the LSDAS system is not equipped to handle an equation with five predictors.)

It is not surprising that Sample B's shrunken multiples are almost the same as Sample A's for the combinations of UGPA and LSAT and for UGPA, LSAT, and WA. The standard errors of estimate for Sample B, however, look quite different from Sample A's because the two law schools used very different numerical scales for their grades. In Sample B's case the standard error of estimate for the three-predictor combination of UGPA, LSAT, and LCM is slightly smaller than the standard errors of estimate for the other combinations (3.36 compared with 3.37 and 3.38), indicating that the combination of UGPA, LSAT, and LCM yields very slightly more accurate predictions than the other three combinations. Thus, on statistical grounds, there is a slight preference for the three-predictor combination of UGPA, LSAT, and LCM.

VI. USING AN EQUATION WHICH INCLUDES LSAT COLLEGE MEAN (LCM)

As previously indicated, Sample B School of Law had the LCM as one of its predictors. Please refer to Sample B School of Law (Table 4, page 14 of the *Law School Validity Study Service*).

When a law school considers the use of an equation which includes the LCM it is important for the admissions officer to be aware of the effect of the use of such an equation on individual student applicants. This is particularly important where the relation between the weight accorded to the LSAT College Mean (LCM) and the weight accorded to the UGPA is such that a relatively small change in the LCM (e.g., 35 points) results in the same amount of change in the predicted first-year average as does a substantial change in the UGPA (e.g., one-third of a grade point).

The following examples illustrate the relative effect on individual prediction of the first-year average (PFYA) from using the LCM. By following the steps shown in the examples of using data on a sample of your own applicants, you will be able to determine the effect of the use of the LCM on your own applicants. Two examples follow: one where there is relatively little effect and one where there is relatively large effect from the use of the LCM on the individual prediction of first-year average.

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[5] The *standard error of estimate* expresses the accuracy of prediction in terms of the numerical scale used for the first-year average grades (FYA). For example, at Sample A College of Law (page 10), whose 1971 entering class had a mean FYA of 2.57, the standard error of estimate is 0.35. This can be interpreted roughly to mean that of every 3 predictions made from these results, 2 should be within 0.35 point of the actual grade and one would differ by more than that amount.

Example A: Relatively Little Effect on Individual Predictions from the Use of the LSAT College Mean (LCM)

We shall use the same nine applicants as those in Examples 1 and 2 on pages 5 and 6. Following are their grades and scores with the addition of the LSAT College Means (LCMs) from the imaginary undergraduate colleges that they attended (they are ranked by LSAT score):

Applicant	Undergraduate grade point average	LSAT score	LCM
Ann	4.0	700	480
Joe	3.0	700	600
George	2.0	700	560
Jack	4.0	600	560
Jim	3.0	600	520
Alice	2.0	600	520
Henry	4.0	500	600
Mary	3.0	500	520
Tom	2.0	500	600

Please refer to Table 4 for Sample B School of Law in the *Law School Validity Study Service* (page 14). You will note that there are five prediction equations. This discussion concerns only the following two prediction equations: The two-predictor equation using only the UGPA and LSAT

$$\text{PFYA}=3.3291\ (\text{UGPA})+0.0192\ (\text{LSAT})+53.8299$$

and the three-predictor equation using UGPA, LSAT and LCM:

$$\text{PFYA}=3.3002\ (\text{UGPA})+0.0186\ (\text{LSAT})+0.0102\ (\text{LCM})+48.8996$$

Note that the shrunken multiple correlation coefficient (.44) is the same for both equations.

Applying the two-predictor equation to Alice's UGPA and LSAT score:

$$\text{PFYA}=(3.3291)\times(2.0)+(0.0192)\times(600)+53.8299$$

you obtain a PFYA for her of 72.0.

Following the same step for each applicant, the PFYA for all the applicants would be as follows:

Undergraduate GPA	LSAT score					
	500		600		700	
4.0	Henry	76.7	Jack	78.7	Ann	80.6
3.0	Mary	73.4	Jim	75.3	Joe	77.3
2.0	Tom	70.1	Alice	72.0	George	73.9

We shall now illustrate what would happen to these applicants if the LCM was included with the UGPA and the LSAT. Under this circumstance, Sample B School of Law would apply the three-predictor equation (UGPA, LSAT and LCM) given above. Applying the three-predictor equation to Alice's UGPA, LSAT score, and LCM:

$$\text{PFYA}=(3.3092)\times(2.0)+(0.0186)\times(600)+(0.0102)\times(520)+48.8996$$

you obtain a PFYA for her of 72.0.

You will note that the PFYA for Alice is the same (72.0) using either the two-predictor or three-predictor equation. Following the same steps for each of the other applicants using their UGPA, LSAT, and LCM as given above, the PFYA for all of them would be as follows:

Undergraduate GPA	LSAT score					
	500		600		700	
4.0	Henry	77.6	Jack	79.0	Ann	80.1
3.0	Mary	73.4	Jim	75.3	Joe	78.0
2.0	Tom	70.9	Alice	72.0	George	74.3

Although some of the predicted grades change slightly, the ranking (from high to low based on PFYA) of the applicants would be the same under either of these two prediction systems:

Applicant	PFYA under 2-predictor equation (UGPA, LSAT)	PFYA under 3-predictor equation (UGPA, LSAT, LCM)
Ann	80.6	80.1
Jack	78.7	79.0
Joe	77.3	78.0
Henry	76.7	77.6
Jim	75.3	75.3
George	73.9	74.3
Mary	73.4	73.4
Alice	72.0	72.0
Tom	70.1	70.9

Note that Ann, with the highest UGPA (4.0) and LSAT (700) ranks first (i.e., has the highest PFYA compared to the others) while Tom, with the lowest UGPA (2.0) and LSAT (500) ranks last (i.e., as the lowest PFYA compared to the others).

Another way to determine whether the use of LCM will result in a change in the ranking of applicants is to see how much difference in the LCM brings about the same difference in predicted grade that a given difference in UGPA would produce. For example, in Sample B School of Law's *three-predictor equation*, an increase of 324 (e.g., 400 to 724) points in the LCM would lead to the same change in the PFYA as an increase of 1.0 point (e.g., from 2.0 to 3.0) in the UGPA. (324 was obtained by dividing the weight for the UGPA in the three-predictor equation, 3.3092, by the weight for the LCM in that equation, 0.0102. This yields an LCM point increase equivalent to a 1.0 UGPA increase.) If you had LCMs of 400 and 724 (324 point difference in the LCM) for two applicants to Sample B School of Law who had the same UGPA (2.0) and LSAT scores (500), their PFYAs, using the three-predictor equation, would be as follows:

Applicant	LCM	PFYA for UGPA (2.0)/ LSAT (500)
A	724	72
B	400	69

Similarly, if the two applicants had UGPAs of 2.0 and 3.0 (1.0 point difference in UGPA), but the same LCM (400) and LSAT scores (500), their PFYAs using the three-predictor equation would be as follows:

Applicant	UGPA	PFYA for LCM (400)/ LSAT (500)
A	3.0	72
B	2.0	69

In each case the PFYA goes from 69 to 72. In the first instance, although the two applicants do not differ in UGPA and LSAT, a relatively large difference in the LCM of the colleges they have attended has resulted in applicant A being ranked higher. In the second instance, although both applicants had the same LSAT score and came from undergraduate colleges with the same LCM, a one-point UGPA difference has resulted in applicant A being ranked higher.

Clearly, LCMs differing by as much as 324 points are extremely unlikely. However, since in the foregoing example a full point (1.0) difference in UGPA is equivalent to a 324 point difference in LCM, a difference of about one-third of a point in the UGPA (e.g., 3.0 to 3.3) would be equivalent to a 108 point difference (one-third of 324) in LCM. Obviously, many applicants will differ by as much as 108 points in LCM or by one-third of a point in UGPA.

Example B: Relatively Large Effect on Individual Predictions from the Use of the LSAT College Mean (LCM)

Let us assume, for the sake of example, that we have another law school with the following fictitious equations and shrunken multiples. Let us further assume that this school has transformed its equations to simpler numbers by the relative predictive weights method described on page 2 of this memorandum.

Two-predictor equation (UGPA and LSAT):

PFYA=109 (UGPA)+1 (LSAT) (.44 shrunken)

Three-predictor equation (UGPA, LSAT and LCM):

PFYA=206 (UGPA)+1 (LSAT)+2 (LCM) (.50 shrunken)

Note that there is a noticeable increase in the shrunken multiple based on UGPA, LSAT, and LCM compared with the shrunken multiple for the two-predictor combination of UGPA and LSAT. Using the steps at the end of the previous example on this fictitious law school's three-predictor equation we find that a change of about 34 points in LCM corresponds to a difference of one-third of a grade point.

The *two-predictor equation* (UGPA and LSAT) for this fictitious school would not yield the same numerical results for PFYA as would be yielded by applying the two-predictor equation of Sample B law school to the same applicants. However, the applicants would be ranked the same at both the fictitious law school and Sample B law school. You could confirm this by using the date for the applicants in the previous example (page 11) and following the steps for Sample B School of Law given on page 11 but using the fictitious school's two-predictor equation (PFYA=109 UGPA+1 LSAT).

Thus, if the applicants in our example had applied to both the fictitious law school and Sample B School of Law, and each law school had applied its own *two-predictor equation* (PFYA=109 UGPA+1 LSAT for the fictitious law school and PFYA=3.3291 UGPA+0.0192 LSAT+53.8299 for Sample B School of Law) to the applicant's grades and LSAT scores, the results would be as follows:

Applicant	Fictitious law school: PFYA under their 2-predictor equation (UGPA, LSAT)	Sample B school of law: PFYA under their 2-predictor equation (UGPA, LSAT)
Ann	1,136	80.6
Jack	1,036	78.7
Joe	1,027	77.3
Henry	936	76.7
Jim	927	75.3
George	918	73.9
Mary	827	73.4
Alice	818	72.0
Tom	718	70.1

In both cases, although the numbers differ, the applicants are in the same rank order (i.e., Ann is first and Tom last).

To see what would happen for the fictitious law school if the third predictor (LCM) is used, one would apply the steps outlined on page 12 to the fictitious law school's three-predictor (UGPA, LSAT, LCM) equation (206 UGPA+1 LSAT+2 LCM). Doing this for the same nine applicants (page 11) yields the following results:

Undergraduate GPA	LSAT score					
	500		600		700	
4.0	LCM 600: Henry	2,524	LCM 560: Jack	2,544	LCM 480: Ann	2,484
3.0	LCM 520: Mary	2,158	LCM 520: Jim	2,258	LCM 600: Joe	2,518
2.0	LCM 600: Tom	2,112	LCM 520: Alice	2,052	LCM 560: George	2,232

The effect of using the LCM for the fictitious law school is enough to change the ranking of the applicants significantly as shown in the table below:

Fictitious law school's applicants ranked according to predictions from:

UGPA and LSAT:		UGPA, LSAT, and LCM:	
Ann	1,136	Jack	2,544
Jack	1,036	Henry	2,524
Joe	1,027	Joe	2,518
Henry	936	Ann	2,484
Jim	927	Jim	2,258
George	918	George	2,232
Mary	827	Mary	2,158
Alice	818	Tom	2,112
Tom	718	Alice	2,052

Ann with the highest UPGA and LSAT, is no longer at the top of the list, because of the LCM (480) at her college. At the other extreme, Tom, with the lowest UGPA and LSAT score, has moved up ahead of Alice, because of the relatively high LCM (600) at his college. Extreme cases such as Ann and Tom are not very likely to be found often among actual applicants at most law schools, since there would usually be more correlation among UGPA, LSAT, and LCM than in these examples.

CONCLUSION

It has been demonstrated that when a relatively *large* difference in the LCM of applicants (e.g., 108 as in the case for Sample B School of Law) was equivalent to a significant (one-third) point difference in applicants' UGPAs, the ranking of applicants was not significantly different for either the two-predictor or three-predictor equations. However, when a relatively *small* difference in LCM of applicants (e.g., 34 points in the case of the fictitious law school) was equivalent to a significant (one-third) point difference in applicants' UGPAs, some rather dramatic changes in rank order occurred. In the latter case, there was also a noticeable incease in the shunken multiple when LCM was added (three-predictor equation of UGPA, LSAT and LCM) as compared to when it was not (two-predictor equation of UGPA and LSAT).

Accordingly, in examining your own validity study report results, it is important to:

1. *determine* the amount of difference between applicants in their LCM that is associated with a given difference in UGPAs between applicants for your three-predictor equation (UGPA, LSAT, and LCM)—especially if there is a noticeable increase in the shrunken multiple for the three-predictor equation (UGPA, LSAT, and LCM) as compared to the two-predictor equation (UGPA and LSAT); *and*

2. *apply*, following the steps outlined in the examples above, your two-predictor (UGPA and LSAT) and three-predictor (UGPA, LSAT, and LCM) equation to the actual data for a sample of your applicants to see how they would rank under each predictor equation. (Note that the same general steps that were outlined for obtaining PFYAs from two-predictor or three-predictor equations could be applied to a four-predictor equation, e.g., UGPA, LSAT, WA, and LCM.)

Law School Policy Options in Deciding Whether to Use the LCM

The decision to use the LSAT College Mean (LCM) in the computation of an Admissions Index is a policy decsion which the law school must make. This memorandum has demonstrated the steps to go through in order to determine the effect that using LCM would have on the rankings of your applicants. If the use of the LCM does have a significant effect on the ranking of individual applicants, a law school might choose one of the following three options:

1. The law school may use a formula with LCM, realizing that the LCM will have an effect on one applicant's Admissions Index compared with another applicant having the same UGPA, LSAT, and WA (if used), but who attended a different undergraduate college (having a different LCM).

2. The law school may use a formula with LCM generally, but treat extreme cases specially. Note that this year, for the first time, the individual score reports that you receive will have the LSAT College Mean (LCM) from the applicant's degree college printed on them so that you can readily see what a particular LCM is, rather than having to look it up in a separate publication as you had to do in the past.

3. The law school may opt to use a two-predictor (UGPA and LSAT) formula, or a three-predictor (UGPA, LSAT, and WA) formula, ignoring LCM.

I would, of course, be glad to answer any inquiries regading any of the points made in this memorandum.

BARBARA PITCHER.

AUGUST, 1974.

Mr. HART. Thank you very much. I appreciate that.

Perhaps I should say that although I do come here as a representative of the Law School Admissions Council there is considerable diversity among the members of that association—namely all the law schools in the United States—and I cannot speak for any one of them because as far as individual law schools are concerned they vary in their admission procedures considerably.

There are a couple of major points that I tried to make in my prepared statement.

The first is that I believe most people assume that we can predict law school success better than we actually can. In a sense they are too kind to the law school admission test and to the other predictors of success.

Second, I have tried to make the point that the admissions process is far more complex than most people believe, that soft data has always been used in the process, that hard data is not as hard as it appears to be at times, and law schools have always made policy decisions as to whom they will admit to the school over and above simply accepting those with the highest predicted first year averages or the prediction of those with the best performance.

My statement also comments upon the use of a few words that occur quite often in any dialog involving this subject, namely, the word "quotas," the word "qualified" and the word "most qualified." I think those words are often used in a way that does not really mirror reality and does not represent the situation as it exists in the law schools.

My statement also comments upon the many ways in which race or ethnic origin is a factor used by admissions offices in law schools.

Finally, I have attempted to point out that the situation in this country, in my opinion, demands that the law schools do something to increase the number of lawyers from minority groups.

If I may, I would like to refer to several parts of the statement I have given to you.

Initially, the statement attempts to describe the Law School Admissions Council and its operations and to tell you something about the test.

On pages 7, 8, and 9 there are tables which reflect the ways in which the test may be used and the predictive power of the test. Typically the predictive power of the test is reduced to a number, so-called correlation coefficient: The higher the correlation coefficient, the more predictive the test.

The law schools through the Law School Admission Council have investigated the predictive power of the test on numerous occasions. We have run over 400 validity studies in the past 25 years to determine the extent to which it predicts success.

Studies currently show that the test definitely is a predictor of success in law school. The correlation coefficients in a recent study we did involving 99 law schools run from 0.12 to 0.70.

A 0.12 correlation coefficient is extremely low. For the particular school that had that correlation coefficient, the test was not doing very much in the way of predicting the success of its applicants.

At the school that had the 0.70, it was doing a fairly good job.

But what is a fairly good job? What is not such a good job?

There are three or four ways of expressing this. Table 1 on page 7 looks at the correlation coefficient in one way. If for example the school has a correlation coefficient o f 0.40 that means to the admission officer that of the students predicted to be in the top fifth of the class 7 will in fact be in the botton fifth, 55 will in fact be in the middle of their class and 38 will be in the top fifth.

Certainly not mathematical accuracy or certainty as to prediction.

Another way of looking at a correlation coefficient is example emphasized by table 2 on page 8, which is an expectancy table. Actually this expectancy table was produced for the University of New Mexico School of Law. It indicates that with the correlation coefficient that we have, if an applicant has a 2.0 predicted first year average, he has a 50–50 chance of making a 2.0 or better, 29 percent chance of making a 2.2 average, and a 71 chance of making at least a 1.8 average in law school.

The table on page 9 is still another way of viewing a correlation coefficient. That table looks at the extent to which we improve prediction depending upon the validity of the law school admission test.

If selection were by random chance—that is, if we are selecting people just randomly without looking at any data—we would have a 50–50 chance of making correct decisions. In a school where the correlation coefficient were 0.4, if that school was selecting 20 percent of its applicants the chance of making correct decisions would be increased to 73 percent. So, again, the test does increase the ability to predict success.

Still another way of looking at the correlation coefficient which I have not gone into in my statement is to look at the extent to which the test is measuring the variables that go into making a good law student.

The basic statistical approach here is to take the square of the correlation coefficient. This is then said to measure the amount of the variance tested.

Hence if you had a correlation coefficient of 0.40, squaring that you have 0.16, and the test would be measuring only 16 percent of the variables that go into making up a good law student. Other things, such as motivation, stick-to-it-iveness, tolerance to ambiguity, and all sort of other qualities, are not measured by the predictors.

The conclusion drawn from this by me and other admissions officers is that the law school admissions test is a very useful tool to the admissions officer, but it has significant limitations.

Most law schools, I would say all law schools, use data in addition to law school admissions test.

The second item of hard data generally used is the applicant's undergraduate grade point average.

To predict success, the law schools use the law school admission test, the undergraduate grade point average of the applicant, and perhaps two other bits of predictive data; namely, the writing ability test score that comes off of the LSAT but is scored separately, and finally the LCM, which is simply the median law school admission test score of the particular college which the applicant attended. These are then combined into a regression equation which weighs those four variables in such a way as to optimize prediction.

On page 13 I have included as table 4 a page out of the validity study that we just completed for our law school. This type of study and report has been done for most of the law schools in the country, either this year or last year.

This study shows the various possible formulae that we can choose in order to predict the performance of applicants.

Each formula in table 4 weighs the law school admission test and the undergraduate grade point average. Some also include the LCM, and the writing ability score.

In addition, the fifth one includes a specific variable; namely, whether the individual went to the University of New Mexico as an undergraduate or went to some other institution. As the fifth formula shows, we improved prediction where a distinction was made between those two groups of people.

The first step in the admission's process at our law school is to inspect the validity study. We must determine which of the five formulae we are going to use for this year. That selection, in itself, can make a difference as to an individual applicant as he or she be admitted under one formula and not under another. This is because of the differing weightings of the variables, that is, LSAT and UGPA.

There are judgmental decisions which have to be made at this time. For example, if you look at table 4, the first inclination is to take the five-predictive formula because it has a corrolation coefficient of 0.43, which is considerably higher than any of the others. But we can't use that formula because it doesn't fit into the computer. The most that we can use in any prediction equation is four variables, four indicators of success. So we have to discard the fifth formula.

But it is possible for us to adjust one of the other formulae to take into account what we have been told by the five-predictive formula.

Another thing I would point out in the five-predictive formula is that one of the predictors that you sometimes use is the writing ability score. This has a negative value in the fifth formula; a value of minus 0.0003. This in effect tells us that if we use that formula somebody who scores high on the writing ability portion of the law school admission test has less chance of being admitted to law school. My reason repels at that.

The reasoning of most admissions officers is the same. I would probably discard the use of that formula simply because it penalizes someone for doing well in a portion of the test. Statistically that formula is perfectly sound. It is correct. But again it goes against reason in the sense that it deducts for good performance in one element of the test.

For next year we have selected the two-predictive formula in table 4. We don't like LCM because LCM sometimes skews results. In some schools that use the LCM, this means that an individual from a particular undergraduate institution has almost no chance of getting into the school because the median LSAT of the people at that school is so low that it pulls him or her too far down.

Again, what I am trying to point out is that there are judgmental decisions even at this point of the admissions process; judgmental decisions that affect who is going to get into school, even though it appears that the predictive equation comes out as a nice neat number, a nice neat mathematical formula.

After a school has determined upon a regression equation, looking at data similar to that in table 4, there is another step that almost all law schools take. That is to try to improve prediction through the use of the expertise of their admissions committee or admissions officers.

In my statement, I have tried to give a number of illustrations where soft data is used to improve prediction. For example, a particular individual who has applied may have a very high LSAT but has a relatively low undergraduate grade point average earned some years before. If there is an interval of time between graduation from college and his or her law school application, during which the individual has had experience either in the military or employment of some kind, many admissions offices would hazard a guess that the LSAT is probably a better predictor of success than both criteria together, on the grounds that the individual was probably immature when he attended undergraduate school and has probably matured.

Next I have tried to cover the selection of a student body. After you have put all applicants in a rank order—although actually it is never done that way, because they are all coming at different times and it is very difficult to ever get a nice neat computer printout of the exact ranking of all applicants—and the computer does not in effect take judgmental decisions as to employment, et cetera—there are policy decisions made by law schools as to the way in which they will select students.

The two common examples, I suppose, are the national law school that want geographical representation in the student body and hence discriminate against applicants from the more populous States, and the State law schools who decide it will cater to residents of the State. These schools discriminate against citizens of other States. We do that as do most State law schools.

There are other policy decisions made. Some schools feel that it is important that there be more legal representation in rural areas. They try to select students who are more likely to return to some of the rural areas of the State. New Mexico, for example, still has some counties where there are no lawyers even though there are substantial people in those counties.

Mr. O'HARA. You ought to advertise that fact and people would move to those counties if they could find a county with no lawyers.

Mr. HART. I am afraid all the lawyers would move there, Congressman, and ruin them.

Mr. O'HARA. Yes, that is right.

Mr. HART. There are other policies that have been adopted by law schools for a long period of time. Diversity of student body is one. For example we would like to have some people in our student body who have Ph. D.'s. We also would like to have in our student body a medical doctor because we think this would not only bring something to the student body but also bring something to the profession.

Such policy determinations always involve judgmental decisions. For example there is an argument, that I have made on occasion, that we ought to exclude anybody who has an advanced degree from law school on the ground that the person has had his or her chance at graduate education and that since resources are so limited we should take somebody who hasn't had a chance to go beyond college. I don't think my position is sound but it is arguable.

The next thing I have tried to address in my statement myself is the use of the word "qualified applicants" and the use of the word "quotas." It is often said that we have denied admission to more qualified white applicants in order to accept some black students. The problem is in determining what is meant by qualified or by more qualified.

If you look at the situation that has occured in the law schools applications, it is clear that a high proportion of people, white, black, Chicano, all kinds of people from all kinds of backgrounds who are being denied today would have been admitted to law school 6 or 7 years ago because our standards, have risen.

All that is meant by raising standards is that we are now more selective. We do not have sufficient positions in the law schools to accommodate all the people who want to come.

If you try to say who is qualified, for example, to come to the University of New Mexico, one way of defining a qualified person is everyone who has a college degree and who has taken the LSAT. Those are the only two qualifications that we require.

I tried in my statement to look at this question another way and say, "Well, how high an LSAT does a person have to have to be qualified to attend the University of New Mexico School of Law. Picking 500 as an arbitrary figure, it is obvious that we had far more below that number 5 years ago or 10 years ago than we have today.

Certainly, someone who had an LSAT under 500 in 1964 for example had a fine chance of getting into our class. In fact, 37 percent of our class of that year was made up of people with an LSAT of under 500.

If you look at the concept of qualified or more qualified or most qualified applicants, there is a danger that you will adhere too closely to the numbers. If you look at a computer printout of applicants to a school, you will see someone who has a 2.31 predicted first-year average and someone else who has a 2.34 predicted first-year average. The tendency is to say that the person with the 2.34 predicted first-year average is more qualified.

But, in my opinion, that is a slavish adherence to a meaningless difference. If you start considering that you are dealing with probabilities and if you look at the slight difference in the number of items that an individual has to get right in the law school admission test, which, after all, is only a half-day test, to raise him or her from a 2.31 to a 2.34 or even from 2.30 to 2.40 or 2.50 it becomes rather obvious that if you say one is more qualified than the other, that is the easy way out. You are just taking a look at some numbers that are cranked out by a machine which purport to have only limited effectiveness.

Also I would quarrel with the use of the word "quotas" as far as the admission of minority students are concerned in law school. I know of no school that uses a quota in the sense in which I use that word.

Mr. O'HARA. I can give you one.

Mr. HART. OK.

Mr. O'HARA. My own alma mater, the University of Michigan Law School, by agreement negotiated with the Black Student Union, 10 percent of the freshman class is to be black each year.

Is that not a quota?

Mr. HART. A couple of responses. I do not think that is right to enter into an agreement that 10 percent of the students to be admitted will be black.

Mr. O'HARA. That is a goal?

Mr. HART. I will not defend the procedure if it is as you describe it.

Mr. O'HARA. It is a goal rather than a quota?

Mr. HART. If it is a goal then I would want to inquire more carefully into what the University of Michigan is actually doing. If it is a goal in the sense that they would like to have 10 percent of their students from the black community and they aim toward obtaining 10 percent of their student body from black applicants by recruitment efforts, by looking carefully at applications from black individuals, then I would defend that.

If it is a goal in the sense that it is really a quota and they in effect reserved 10 percent of the seats and no one can get those seats but blacks, then I cannot defend their procedure either as an individual or as representative of the law school admissions council.

I would suggest, however, that I know of no law school—I don't know about Michigan and I don't know about all law schools, although I think I know about many—that do set quotas quite like that.

Let me tell you one thing we do at the University of New Mexico that looks very much like a quota, but I deny that it is. We have about 100 seats in the first-year class. We aim at exactly 100 people in the first year, and we reserve 20 of those seats for late admissions. Some may say that late admissions is simply a euphemism for minority admissions. Why do we reserve the seats? Because we know that there is the CLEO program, and an American Indian law scholarship program that operate during the summer between an applicant's graduation from college and his potential entrance into law school.

We reserve those 20 seats in the hope that we will receive applicants from those programs who meet our qualifications and whom we can accept.

We want to make decisions about these applicants at the end of the summer after these programs are over because we want to take into consideration the applicant's performance in those programs as well as their LSAT and undergraduate grade point average.

There are years when we don't get 20 accepted applicants from these programs. That doesn't concern us all that much. We would like to have 20 but we don't get them from those programs; we fill the vacancies from people on our waiting list.

There are years when we go over 20. This past year we went way over and took more than 20 as a result of summer programs. As a result we have 124 in the first-year class.

Now, the entire 24 were not from the CLEO programs. There were other mistakes we made in our admissions procedures. But again that doesn't bother us too much that we have gone over a little bit. It doesn't bother us if we go under as far as total admissions, and we end up with 95 or 93 students.

I would suggest that although our procedure looks like a quota and people may say, "Well, you are holding 20 seats for minorities," I don't think that is right. I think we are holding 20 seats to give a certain group of people the opportunity to prove to us through a summer program that they are capable of adequate performance in our law school and that they meet our qualifications.

I would suggest that the schools that have adopted a policy that they would like to have a certain percentage of students from the black community or from the Chicano community or from the Indian community are doing the same sort of thing as we are.

The decisions are rational, intelligent decisions based not only upon race but upon all the factors, all of the credentials, that an individual brings to the admission committee.

Mr. O'HARA. With respect to these late admissions, are you applying the same standards? You have a system at the University of New Mexico Law School for how you decide who you are going to let into your law school. You use these predictive factors. LSAT, UGPA, grade point average——

Mr. HART. All that stuff.

Mr. O'HARA. All that.

Mr. HART. Right.

Mr. O'HARA. And you arrive at—you don't use them so mechanically. But whatever it is you do have some sort of a rough level at which you stop admitting that group.

Mr. HART. Yes, sir; we do.

Mr. O'HARA. Do you exact the same requirements of the late admissions that you do of the early admissions?

Mr. HART. I believe we do. Again I have to explain my answer because it may appear as though we don't.

What we are doing for the coming year is to draw a line on the projected first-year average below which everyone will be denied admission whether they are black, Chicano, white.

That will probably be a line showing a predicted first-year average of about 2.1 or 2.2. So we deny everyone who doesn't have about a 70 percent chance of completing our law school.

We will then draw another line at the top. We will say anyone that has a predicted first-year average of over 3.0 will be admitted.

The remaining applicants, the largest group, is composed of those in the middle. In this group everyone will be considered in full including hard data and including anything else the applicant sends to us. This includes answers to a question that we are going to ask this year, that is essentially, "Why should you be admitted over other people who are equally or more qualified?"

We are going to ask everyone to file an answer to that question because we think it might evoke the kind of response that will show us something about the ability of the individual.

Within the middle group we take race into consideration in ways that, in my opinion, are not violative of equal protection. For example, we know from past experience that a large proportion of the blacks and Chicanos are disadvantaged as far as their educational background is concerned. As a result, when it is brought to our attention that an applicant is from a minority race, we are more alert to the fact of possible educational disadvantage, and we try to investigate the background that individual in more detail through what he submits to us.

Mr. O'Hara. But you don't do that for an Anglo applicant, do you?

Mr. Hart. We will for the Anglo if it comes to our attention that he may be culturally disadvantaged.

Mr. O'Hara. But not if it doesn't.

Mr. Hart. Not if it doesn't.

Mr. O'Hara. So, if the Anglo child of migrant farmworkers isn't savvy enough to come up to your office and say, "Hey, I am the child of a migrant farmworker and I grew up in poverty and had an interrupted education and got a lot of problems," then you don't give him any credit for that.

But on the other hand if he was a child of a black migrant farmworker you would automatically find out, wouldn't you?

Mr. Hart. No, we don't automatically find it.

Mr. O'Hara. You mean you would take his file aside?

Mr. Hart. That is right.

Mr. O'Hara. And you would look for it there.

Mr. Hart. Yes, sir. Our reaction is based upon simply the probabilities that the Chicano applicant from New Mexico or the black applicant from New Mexico is more likely to be educationally deprived.

Mr. O'Hara. Dean, I don't think I would agree with you that your system is not discriminatory. But I don't want to get into that argument at the moment because I want to get to a couple of other matters with you, if I could.

Mr. Hart. Certainly.

Mr. O'Hara. The law school admissions test, we have had witnesses come before us and tell us it is culturally biased. Is that true?

Mr. Hart. I don't know.

Mr. O'Hara. You have certainly heard a lot more of those complaints than I have.

Mr. Hart. Yes, sir, I have heard a few.

Mr. O'Hara. What have you heard to tell me that is isn't culturally biased?

Mr. Hart. We decided about 10 years ago to try to determine whether there was any cultural bias in the law school admissions test. We have run a number of studies since then. The primary difficulty is numbers. To do a good statistical study you need a minimum number of people.

To conduct a validity study you like to have one law school with at least 100 blacks in the first-year class and 100 whites in the same class. You then compare the two subgroups by doing separate validity studies on each subgroup. Unfortunately, this situation does not exist in any law school in the United States.

We have dropped the number on the validity studies from 100 to 50 in the research that we have done. That automatically starts to color the question. To get even 50 blacks in one school we have had to cross years. In other words, run two classes together. Again that raises statistical questions.

The studies we have done have all resulted in a showing that the test is not culturally biased in the traditional sense of the use of that term, but I am reluctant to draw any strong conclusions from those studies because of the compromises we make with good statistical practices.

That is one thing. The second is that in the last decade psychometricians across the country have spent much time on the concept of what is meant by "cultural bias."

One way of looking at it is simply that if the majority or the minority have different mean scores the test is culturally biased. In the Law School Admission Test the whites have a higher mean score than do the blacks and than do the Chicanos, but most psychometricians reject the conclusion that this demonstrates that test is culturally biased because the test is trying to determine abilities that may be culturally related. It is trying to predict success in law school. If one subgroup happens to be lower than another in those abilities that is simply the way things are.

Another way of looking at "cultural bias" is to determine whether the test overpredicts or underpredicts for either subgroup.

Our studies show that the test predicts for blacks, whites and the Chicanos, three groups that we have studied, approximately the same. There are some differences. There are no differences in the slope of the regression lines but there are differences in the error of estimate of prediction and in the intercepts.

I believe that most people who look at our studies would say that the differences are not all that significant, there are some differences.

During the last 2 years there have been a number of published studies that question the proper definition of cultural bias. Highly respected psychometricians like Robert L. Thorndike, Nancy Cole, Melvin Novick and others have built different models of cultural bias. I have attached those to my remarks as appendix B. A study recently completed by Dr. Robert L. Lynn, a psychologist at the University of Illinois—he discusses these various models in the context of the concept of cultural bias. I draw two conclusions from these studies and the investigations we have conducted on the LSAT.

I do not think the test is culturally biased in the traditional sense of the term, but I am not sure of my belief because we need to do more work on this question. We will and we are doing it.

Second, I am not so sure anymore about the definition of cultural bias as I was a couple of years ago because there are different models, different ways of looking at that concept.

Mr. O'HARA. Some of the witnesses that have appeared before us have used as an excuse for applying different standards in admitting minority applicants to law school from those used in the majority of applicants is the claim that the LSAT is culturally biased.

They say therefore because it is culturally biased we ought to make up for that by applying a different standard.

Mr. HART. I put it a little differently, Congressman.

Mr. O'HARA. I noticed that.

Mr. HART. I think there is something wrong with the system that produces lawyers. I think there is something wrong with a system where only 1 percent of our lawyers are black. I believe the same thing is true with respect to Chicanos and American Indians. I don't know where that defect lies. I don't know whether it is in the LSAT or whether it is in the early educational background if applicants from these groups or whether the undergraduate grade point averages is "culturally biased," however I believe the presumption must be that there is something wrong with the system.

Mr. O'Hara. Let me give you a couple of hypotheses, OK? I think to begin with there is something damn wrong with the system in which we have thousands and thousands of prospective law students, people who want to become versed in the law, who want to appreciate our legal heritage, who want to understand the way our system operates, who can't get into a law school even though they are qualified to do so. That is the real starter.

I am sorry that no one addresses themselves to this. What in the name of God is so grand about a law school that we have to exclude most people who want to get into it?

Mr. Hart. Congressman, the answer is simple. It is money.

Mr. O'Hara. I think it is more than money.

Mr. Hart. I don't think so. I don't know of law schools that have elected to expand if they can obtain sufficient money to allow them to expand without dropping standards substantially. I think the history of legal education shows that the lawyers, the legal profession, has truly been shortchanged as far as education is concerned. The cost of legal education in this country is simply a disgrace if you compare it with any other kinds of graduate education.

We have no reluctance at all to have a 6-to-1 student-faculty ratio turning out somebody who gets a master's or Ph. D. in political science, but a law school is damned lucky if there is a 25-to-1 student-faculty ratio.

If you look at the University of New Mexico—and we mirror other universities in this—there are only three departments offering graduate level instruction in the whole university that are below us: Home economics, business and I forget what the third one is. We are right down there and we have been——

Mr. O'Hara. That is the very thing that makes me wonder about the cost argument, you see. It is cheaper to educate lawyers than practically anybody else.

Mr. Hart. It is cheaper to give lawyers a degree. It is not cheaper to educate them. That is what we have been fighting for in law schools.

Mr. O'Hara. Some of them are uneducable.

Mr. Hart. That is true, too. What the law schools have been trying to do over the last decade is to have more resources at the disposal of students. We have made some progress. Also, I would point out that we have in fact expanded the size of our student bodies. If you look at table 5 of my statement, it provides statistics on the number of students in law school and on bar admissions. In the past 10 years we have almost doubled the number of seats in the first year of law school. That was not easy to do.

Mr. O'Hara. I would like to see a program and I am going to try to devise one in which the Federal Government helps that every qualified applicant that wants to attend law school is going to be admitted. I see nothing wrong with that.

Then, of course, we don't have any problem, you and I, about who you admit. You admit everybody that is qualified. You don't have to ration out the places because when you have got a scarce commodity and you give it to A, it means you didn't give it to B. That, of course, is the vice of the whole operation.

The reason it doesn't bother you, that you apply certain different standards, is you aren't the one that has been denied admission. It bothers DeFunis, I will tell you. And with darn good reason. If you were in DeFunis' shoes you would be a lot more bothered about it than you are today.

Mr. HART. Sir, I would disagree with you on that. It does bother me. I consider myself a liberal. As far as I am concerned the principal tenants of our country, if you had to narrow them down, are really due process, the first amendment, and equal protection.

This area does bother me. It bothers me substantially. I think I am right. I think after working with it that I am doing the right thing. But to say that it doesn't bother me is simply not true.

Mr. O'HARA. I was taking your word. You said it didn't bother you that you have this system at the University of New Mexico Law School.

Mr. HART. I should say I think it is right. My father will be 89 next week. His parents died very young. He went out looking for a job in the mills up in Boston when he was 18 years old. He saw a lot of signs, "No Irish Need Apply."

I remember his stories about his problems. It hurts me when I think anyone being denied admission to law school, particularly anyone that has a reasonable chance of succeeding.

Mr. O'HARA. It was quite a while ago that they said, "no Irish need apply."

I will give you a more recent case. When I was at the University of Michigan they had a quota at the medical school, a quota designed to limit the number of Jewish applicants who would be admitted to the medical school. Highly qualified applicants who were Jews were turned down at the University of Michigan Medical School.

They were people about my age. So presumably many of them went off and married and had children, just as I did. I now have a son at the University of Michigan. I wouldn't be surprised if the children of some of those Jewish classmates of mine who couldn't get into the medical school aren't trying to get into the medical school right now and being turned away because they aren't black or they are not women or they are not something else.

We are telling them, "Look, don't worry about it. We are overcoming the effects of past discrimination, you know, at your expense. So it is OK."

But I don't think it is OK. It bothers me a great deal. I am glad that it bothers you.

There are several ways of going at it. One of them is we are going to have to expand the number of opportunities. I think the more people that are trained in the law in this country the better off we are going to be.

I find even in my district a lack of understanding of the real basis of our constitutional principles and so forth, among the populace.

I think the more people we have that have a good grasp of that, what Magna Carta was and what the Bill of Rights is, the better country we are going to have.

So I would like to see more and more people going to law school, not necessarily practicing law, because one of these days I am going to be turned out of office and I will have to go back and compete with them, but, you know, trained in the law.

Mr. HART. I would totally agree with you, Congressman. Certainly the Federal Government has responded to needs in other professions, the medical profession. It has given subsidies to medical schools that increased the size of their student body. Also, when we needed people in engineering and the sciences; the same thing was done.

I would certainly hope that some response would be given to the law school needs.

Mr. O'HARA. Just one last question about law school aptitude test. You judge the test in every case, really, whether you are looking for cultural bias, whether you are looking for any kind of validity, by law school success?

Mr. HART. Yes, success in the first year of school.

Mr. O'HARA. That is what you are trying to predict, law school success.

Mr. HART. Yes, sir.

Mr. O'HARA. You are not trying to predict whether this fellow would be a good Supreme Court Justice some day. That is a little beyond what you are asked to do. And you have found that it does have a reasonable correlation. In fact you have set yourself a test standard here because you have set top fifth, middle three-fifth's, bottom fifth.

What kind of correlation coefficients do you get if you just predict successful completion on the basis of——

Mr. HART. No different, Congressman. We tried that a couple of years ago in a study. We drew two lines, top 5 percent of the class and those who had failed. The top 5 percent at that time was important for scholarship purposes.

We found that prediction under that system is the same as it is under the tradition validity approach: You have as many misses and hits under that system as disclosed by the correlation coefficient.

In short, we have found no better way of expressing the predictability of the test better than the correlation coefficient.

Mr. O'HARA. I think you hit pretty good when you were hitting as good a corrolation as you do. That is a pretty good predictor, as perdictors go.

Mr. HART. I think it is at this level of education.

Mr. O'HARA. O.K., thank you very much for coming before us.

Mr. HART. Thank you, sir.

Mr. O'HARA. I am going to see to it that not only is your full statement but the various appendices that you supplied with the statement will be printed in the record of the hearing. I think they provide some valuable background with respect to the whole question of the Law School Aptitude Test and its validity and its use.

Mr. HART. Thank you very much, Congressman.

Mr. O'HARA. Thank you.

Our next witness will be Sidney Hook, a distinguished author and teacher who is a professor emeritus at New York University.

Professor Hook? Would you please take a place at the witness stand?

TESTIMONY OF PROF. SIDNEY HOOK, EMERITUS PROFESSOR OF PHILOSOPHY, NEW YORK UNIVERSITY, AND SENIOR RESEARCH FELLOW, HOOVER INSTITUTION ON WAR, REVOLUTION, AND PEACE, STANFORD UNIVERSITY

Mr. HOOK. I have a prepared statement which is comparatively brief. I am not going to read all of it. I shall take no more than 10 minutes. I know how valuable your time is.

My statement is directed to what I think, as evidenced by the testimony this morning, is a basic consideration which has arisen in the analysis of the obligations of institutions of higher education to provide equality of opportunity in education and employment. I can say a great many more things. But I am going to stress that main argument.

I appear before you primarily as a philosopher and an educator who has spent more than 50 years as a teacher, almost all of them in college and university.

I speak for no vested interest within or without the academy. My educational philosophy is derived from my teacher, John Dewey, who taught that in democracy every person has a right to that schooling which will enable him to achieve his maximum intellectual growth and spiritual growth as a human being and that what intelligent and loving parents want for their children in the way of education, the community should want for all its children, regardless of race, religion, sex or national origin.

I have been committed to this philosophy all my life. I have fought against all forms of invidious discrimination, especially in education.

I have welcomed the long overdue Executive Order 11246 and its amendments as well as the Civil Rights Act of 1964.

It was this commitment that inspired my public criticism of the enforcement procedures of the Office for Civil Rights of HEW, which was delegated to it by the Department of Labor's Office of Federal Contract Compliance.

For the directives and procedures that emanated from that office violated the spirit and letter of the Executive order and the section 703 of title VII of the Civil Rights Act of 1964 by requiring that "numerical goals and time schedules" be established to guide hiring practices of members of minorities and women wherever their underutilization is allegedly shown.

In a series of articles which I believe is in your possession, Congressman O'Hara, I developed the argument and showed that cognitively, even theoretically, not merely practically, but cognitively, there was no difference between "good faith efforts" to achieve numerical goals within a certain time frame and "good faith efforts" to achieve quotas.

Subsequently, I helped organize the Committee on Academic Nondiscrimination and Integrity, a group of distinguished scholars who are convinced that the educational health of the country, the public welfare and plain justice require that appointments and promotions in the academy be determined solely on the basis of competence rather than by membership in any group; that academic integrity requires that the best qualified person be appointed to the post without consideration of scholastically extraneous factors such as race, sex, religion or national origin.

Indeed in behalf of that very principle that has inspired their opposition to past and present deplorable practices of discrimination against women and members of minority groups, the members of our committee are as steadfastly opposed to discrimination in favor of women and members of minority groups.

To save time I shall focus my remarks on one key, indeed, the decisive point. This point was apparent in the testimony that preceded mine.

Do the Higher Education Guidelines of the Office for Civil Rights call for or encourage preferential hiring or the introduction of a quota system as I maintained from the very outset of my criticism?

Before considering this question it is important to treat briefly some peripheral questions to avoid confusion.

We do not deny that discrimination in the past on grounds of religion, race, sex, and national origin has occurred, that in some places it still exists and that it is morally wrong.

We do not deny that this discrimination is apparent not only in hiring but in rewarding, promoting, and retiring and that all such practices should be abolished forthwith.

What makes these practices wrong is the violation of the merit principle. Individuals have been punished for no fault of their own but merely because they were members of some group membership that had nothing to do with the qualifications for the post in question. For the moment I do not inquire whether purely statistical disproportions in the employment of individuals of various groups is cogent evidence of active discrimination.

Granted then the evil of past and present discrimination, what is the remedy? Surely not another kind of discrimination. No one would argue that because many years ago blacks were deprived of their right to vote and women denied the right to vote that today blacks and women should be compensated for past discrimination by being given the right to cast an extra vote or two at the expense of their fellow citizens or that some white men should be deprived of their vote.

Take a more relevant case. For years blacks were shamefully barred from professional sports. Would it not be absurd to argue that therefore today in compensation for the past there should be discrimination against whites in professional athletics?

Would any sensible and fair person try to determine what proportion of whites and blacks should be on basketball or football teams in relation to racial availability or utilization?

We want the best players for the open positions regardless of the percentage distribution in proportion to ratios either in the general population or in the pool of candidates trying out.

Why should it be any different when we are looking for the best qualified mathematician to teach topology or the best medieval philosophy scholar?

Why not drop all color, sex, and religious bars in honest quest for the best qualified, no matter what the distribution turns out to be?

The retort that dropping all bars of discrimination is not sufficient to achieve parity of representation for various groups is completely without merit since it assumes what has never been proved: that under fair and equal opportunities of vocational selection the ultimate outcome would reflect the proper proportions among qualified applicants. Of course, the quest must be public and not only fair, but seen to be fair.

How can we drop all these extraneous, discriminatory bars and still strive to achieve "numerical goals?" If we abandon all discriminatory practices in recruitment, enrollment, salaries, and promotion why do we need "numerical goals," unless it is argued that the only real proof of the abandonment is the achievement of these numerical quotas?

The representatives of HEW shy away from the word "quota." Hardly anyone will say they believe in the quota system because they know that a quota system is incompatible with the basic norms of merit and individual justice.

This is a matter of logic. A "numerical goal" when selections are guided by anything but merit is precisely what we normally mean by a quota, the dictionary definition of a quota.

In Europe the Latin phrase numerus clausus was used to set religious quotas for entry into universities.

One can take this as an elementary exercise in logic. Suppose I say, "You are to aim at a quota of x percent of blacks, Chicanos, Puerto Ricans, women, et cetera, for your staff within 2 years."

How does that proposition differ from this proposition: "You are to set as your goal recruitment of x percent of blacks, Chicanos, Puerto Ricans, Women, et cetera, within 2 years?"

The representatives of HEW confuse themselves and others by saying that numerical goals are not quotas because "good faith efforts" to achieve goals is "an adequate substitute for evidence that goals have been met."

But this is logically equivalent to saying that sincere good faith efforts to achieve quotas are adequate evidence that quotas have been met.

Here is a proposition in ethics. If anything is morally wrong then sincere efforts to bring it about are wrong. If quotas are morally wrong in education then sincere "good faith efforts" to achieve them are also wrong.

For some purposes, trade, immigration policy, rationing of scarce commodities, the compilation of jury rolls, a quota system may be legitimate and numerical goals reflecting a community's racial or sexual profile accepted as a guide.

But when we are seeking the best qualified person or persons for a position it is never morally legitimate to make membership in a group, whether religious, racial, or sexual, a ground of selection all the more so because such grounds of selection have been the cause of the discrimination in the past that we deplore.

When I first protested the establishment of numerical goals and timetables as part of the affirmative action programs demanded by HEW I predicted that colleges and universities in order to prove that they had made sincere, good faith efforts to achieve these goals would resort to preferential hiring.

That prediction has been fulfilled. The Anti-Defamation League, the University Centers for Rational Alternatives and other organizations during 1972–73 have uncovered more than a hundred examples of racially determined preferential seletion for 1972 and 1973.

Even with our very limited resources hardly a day goes by in which we do not hear of continued discriminations. Many complaints are not made because victims fear publicity.

The fundamental cause of this policy of discrimination, adopted presumably to end discrimination, is the requirement that numerical goals and timetables be an integral part of the affirmative action programs acceptable to HEW.

Despite our repeated criticism, protestation and petitions for the abandonment of prejudicial numerical goals and timetables the Nixon administration refused to take any action. Yet these are the continuing source of preferential hiring practices.

Where Federal funds are necessary to the survival of so many institutions of higher education administrators feel intimidated by the requirement.

Representatives of HEW are confused by it themselves. One of them before this committee on August 9, 1974, in answer to a question by Mr. Dellenback concerning the degree to which numerical goals at the end of the 5-year period are to reflect the availability of minorities and/or women, replied:

"The OFCC regulations in effect require that in the life of the plan or the end of the life of the plan, the 5 years, that parity be achieved. If the work force is 20 percent female Ph. D., political science, one would expect that the composition of the faculty in *X* political science department at *X* university would be 20 percent female."

Then, not having the courage of his confusions, he adds: "That is not a quota."

But that it is a quota is apparent in the answer to Mr. Dellenback's next question:

> What if a given institution came to you with an affirmative action plan which showed very clearly that in solicitation, in hiring and everything else that is followed thereafter they really were on target in following the nondiscriminatory practice, they were really going to reach, but said nothing about what they would have in composition five years hence, would that be acceptable?

To which Mr. Holmes answered, "no."

Apparently then absolute fairness in every aspect of the hiring, paying and promoting process is not enough and the quota or goal must be reached.

Despite this Mr. Holmes then goes on to add, in reply to a further question:

> We would urge the institution, as the regulations propose, that the goal be parity, but we will not and we have not gotten hung up with an institution over that issue if we think that the actions they are proposing to take are with regard to salary equity equitable and broadening of the recruitment process.

But if this is so then why require "numerical goals and time schedules," especially since they are the source, as HEW itself sometimes admits, of pervasive misunderstanding by university administrators?

A few words in conclusion. Preferential hiring or quotas in education under any disguise is inherently divisive, unjust and undemocratic.

It destroys the quest for excellence and opens the door to mediocrity, injurious to students, educational institutions and in the long run to the public good.

It gives rise to the impression that even when inequalities and inequities in hiring practices, salaries, leaves, promotions and tenure have been abolished, members of minority groups and women cannot make it on their own, that they require the crutch of extraneous group membership to compete successfully with others.

It ultimately will be harmful to the professional dignity and integrity of all teachers, including those who slip into positions because they meet a quota or goal rather than because they have succeeded on merit.

For it will create a two-standard faculty—those who have made it on their own and those who have not.

It tends to debase standards of scholarship and teaching under the cloak of combating discrimination.

Prof. Jacob Neusner of Brown University is my authority for the following incident. I do not contend it is typical, but it does point up a danger of the degradation of quality of teaching instruction.

Representatives of the regional offices of HEW demanded an explanation of why there were no women or minority students in the graduate department of religious studies.

They were told that a reading knowledge of Greek and Hebrew was presupposed. Whereupon the representatives of HEW advised orally: "Then end these old-fashioned programs that require irrelevant languages. And start up programs on relevant things which minority group students can study without learning languages."

If we are considering the question of quotas or any system of preferential selection in a larger context, it should be clear that it violates two fundamental and interrelated principles of social morality, justice, and human welfare.

Once basic human needs are equally gratified, differential rewards of scarce goods, services, and opportunities should depend on merit or desert. The person who is best qualified for a post deserves it even if other considerations sometimes override his or her right.

But in this case considerations of human welfare strongly reinforce the right of award by merit because the consequences of recognizing it create values and goods that are to the benefit of the entire community.

The principle of merit or desert therefore encourages and strengthens the quest for excellence. In the course of the pursuit of excellence, everyone profits.

In imposing a quota system, we are not only defeating the ends of justice but unnecessarily limiting multiple advances in human welfare.

The society which today sacrifices the principle of merit and which downgrades the quest for excellence faces very bleak prospects of survival in our precarious and dangerous world.

In addition, the use of preferential treatment by race or sex as a tool of the administration of social policy presents the most dangerous kind of precedent to society at large. It not only sets groups against each other and promotes discord, but it also devalues what it means to be a citizen of the United States since what once was a precious right, equal justice under the law, becomes a privilege to be doled out at the pleasure of an administrator.

Discrimination where it exists must and can be policed, punished, and eradicated, but it should not be created anew in the name of its opposite.

Our educational emphasis must fall not on lowering existing standards of achievement but on adopting all effective measures—financial, psychological, social and pedagogical—that will increase the qualified supply of members of minorities and women.

In the area of law Congressman O'Hara had just made a suggestion today which I think is very valid and will increase the qualified supply of members of minorities and women.

The community has a responsibility not only in education but in all areas of industry to provide employment for all who are willing and able to work. This expansion of opportunities on all levels of education does not require quotas or numerical goals but fundamental commitment to democracy as a way of life.

Thank you very much, Congressman.

[Professor Hook's prepared statement follows:]

Statement of Professor Sidney Hook, Emeritus Professor of Philosophy, New York University and Senior Research Fellow, Hoover Institution on War, Revolution, and Peace, Stanford University

I am grateful for the kind invitation to testify before you on the obligations of institutions of higher learning to provide equality of opportunity in education and employment. I appear before you primarily as a philosopher and educator who has spent more than fifty years as a teacher, almost all of them in college and university. I speak for no vested interest within or without the academy. My educational philosophy is derived from my teacher and friend, John Dewey, who taught that in a democracy every person has a right to that schooling which will enable him to achieve his maximum intellectual and spiritual growth as a human being, and that what intelligent and loving parents want for their children in the way of education, the community should want for all its children, regardless of race, religion, sex or national origin.

Committed to this philosophy, I have fought all my life against all forms of invidious discrimination, especially in education. I have welcomed the long overdue Executive Order 11246 and its amendments as well as the Civil Rights Act of 1964. And it was this commitment that inspired my public criticism of the enforcement procedures of the Office for Civil Rights of HEW, delegated to it by the Department of Labor's Office of Federal Contract Compliance. For the directives and procedures that emanated from this office, violated the spirit and letter of the Executive Order and the Section 703(j) of Title VII of the Civil Rights Act of 1964, by requiring that "numerical goals and time schedules" be established to guide hiring practices of members of minorities and women wherever their underutilization is allegedly shown. In a series of articles which I believe is in your possession, I developed the argument and showed that cognitively there was no difference between "good faith efforts" to achieve numerical goals within a certain time frame and "good faith efforts to achieve quotas. Subsequently, I helped organize the Committee on Academic Nondiscrimination and Integrity, a group of distinguished scholars who are convinced that the educational health of the country, the public welfare, and plain justice require that appointments and promotions in the academy be determined solely on the basis of competence rather than by membership in any group; that academic integrity requires that the best qualified person be appointed to a post without consideration of scholastically extraneous factors such as race, sex, religion or national origin. Indeed, in behalf of the very principle that has inspired their opposition to past and present deplorable practices of discrimination *against* women and members of minority groups, the members of our Committee are as steadfastly opposed to discrimination *in favor of women* and members of minority groups.

To save time I shall focus my remarks on one key, indeed, decisive point. Do the Higher Education Guidelines of the Office for Civil Rights in effect call for or encourage preferential hiring or the introduction of a quota system as I maintained from the very outset of my criticism? Before considering this question, it is important to treat briefly some peripheral questions to avoid confusion.

We do not deny that discrimination in the past on grounds of religion, race, sex and national origin has occurred, that in some places it still exists—and that is morally wrong. We do not deny that this discrimination is apparant not only in hiring but in rewarding, promoting and retiring, and that all such practices should be abolished forthwith. What makes these practices wrong is the violation of the merit principle. Individuals have been punished for no fault of their own but merely because they were members of some group-membership that had nothing to do with the qualifications for the post in question. For the moment, I do not inquire whether purely statistical disproportions in the employment of individuals of various groups is cogent evidence of active discrimination.

Granted, then, the evil of past and present discrimination, what is the remedy? Surely not another kind of discrimination. No one would argue that because many years ago blacks were deprived of their right to vote and women denied the right to vote that today blacks and women should be compensated for past discrimination by being given the right to cast an extra vote or two at the expense of their fellow citizens or that some white men should be deprived of their vote. Take a more relevant case. For years blacks were shamefully barred from professional sports. Would it not be absurd to argue that therefore today in compensation for the past there should be discrimination against whites in professional athletics? Would any sensible and fair person try to determine what proportion of whites and blacks should be on basketball or football teams in relation to racial availability or utilization? We want the best players for the open positions regardless of the percentage distribution in proportion to ratios either in the general population or in the pool of candidates trying out. Why should it be any different when we are looking for the best qualified mathematician to teach topology or the best medieval philosophy scholar? Why not drop all color, sex and religious bars in honest quest for the best qualified—no matter what the distribution turns out to be? (The retort that dropping all bars of discrimination is not sufficient to achieve parity of representation for various groups is completely without merit since it assumes what has never been proved: that under fair and equal opportunities of vocational selection the ultimate outcome would reflect the proper proportions among qualified applicants.) Of course, the quest must be public and not only fair, but seen to be fair.

How can we drop all these extraneous, discriminatory bars and still strive to achieve "numerical goals"? If we abandon all discriminatory practices in recruiting, enrollment, salaries and promotion why do we need "numerical goals"—unless it is argued that the only real proof of the abandonment is the achievement of these numerical goals?

The representatives of HEW shy away from the taboo word "quota" because they know that a quota system is incompatible with the basic norms of merit and individual justice. But a "numerical goal" when selections are guided by anything but merit is precisely what we normally mean by quota. In Europe the Latin phrase *numerus clausus* was used to set religious quotas for entry into universities. Where one says (A): "You are to aim at a quota of X% of blacks, Chicanos, Puerto Ricans, women, *etc.* for your staff within two years," the meaning is the same as (B): "You are to set as your *goal* recruitment of X% of blacks, Chicanos, Puerto Ricans, women, *etc.* within two years." The representatives of HEW confuse themselves and others by saying that numerical goals are not quotas because "good faith efforts" to achieve goals is "an adequate substitute for evidence that goals have been met." But this is logically equivalent to saying that sincere good faith efforts to achieve quotas are adequate evidence that quotas have been met. If anything is morally wrong, then sincere efforts to bring it about are worng. If quotas are morally wrong in education, then sincere "good faith efforts" to achieve them are also wrong.

For some purposes—trade, immigration policy, rationing of scarce commodities, the compilation of jury rolls—a quota system may be legitimate and numerical goals reflecting a community's racial or sexual profile accepted as a guide. But when we are seeking the best qualified person or persons for a position, it is never morally legitimate to make membership in a group—whether religious, racial or sexual—a ground of selection all the more so because such grounds of selection have been the cause of the discrimination in the past that we deplore.

When I first protested the establishment of numerical goals and timetables as part of of the affirmative action programs demanded by HEW, I predicted that colleges and universities, in order to prove that they had made sincere, good faith efforts to achieve these goals, would resort to preferential hiring. That prediction has been fulfilled. The Anti-Defamation League, the University Centers for Rational Alternatives and other organizations during 1972–73 have uncovered more than a hundred examples of racially determined preferential selection for 1972 and 1973. Even with our very limited resources hardly a day goes by in which we do not hear of continued discriminations. Many of the victims fear publicity.

The fundamental cause of this policy of discrimination, adopted presumably to end discrimination, is the requirement that numerical goals and timetables be an integral part of the affirmative action programs acceptable to HEW. Despite our repeated criticism, protestation and petitions for the abandonment of prejudicial numerical goals and timetables, the Nixon administration refused to take any action. Yet these are the continuing source of preferential hiring practices. Where federal funds are necessary to the survival of so many institutions of higher education, administrators feel intimidated by the requirement. Representatives of HEW are confused by it themselves. One of them, before this committee on August 9, 1974, in answer to a question by Mr. Dellenback, concerning the degree to which numerical goals, at the end of a five year period, are to reflect the availability of minorities and/or women, replied:

> "The OFCC regulations, in effect require that in the life of the plan, or the end of the life of the plan, the five years, that parity be achieved. If the work force is 20% female Ph.D., political science, one would expect that the composition of the faculty in X political science department at X university would be 20% female." (Stenographic Transcript, p. 296)

And then, not having the courage of his confusions, he adds: "That is not a quota."

But that it is a quota is apparent in the answer to Mr. Dellenback's next question:

> What if a given institution . . . came to you with an affirmative action plan which showed very clearly that in solicitation, in hiring, and everything else that is followed thereafter, they really were on target in following the non-discriminatory practice, they were really going to reach, but said nothing about what they would have in composiiton five years hence, would that be acceptable? *Mr. Holmes*: "No." (Hearings, p. 298).

Apparently then, absolute fairness in every aspect of the hiring, paying and promoting process is *not* enough and the quota or goal *must* be reached. Despite this, Mr. Holmes then goes on to add, in reply to a further question:

> We would urge the institution, as the regulations propose, that the goal be parity, but we will not, and we have not gotten hung up with an institution over that issue, if we think that the actions they are proposing to take are with regard to salary equity [equitable] and broadening [of] the recruitment process. (Hearings, p. 299.)

But if this is so then why require "numerical goals and time schedules," especially since they are the source, as HEW itself sometimes admits, of pervasive misunderstanding by university administrators?

A few words in conclusion. Preferential hiring or quotas in education under any disguise is inherently divisive, unjust and undemocratic. It destroys the quest for excellence and opens the door to mediocrity injurious to students, educational institutions and in the long run to the public good. It gives rise to the impression that even when inequalities and inequities in hiring practices, salaries, leaves, promotions and tenure have been abolished, members of minority groups and women cannot make it on their own, that they require the crutch of extraneous group membership to compete successfully with others. It ultimately will be harmful to the professional dignity and integrity of all teachers, including those who slip into positions because they meet a quota or goal rather than because they have succeeded on merit. For it will create a two standard faculty--those who have made it on their own and those who have not. It tends to debase standards of scholarship and teaching under the cloak of combatting discrimination. Profession Jacob Neusner of Brown University is my authority for the following incident. I do not contend it is typical but it does point up a danger. Representatives of the Regional Offices of HEW demanded an explanation of why there were no women or minority students in the Graduate Department of Religious Studies. They were told that a reading knowledge of Greek and Hebrew was presupposed. Whereupon the representatives of HEW advised orally: "Then end these old fashioned programs that require irrelevant languages. And start up programs on relevant things which minority group students can study without learning languages."

If we are considering the question of quotas or any system of preferential selection in a larger context, it should be clear that it violates two fundamental and interrelated principles of social morality—justice and human welfare. Once basic human needs are equally gratified, differential rewards of scarce goods, services and opportunities should depend upon merit or desert. The person who is best qualified for a post deserves it even if other considerations sometimes override his or her right. But, in this case considerations of human welfare strongly reinforce the right of award by merit, because the consequences of recognizing it create values and goods that are to the benefit of the entire community. The principle of merit or desert therefore encourages and strengthens the quest for excellence. In the course of the pursuit of excellence everyone profits. In imposing a quota system we are not only defeating the ends of justice, but unnecessarily limiting multiple advances in human welfare. The society which today sacrifices the principle of merit and which downgrades the quest for excellence faces very bleak prospects of survival in our precarious and dangerous world.

In addition, the use of preferential treatment by race or sex, as a tool of the administration of social policy, presents the most dangerous kind of precedent to society at large. It not only sets groups against each other and promotes discord, but it also devalues what it means to be a citizen of the United States since what once was a precious right, equal justice under the law, becomes a privilege to be doled out at the pleasure of an administrator. Discrimination where it exists must and can be policed, punished and eradicated, but it should not be created anew in the name of its opposite.

Our educational emphasis must fall not on lowering existing standards of achievement but on adopting all effective measures, financial, psychological, social and pedagogical, that will increase the qualified supply of members of minorities and women. The community has a responsibility not only in education but in all areas of industry to provide employment for all who are willing and able to work. This expansion of opportunities on all levels of education does not require quotas or numerical goals but commitment to democracy as a way of life.

Mr. O'Hara. Mr. Hook, thank you very much. I like your conclusion. I think you have also very cogently demonstrated the error of the newspeak and newthink in this business of goals, that goals are really different from quotas.

HEW has said, "Well, we really haven't put anybody in trouble. No one has ever gotten in trouble for failing to meet their goal."

Well, maybe. But if you are an administrator of a university that has Federal contracts with $3 or $6 or $8, $12 million, and you want to hang on to this contract because you have to have it in order to keep the university functioning in the way that it has grown accustomed to functioning, you aren't going to take any chances.

That is indeed what they rely on. The way the system works they say, "You can satisfy us by two methods. One, you meet your goal or, two, you prove to us that you made a good-faith effort to meet your goal but failed. The burden of proof is on you."

So you face this problem. You say, "All right, we have our choice here. We can either meet the goal or we could not meet the goal and then fight it out and with good luck and the help of God we will prevail."

You know the easy way out of that one.

Mr. Hook. I think you have put your finger right on the key issue. It is very difficult to establish a negative conclusion when one has made good faith efforts. How does one really know? There is always doubt about it. Meanwhile, the contracts and the money are being held up.

The universities are in a straightened financial situation. All sorts of crucial things depend upon it. The administrators then bring pressure upon members of their departments to meet these goals so they can solve their problems and avoid threatening countermeasures.

Mr. O'Hara. The easy way out is to meet the goal. That is the easy way.

Mr. HOOK. I have never gotten a clear answer from a representative of HEW as to why they need in their guidelines the reference to numerical goals and quotas.

Let us assume that we have all of the other recommendations: the broad recruitment policy, advertisement for every possible job, the appointment of an overall committee to supervise the appointment and selection within the faculty to see that actually the best-qualified person has been hired, that there are equal standards for men and women, that the criteria for promotion are the same and that the nepotism rule is abolished, which in effect has mainly affected women. All of these are very worthwhile objectives. If these are adopted, why do we need insistence on numerical goals and timetables?

The answer is implied in what you have said. This is the whip with which they can bring the universities to heel. The effect has been—and this, I think, in the long run is the most serious aspect of the situation—in the field of education a degradation of standards of scholarship.

Some representatives of HEW have maintained that in the past criteria have been used in a discriminatory way. In one case, they contended that if there weren't any qualified applicants for a post, whether minorities or women, then the standards that were employed in the past for the least qualified person in the department should operate for the future.

That means that if 20 years ago some mediocre man was hired, because no one else was then available, and in the meantime the standards of the department have improved, that if an applicant appears, a woman or minority member, whose qualifications are no better than that of the individual who was hired 20 years ago, he or she then has to be hired.

To be sure, it is argued that sometimes there is a danger that an administrator in order to bar a member of a minority or a women, will capriciously raise the standards.

That is a danger. How do you test it? You watch his next appointments; you observe what happens. You proceed as you do when you suspect discrimination in housing. What is the evidence of discrimination in housing when a landlord establishes certain criteria for his tenants, say, he wants them well-behaved, of a certain income level, and so on.

If you suspect that he is using this as a dodge for discrimination, then you send some minority person who meets those criteria and see what happens. If the landlord subsequently rents to somebody who doesn't come up to these criteria then you have your proof of discrimination.

I have really been puzzled. Perhaps, Congressman, you can answer my question. It is almost a simple-minded question. Why have so many witnesses before you consistently denied that a numerical goal within a certain time period is a quota?

It seems to me as obvious as two plus two equals four that a numerical goal and a quota are synonymous. Why do they insist that there is a difference? They shirk from the use of the term "quota." Emotively there is a difference between numerical goals and quota just as emotively there is a difference between the term "lazy"—and "easy-going."

But cognitively, intellectually, it seems to me there is no difference.

But even deans, as we have heard, sometimes say there is a difference between a goal and a quota.

I wonder if you can account for this failure to recognize the obvious?

Mr. O'Hara. I find it very hard except that I guess, Mr. Hook, when somewhat ardently desires the achieving of an objective they can talk themselves into believing that there are differences. I understand it. I am sure you do too, especially when some of the witnesses who have appeared before us on behalf of women applicants for positions at universities and so forth, they say, "Well, look, if 20 percent of the qualified"—they have been the victims of discrimination, you and I both concede that and they are arguing that they continue to be the victims of discrimination in academic promotion, hiring, pay, and so forth—"if 20 percent of the qualified persons are women that if you adopt a nondiscriminatory hiring practice on the average around the country you are going to end up with a 20-percent female faculty in that department and therefore it is a good standard to use in measuring whether or not there has been discrimination."

Mr. Hook. Yes, but what they overlook is the fact that even if you have 20 percent, to use the illustration, of women who have Ph. D.'s, certain social considerations and attitudes may operate in determining their availability.

These are matters one may deplore. Some people say, "I resent it that you have so few women on faculties compared to the number of women that go to college." But I can testify from my own experience why this is so. I have always urged by bright coeds to try to combine marriage and a career. I again and again discovered—this was especially true in the 1940's and 1950's—that many of them said, "Oh, no, I am not interestd in a career. I am primarily interested in getting married and raising a family." You find all sorts of testimony which shows that the social mores of the time did not encourage the quest for a career as well as marriage. Sometimes you will also find that women who wanted a career and got married and discovered that husbands were not sufficiently cooperative.

These attitudes are changing. I think more and more today it is recognized that it is desirable for women to combine marriage and a career.

Mr. O'Hara. Professor, let me make the point that when we talk about the pool of Ph. D.'s you are talking about a group of women who in effect made a career decision.

Mr. Hook. Let us take 20 percent of the Ph. D.'s in political science. One must then ask how many of them are married?

When they get married the burden of bringing up the children usually falls upon them. Evidence shows for example that women who are not married progress more rapidly than those that do, not because there is discrimination against women, women are involved in both cases, but because the main burden of developing a family rests upon the woman. She is therefore not able to devote as much time to professional chores as she would if she were unmarried. There are certain social factors which operate in a way that make it questionable to say "If you have 20 percent Ph. D.'s among women therefore they should have 20 percent of the teaching jobs available."

Mr. O'Hara. When you put that social and marriage filter on the pool you still don't, even when you apply those things to end up with the actual pool of available Ph. D. women, you still——

Mr. HOOK. Then you have the question of geographic distribution. Why? Because in this day and age if the woman gets a job somewhere her husband seldom decides to give up his job to join her. There was an article published in the newspaper about a husband who did—it is so rare. The general rule is that if a woman is teaching and her husband is teaching, if he takes a job elsewhere, the wife will follow. There she may be unemployed because they may not have a need for her. Nonetheless she will normally follow her husband not vice versa.

When it comes to minorities, I would say look at the record. If you had 20 percent of the minorities, say, in mathematics then I would certainly think you would find 20 percent of the mathematics jobs in the colleges held by blacks.

Today the quest for numbers of minorities at the universities is very intense.

Mr. O'HARA. There is a bidding war.

Mr. HOOK. They can write their own tickets.

Mr. O'HARA. Which gets them into trouble with women because then they bid up. They have 16 institutions bidding for the black Ph. D. and they have to offer more money.

Mr. HOOK. That sometimes happens. You stressed the point that there should be more law schools available. I think there should be more effort to prepare members of minorities for work in higher education.

Mr. O'HARA. I certainly agree with your analysis. So you can see that I am on your side of the argument. But I am troubled and I am sure you are by the fact that when you try to approach this whole problem on a case-by-case basis that it takes a long time to overcome discriminatory practices and the enforcement process is slow.

I can understand the frustration of those who feel that they are not being given equal treatment. I think many minorities and women feel that they aren't going to be given equal treatment in faculty hiring unless there is some kind of an effective club being held over the heads of the departments heads at the universities and so forth and that the threat of a prosecution upon an individual complaint being made by someone who believes they are discriminated against is not enough of a club. So I can understand how they feel.

Mr. HOOK. I can understand it. But I think it would be unfortunate if we relied upon the present club because it is developing a series of injustices.

Mr. O'HARA. It has got too many spikes in it.

Mr. HOOK. That you will hear more about in the future.

Nevertheless, Congressman O'Hara, I would maintain that the climate in the universities is perceptibly changing, that the faculties themselves now are in a position to implement and police the guidelines against discrimination.

In the past if you wanted to hire somebody you would get in touch with your colleagues at another university. Today very few people will hire that way. It is expected that they make public, advertise if possible, the opening of a job.

If an affirmative action committee is appointed then it can be empowered to go over the appointments that were made. On these committees women and members of minorities can serve. It may be a slow process. But I think in the end any other approach would do irreversible damage to the integrity of the educational process.

Mr. O'Hara. Professor Hook, I am in agreement that the present approach is creating injustices. I cannot support the present approach. But I would like to try to find ways in which we can effectively guarantee the rights of all applicants to equal treatment without depriving anyone else of their rights.

If I come up with that answer it will be a miracle. I do think that we ought to be looking at it from both angles.

I think the present system is wrong. But I think we ought to do better.

Mr. Hook. If we could, as you suggested, increase the number of law schools, so I would suggest increasing our efforts to establish more colleges. We have to give priority to education. I think our children are our most precious crop.

We should move in the direction of full educational employment. Suppose it is true that in some university you hire the most qualified person. You can't hire everybody there. If there were other educational opportunities there would be other avenues for significant activity on the part of individuals.

There will always, of course, be some disappointment if one is preferred over somebody else. But I do think that every person who is able and willing to engage in his vocation should have an opportunity to do that. That is a responsibility of the community and the Government.

That is why I believe this is only one aspect of a larger problem which requires the attention of the entire country, not merely that of educators.

Mr. O'Hara. I very much enjoyed talking to you.

Mr. Hook. Thank you very much for your courtesies.

Mr. O'Hara. Our next witness will be Prof. Miro M. Todorovich who is associate professor of physics at the Bronx Community College, City University of New York, and a coordinator of the Committee on Academic Nondiscrimination and Integrity.

Mr. Todorovich?

[Mr. Todorovich's prepared statement follows:]

Prepared Statement of Prof. Miro M. Todorovich, Associate Professor of Physics, Bronx Community College, City University of New York, and Coordinator of the Committee on Academic Nondiscrimination and Integrity

Mr. Chairman and distinguished members of the Subcommittee: I wish to present before the Subcommittee the views of the Committee on Academic Nondiscrimination and Integrity on various aspects of Antibias Regulations in Higher Education promulgated by the Federal Government.

For several years now, American colleges and university professors have found themselves psychologically squeezed between lofty egalitarian rhetoric and harsh realities of life. On the one hand, they are urged to work towards a fully nondiscriminatory society in which everyone will be treated "without regard" to race, sex, color or national origin (Presidential Order 11246, Amended); on the other, regulations of the Labor and HEW Departments, and the EEOC demand that teachers and scholars become very much conscious of color, sex and ethnos in dealing with all segments of their campus population, and cooperate in the preparation of affirmative action plans, implying favored treatment of some groups designated as preferred. Members of our faculty are first told that it is up to them to develop sensible estimates of what can be reasonably accomplished; soon they find their institutions under the threat of governmental punishment if they do not conform to the demands of Federal investigators. This enormous discrepancy between words and deeds, declared intentions and actual decisions of pertinent bureaucratic officials can best be illustrated by factual examples.

Institutions of higher learning have been repeatedly told that they and they alone should establish realistic affirmative action plans. This assertion has been reiterated most recently by Mr. Holmes during his testimony to this Subcommittee on August 9. The facts, however, tell another story.

For example, New Mexico State University was one among several public institutions which promulgated with pride, back in 1970 and 1971, their Equal Employment or Affirmative Action programs. This was followed by compliance review visits by officials from the Dallas Regional Office for Civil Rights of the HEW. Things went from bad to worse until in the Fall of 1972, President of the University, Gerald W. Thomas felt compelled to protest:

> I am concerned that the reports always point to deficiencies and problems *and never recognize the special efforts being made by the University to move ahead in a positive manner.*
>
> I am concerned about the implication of statements such as, "The only women in the College of Agriculture are in Home Economics, and there are no women in the Engineering College." This statement is misleading in that it implies that qualified women with advanced degrees are "available" in all fields. The problems here are not discriminatory in nature, *but* problems of availability of qualified people. Furthermore, Agricultural Extension was not included in the survey.
>
> I am concerned that, in order to correct the historic problems associated with past generations, we cannot give proper consideration to many highly qualified male applicants from the majority culture.
>
> I am concerned when the Office of Contract Compliance of HEW feels that it must use threats and coercion to force "quotas" rather than to set goals and objectives as specified by Congress. For example, the following is a quote from our recent review:
>
> > "A detailed response to our findings and the revised affirmative action plan (inclusive of goals and time tables) must be submitted to our office within 30 days. The award of a substantial contract of over 2 million dollars is pending our approval. In view of this fact we are sure you will want to act as expeditiously as possible by making adequate commitments."
>
> And,
>
> I am concerned about the lost time and effort and the tremendous expense associated with the investigation and review merely because we were not given advance information about the nature of the investigation or the time span of the study. We were told by members of the review team that the universities "could not be trusted with advance notices" because they would "change their records." This statement is a reflection on all Institutions of Higher Education in this Nation and cannot foster the cooperation needed to correct our historic problems of discrimination.

The reasons for President Thomas's indignation are self-explanatory

The San Francisco OCR-HEW regional office was so insistent on a naive interpretation of numbers and on its demand that "University [of Arizona] must submit written commitments to this office within thirty (30) calendar days, indicating in detail how each of the above deficiencies will be corrected, along with numerical goals and timetables for completion," that University of Arizona's President, Richard A. Harvill, felt compelled to write a long didactic reply which explained among other things the actual employment picture:

> On page 5 of your letter a number of specific departments are listed with no female faculty. Unfortunately, degree data for the time span 1948–1968 were not available by subject matter. Data were available, however, for 1960 through 1968 giving by subject matter the number of doctorates awarded to women. On the basis of these data, it is evident that in over half of the departments listed there are not enough women docorate holders available to justify the listing of these departments as deficient. In Agronomy, for example, over the nine years period examined, only six Ph.D.'s were obtained by women; two were obtained in the same time span in Meteorology; eight, in Watershed Management. Even doubling this degree output to estimate the number of degrees granted over a twenty year span does not provide a sufficient pool of females to justify the inclusion of these depart-

> ments on the list. As a matter of fact, over half of the departments listed had less than fifty female doctorates available from which to recruit during the period 1960 to 1968. Even doubling these amounts to simulate a longer time span hardly provides an adequate supply of women faculty for the hundreds of departments needing such personnel among the twenty-four hundred institutions of higher education in this country. This is especially so when consideration is given to the fact that not all of these women are available for higher education. Many go to business, industry and the government. It hardly seems reasonable to expect institutions to have women faculty members in academic fields in which the supply is too limited to permit representation on more than a few departmental faculties in the country.
>
> A statement on page 8 of your letter says: "Departments with significant numbers of female Graduate Assistants would be expected to have a similar proportion of females on their faculties." This statement does not take into account the fact that only a limited number of female graduate students reach the level of training needed for a university teacher, possibly because no great number seem to be interested in university teaching. In many disciplines such as English, foreign languages and education a large number of the graduate assistants are not preparing themselves for a career in university teaching, but plan rather to teach at the junior college, high school or elementary school level. Indeed, in general, if we base our hiring purely on the basis of trying to find the best qualified person for a given position, the number of women on our faculty will depend on the particular pool from which we search for faculty and this will vary from subject to subject.
>
> In the sciences and mathematics, for instance, we recruit not from fresh Ph.D.'s in general but from post-doctorals, those who are research associates or faculty members in other universities. In the fine arts we recruit from established professionals to a large extent. In areas such as history or English we recruit from instructors in other universities who have good publication records or from established professionals. These pools are in general selected from those Ph.D.'s who have chosen to subject themselves to a competitive test beyond the Ph.D. and who are relatively well known performers. Since we avoid hiring our own students in order to prevent inbreeding, the number of women students in these pools is not under our control. Hiring must in any case be based upon the availability of the personnel and not upon the representation of the sexes among graduate students.

At the other end of the country, negotiations with the New York City institutions was mostly handled by the main Office for Civil Rights in Washington, with some almost comical overtones. For example, in November of 1972, City University of New York's Chancellor, Robert Kibbee, wrote a letter to the Presidents of City University campuses, emphasizing in the first sentence that, "as you no doubt are aware, the City University has developed an Affirmative Action Program more than a year ago even though at the time the existing Executive Orders did not require the development of a plan by public institutions." Dr. Kibbe obviously believed that CUNY had had a plan for about a year or so, a plan which was developed with the active participation of the entire university community. Not so, says a paragraph written by J. Stanley Pottinger at about the same time: "we look forward to completing our investigation and assisting the University in *establishing* an affirmative action program *at the earliest possible date*." (tIalics added.) OCR's assistance is apparently of paramount importance.

The just quoted Kibbee-Pottinger exchange took place during the successful effort by the university to secure a *certain degree* of confidentiality for wholesale data demanded by HEW. It is interesting to note that the letter outlining the understanding between OCR and CUNY on this point contained the following clause:

> In addition, we wish to make clear that the contents of this letter apply specifically and only to the City University of New York. In no way do these temporary procedures necessarily express or imply procedures or policies for investigation with regard to other Federal contractors, and we will appreciate your treating this letter with the confidentiality necessary to preserve this point.

Thus, not only were the university administrators and faculties most of the time in the dark as to what they were exactly expected to do; the uncertainty seems also to have been deliberately perpetuated by officials of the crucial agency.

In his testimony to this committee, Mr. Peter Holmes, Director of the Office for Civil Rights of HEW, stated that "the recent recruitment analysis, selection analysis, salary equity analysis, promotion analysis are in our estimation so much more important to correcting discrimination factors in the . . . employment process . . . that we quite candidly do not attempt to make an issue of an institution that is establishing goals and timetables for itself that it must achieve parity at the end of a five year period." However, the impression of gentle reasonableness, conveyed by Mr. Holmes's statement has surely eluded Mr. Edward V. Grant, Acting President of the University of Connecticut after reading the letter by John G. Bynoe, Regional Civil Rights Director of the Boston area in which he rejects the UCON plan. Mr. Bynoe states for example:

> An acceptable affirmative action plan is required by Section 60–2.12 to have goals and timetables. These are provided as a means of measuring progress in the elimination of underutilization. Goals are to be developed separately for minorities and women based on the conclusions of the utilization analysis. The goals-setting process should involve department chairpersons and faculty, personnel relations staff and unit managers. Goals timetables and affirmative action commitments must be designed to correct any identifiable deficiencies.

In other words, Mr. Grant is asked to use goals and timetables as "a means of measuring porgress" and "to coreret identifiable deficiencies." There is even no talk of "good faith effort": you either satisfy the "measure" or risk losing the badly needed funds.

The Boston OCR officer was even more fundamentalist in his enforcement of Order No. 4. He charges:

> Instead of a detailed utilization analysis for minorities and women in the total university workforce, your response has concentrated on proving the inadequacy of the minority workforce in the areas from which you are most likely to recruit. You also cite the local housing, transportation and social problems, which are all external to the university, as reasons for the meager workforce of minorities available for employment. . . . Order No. 4 requires an institution to examine external problems and develop programs which will help to correct these problems where they inhibit minority employment.

Does this mean that the University must "develop programs which will help to correct these [external] problems" of "housing, transportation, and social problems"? Of course it does, as can be seen from another "recommendation" by the OCR official:

> Your response cites a transportation survey that is now three years old and relies on its continuing validity as a definitive answer to the request made in this recommendation. We believe the passage of time coupled with the obligation of an institution complying with affirmative action requirements to do more than ensure employment neutrality with regard to race, color, religion, sex, and national origin demands that the university undertake specific efforts which can be documented to meet this problem. This is not evidenced by your response.

After this some faculty wrote to our CANI office to inquire, jokingly, how could a university get into the railroad business. That this was not entirely beyond the range of OCR's ambition, the earlier set of recommendations made by HEW in November 1972 shows clearly:

> The University should undertake a feasibility study to investigate ways of improving transportation between Hartford and Storrs, Connecticut as a way of improving the minority applicant flow.

Thus, OCR did not just want the University to find out the facts: it also wanted the school to solve the "problem" of an "insufficient" supply of possible minority applicants for employment.

In the light of the above examples, it is no wonder that what was billed as a drive for nondiscrimination ended in the establishment of "numerical goals and precise timetables" which became quotas in everything but name. It took the OCR officials about two years to break down the last barriers of academic self-esteem. From then on, at least in the goal-timetable areas, universities became pliable to the point of accepting everything.

The already quoted President of New Mexico State University became party to a bargaining with the HEW's Regional Contract Compliance Officer in Dallas, Mr. Miles Schulze, which involved not only integral numbers of bodies but even fractions of a person. Here is an excerpt from his letter to Mr. Schulze:

> In paragraph 3, page 1, you have indicated that we failed to meet the goals set for minorities. Our analysis of chart I indicates that we did not meet our goals in the official-managers category (3 projected—0 hired) technicians (10 projected—9 hired) and sales workers (1 projected—0 hired). We did exceed our goals in the professional category (5 projected—19 hired) and the office clerical category (40 projected—55 hired). Our overall goal for these five categories was also exceeded (59 projected—83 hired). In the technician and sales workers category we missed our goal by one individual. Although there were no minority new hires in the official-managers category, two Spanish-Surnamed Americans (J. J. Tejada, Asst. Director, Cooperative Extension Service, and Jose I. Garcia, Manager, Administrative Systems Development, Computer Center) were promoted into this category, but have not been counted as new hires.
>
> In paragraph 1, page 2 you have indicated that we have no Native Americans on the faculty. Assistant Professor Richard J. Lease of the Police Science Department is *three-fourths* Cherokee, considers himself a Native American, and is so shown in all of our reports since he joined the faculty in 1965. The new Director of the Agricultural Extension Service is *part* Cherokee Indian. (Italics added.)

At the University of Cincinnati, which is under the jurisdiction of another regional branch of HEW, their Affirmative Action plan contains the statement that the objective of the University is "to utilize women and minority group employees in all fields and on all levels of employment in proportion to the availability of minority group members and women in the populations of a reasonable recruitment area." In practice this means, for example, at the start of the 1973–1974 school year (employment period August–December 1973), that the white male faculty had increased by 214 persons while the combined female and minority category had registered an increase of 238, *i.e.* more than one preferred category person hired for every candidate from the category of "others."

At the University of Michigan, whose president so ably described some of the difficulties, the Affirmative Action plan invoked in the fall of 1973 provided that in all employment categories 777 new positions projected for the coming three year period should be filled by 698 additional minority members and 105 non-minority women for a *net loss* of 26 non-minority men. No matter how flexibly one interprets these goals, the stated targets are a *reduction in* non-minority employment (−26) compared to a colossal *increase* (803) in the preferred categories. In the case of new academic personnel, the projected three year increments are +101 for minorities, +54 for non-minority women and +61 for non-minority men—a total of +216 new openings. This should be compared with an additional position activity of 290 covering attrition and turnover, for which "the University will continue to hire large numbers of non-minority men as well as women and minorities over three years." (*University Record*, October 8, 1973.)

It is worth noting that these and many other goal-timetable projections of this one inch thick Affirmative Action Document, for which the "cost of compiling the information would, I think, astound members of this committee," (testimony of President Robben Flemming of August 12, 1974), have been compiled despite the cautionary warning in another part of this astonishingly expensive document that:

> Both limited availability and keen competition for minorities makes it highly improbable that this percentage can be realized. In the current market minorities do not constitute one in five applicants for institutional positions.

Thus, it is clear that the yearly goals grossly exceed the proportions of minorities and women on the labor market, in programs not only approved by HEW, but extracted (as at Michigan) after long and arduous negotiations. This, despite the testimony to this committee that the goals are merely supposed to reflect, *in each year's new hires*, the existing availability proportions.

* * * * * * *

Commitments to goals of the type listed above lead inevitably to consequences of a most deplorable nature. Discriminatory actions of the type most of us thought had been pushed into the disrespected underground of human consciousness, emerged suddenly with ugliness and vigor. In order to fulfill the required goals within a stated period of time, and, in the words of Columbia's President

McGill, to "get the government off our back," departmental chairmen and other administrators began to write and mail announcements and letters like this:

> Dear Mr. Pittman, The recommendation for your appointment to the Department of Psychology at Prince George's Community College was disapproved by the Board of Trustees on August 15, 1972. The basis for disapproval was primarily that the position presently vacant in that department requires certain qualifications regarding the overall profile of the institution and department as well as educational qualifications of the individual involved.
>
> The disapproval in no way reflects upon your professional preparation or specific background in the area of Clinical Psychology. The decision was based primarily on the needs of the department in accord with its profile and qualifications.
>
> Sincerely,
>
> ELMER J. KUHN, *Dean*.

Similar was the experience of Richard J. Larschan, a prospective teacher of English who looked for a job at Connecticut College in New London:

> It is quite true that we have an opening here and that I have examined your dossier. It is very impressive indeed, and I wish I could invite you to come for an interview. At present, however, the department is interested in the appointment of a woman so we are concentrating on interviews of this kind.
>
> I appreciate very much your interest in the College, and I know that with your excellent qualifications you will find a position of your choice. Naturally, I shall keep you in mind should any changes occur.
>
> Best wishes to you for success.
>
> Sincerely yours,
>
> G. J. WILLAUER, Jr., *Chairman*.

Likewise, the chairman of the Sociology Department of a University in Florida wrote to a prospective appointee in February of 1972:

> Since I last corresponded with you regarding the possibility of a position in this Department, decisions have been made by the top administration of the University that have created some awkwardness in our recruiting efforts.
>
> The decision I refer to is that all unfilled positions in the University must be filled by black or females. Since I have no information reguarding your racial identification, it will only be possible to consider you for a position in the event that you are black.
>
> I might add that we have received letters from your references and have been enthusiastic about your candidacy.

Sometimes, the applicant didn't have to bother. On April 18, 1972 a Sonoma State College Administrator wrote to a placement officer at Berkeley:

> I was intrigued by the description you gave of Mr. Michael Goldberg and very much appreciate your efforts on his behalf. Your letter says much about you at well as about him.
>
> Mr. Goldberg has not contacted me and I fear that were he to do so we would have no more than a pleasant conversation, for we are pledged to the affirmative action policy in our hiring this year.

Similar restrictive announcements are coming from all kinds of colleges, big and small, East and West:

> Sacramento State College is currently engaged in an Affirmative Action Program, the goal of which is to recruit, hire, and promote *ethnic and women candidates until they comprise the same proportion of our faculty as they do of the general population.*
>
> The Department of Philosophy at the University of Washington is seeking qualified women and minority candidates for faculty position at all levels beginning Fall Quarter 1973 . . .
>
> All of the California State Colleges have been requested to implement a program of active recruitment of qualified faculty of minority background, especially Negro and Mexican-American.
>
> Since I am unable to determine this type of information from the resumes you have sent me, I should very much appreciate it if you could indicate which of your 1972 candidates are either Negro or Mexican-American.
>
> Your prompt response to my letter of May 12 with four candidates, *all of whom seem qualified for our* vacancy, is greatly appreciated. Since there is no indication that any of them belongs to one of the minority groups

> listed, I will be unable to contact them at present. My instructions are to exhaust every opportunity for recruiting a qualified person from among a minority group, including women. If this attempt is fully documented, I will then be given permission to seek the best qualified person available regardless of race, color, or creed which has always been our practice in the past. If I get this "green light," I would certainly be interested in two of your candidates and would contact them to see if they were still available.

Particularly heartbreaking, has been the case of Martin S. Goldman, a native of Philadelphia whom this committee may have an opportunity to hear first hand. Having first worked in predominantly black schools, he learned about deficiencies in existing curricula. Like many others of his generation, he proceeded to translate his understanding into action. Faced with a choice of possible specialties, he put heavy emphasis on courses in black history. His intent was to teach at some college or university, and his first experiences looked promising.

Three years ago, in April of 1971, the University of Michigan, Dearborn Campus, invited him out for an interview for a position in Afro-American and urban history. He flew out to Dearborn and after giving a paper was offered a one-year half-time appointment on the spot by the Dean of Liberal Arts and the Chairman of the Department. He told them that he had not yet begun research on his thesis and would very much appreciate it if they would hold the offer open for the following year. (He had only passed his Ph. D. orals the day before the interview.) They said they would try, but of course could make no promises. The next year he received a note telling him how impressed they were and that he was still the top candidate for the spot. In the spring of 1972, the Chairman called and said that because of budget problems no position was funded but that Mr. Goldman would be reconsidered for that year. A call to the Chairman, Dr. Donald Proctor, broke the news, however, that a new dean had been installed and that he had passed down the word to hire blacks. Though still very impressed with Goldman's work, said Proctor, the department would have to follow the dean's orders—a bitter disappointment for someone whose hopes had been kept high for almost two years.

Little had Mr. Goldman known at the time that this refusal was only a beginning. Over the ensuing years, he tried unsuccessfully to knock on the door of more than 100 U.S. universities and colleges of every size and in every geographic area, only to find them shut tight. Like many other young persons who selected the same scholarly area, he was subjected to every type of discriminatory treatment that may be found in the book. After many unsuccessful years of search, Mr. Goldman has given up and accepted a Federal job. Donald Avery, also specializing in the Afro-American aspects of American history, was finally lucky and landed a satisfactory teaching job. Not so fortunate was Paul Lammermeier who had to settle for a job of short-order cook in a pancake house in Mentor, Ohio.

The present situation seems quite bleak. Particularly revealing is a study covering the field of Sociology which was carried out by Dr. Edgar Borgatta, distinguished professor at Queens College, City University of New York. He polled chairmen and male and female members of departments of Sociology all over the country with results which cannot be simply set aside. The first question,

> . . . During the last three years, have you (has your department) received any communication from your administration to the effect that positions would be made available (added, replaced or not deleted in the budget) if an acceptable candidate from a minority group could be found?

elicited a "yes" reply from 37% of chairmen, 39% of female staff and 35% of male staff. The second question read:

> During the last three years, has any candidate been sought out preferentially (non-competitively) because of sex, race, national origin, or other arbitrary characteristics (assuming, of course, the person was presumed to have acceptable qualifications as a sociologist)?

It would seem clear that in responding "yes" to this question we would have a statement of attempted preferential hiring. 40% of polled chairmen answered in the affirmative, and so did 42% of their female and 47% of their male staff. The third question was quite straightforward:

> . . . During the last three years, have you (has your department) received any communication from your administration, formally, to seek out and give preference to candidates of minority groups in filling positions, i.e., not treat one or more of the positions as open to all comers on a competitive basis?

23% of the chairmen answered "yes" with 24% and 38% being the respective numbers for female and male. Next inquiry was about other institutions:

> During the last three years, have you (or has the staff member in charge of answering requests about your students and faculty who are entering the market) received any requests which explicitly or implicitly indicate that preference in filling a position will be given (non-competitively) to a person or minority group status?

The "yes" answers were 57%, 26% and 38% for the respective categories. The chairmen's answers should be considered more reliable since they are mostly recipients of the requests in question. Finally, Dr. Borgatta asked:

> In your opinion, which of the statements below represents the interpretation of Affirmative Action on your campus according to actual procedures (and the explicit or implicit support of your administration)?
>
> 1. Affirmative Action requires special attention to finding some minority group candidates, with the objective of preferentially hiring them if the (minimum acceptable) standard of the department of the school can be satisfied.
>
> 2. Affirmative Action requires special attention to finding minority group members in the recruitment process so that they can be evaluated with other candidates, but preference in selection is to be given to some minority group members among candidates who are acceptable to the department and school if this is the only way to add minority group members to the department.
>
> 3. Affirmative Action requires that attention be given to locating all possible candidates for a position, including those of minority group status, but once the inclusive recruitment base is established only the factors related to academic potential and excellence are to be used.

The first alternative answer was indicated by 15% of the chairmen, 13% of female staff and 27% of male staff. Respective numbers for the second alternative were 23%, 42% and 32%, *i.e.* 38% of chairmen, 55% of female staff, and 56% of male staff believe that Affirmative Action means some kind of preferential *i.e.*, discriminatory treatment. Thus in the same issue of ASA Footnotes (December 1973) in which another author bitterly complained about essentially all results of Affirmative Action in the field of Sociology, Dr. Borgotta could not escape the conclusion that:

> In summary, with whatever limitations this abbreviated research may have, it is doubtful that any conclusion can be reached other than that in a large proportion of academic institutions Affirmative Action has meant giving preference to women and minorities, and, in the words of Bernice Sandler, violating the very laws and regulations they are seeking to observe. In corroboration of the findings of this study, another report recently appeared with findings that 35 percent of responding chairmen from a broader sample of institutions indicated that their departments had formally determined a priority list for the hiring of women and minorities (Lorch 1973).

SUMMARY AND RECOMMENDATIONS

Affirmative action programs have fallen into the abuses and contradictions described by many witnesses essentially because their devisers sought to find a shortcut from the task of correcting the wrongs of discrimination. That shortcut was the so-called "statistical" method (usually characterized by a lack of statistical preparation) and it resulted in the goals and timetables. The problem arose that getting the proportions right is not the same thing at all as nondiscrimination. Looked at from the outside, from the point of view of a bureaucrat observing proportions, it may appear identical, but looked at from the inside, from the point of view of the man or woman, black or white, who has seen someone preferred to him or her precisely in *order* to get the numbers right, it is nothing more than discrimination in its crudest form. Like many shortcuts, this one turned out to be a snare and a delusion.

Not only have these programs worked injustice on many individuals and created a general cynicism about the justice of what should be merit considerations, but, as several witnesses, such as Presidents Hester and Flemming, have testified before this committee, they are clumsy, expensive and time-consuming out of all proportion to thier effectiveness, conceived in a spirit of *a priori* punitiveness, and, in short, unworkable. As President Hester said, if many aspects of the regulations are meant to be taken at face value and their five or ten year deadlines enforced, "it will be disastrous." If they are not meant to be enforced, then they represent a colossal waste.

The "numerical goals" and "precise timetables," which seem to be the root cause of the new wave of discrimination and related malpractices, appear to have been created because they looked like the most convenient bureaucratic solution. The officials would not have to make the moral decisions involved in a finding of discrimination or its absence and they would not have to yield to the claims of professional competence made by those they were investigating and judging. All they would have to do would be to check off numbers on a list and think up requirements for others to fulfill. Once adopting this approach, the rule makers proceeded to devise Orders, guidelines and other ordinances while almost completely ignorant of the actual state of affairs in the professional labor market, of the statistical theory, and of the structure of educational institutions which they wanted to regulate. They never tried out a pilot project but rushed headlong into generalizations. They did not seek counsel from those ultimately involved in the programs, yet went forward with threats which touched upon the very financial survival of institutions under pressure. No wonder, then, that the consequences of such preciptious acts were both unpleasant and many and that one should now take decisive action to right the wrong.

Of greatest importance would be the disassociation of institutions of higher education from the Labor Department regulations which, even in their acceptable parts, reflect another domain of applicability and are poorly suited for institutions of higher learning. Also, the demands for numerical goals and timetables should be rescinded in the light of their proven ineffectiveness on the one side, and their inordinate cost and enormous potential for harm on the other.

This would pave the way for the development by appropriate groups of experts under the overall supervision of the Department of Health, Education, and Welfare of a new set of antidiscrimination rules, implementing the pertinent statutes, which would be fair, just, equitable and workable.

The following suggestions might be useful in formulating an approach that places the best of the present congerie of programs into the context of a genuine nondiscrimination plan.

(1) Colleges and universities should be asked to comply with clearcut nondiscrimination directives in the areas of recruitment, hiring, promotion, retirement, salary and adjudication of grievances. These would reflect the spirit as well as the letter of Executive Order 11246 which seeks to cast the net as widely as possible for all qualified applicants for a position and to guarantee that all are treated "without regard" to their race or sex. Such directives clearly would have to preclude the existence of any double standard, either substantive or procedural. Thus there would be no room for such exercises as the Chancellor of the State University of New York's newly stated hiring policy. This policy requires voluminous documentation if a white male is to be hired, including letters of disinterest from women and members of designated minorities invited to consider job offers, and often already holding other jobs. On the other hand, if a member of one of the preferred groups is to be hired, comparatively little paperwork is required. Such a policy discourages the hiring of qualified white males just as surely as grandfather clauses and poll taxes once discouraged voting by blacks. Such differential approaches, if accepted for use against any group can be used against all.

(2) Antidiscrimination directives applicable to educational institutions should be the joint product of educators and government officials aided by statistical and other experts. In the future there should be much greater cooperation between bureaucrats and academics on projects of common concern. An office in HEW, centralizing the development and oversight of affirmative action programs in education, should be staffed by personnel which is substantially more knowledgeable about the nature of universities than was the case in the past. This may bring to an end many of the complaints heard from university administrators and faculty about the unreality of bureaucratic programs.

(3) Educational autonomy should be strongly reaffirmed in the fields of curriculum, staffing and teaching. The attempts by government officials to interfere with academic structures and content out of a desire to facilitate the fulfillment of the programs they oversee, is one of the more alarming side effects of the present melange of programs. Government officials are there to see that discrimination is halted, not to determine teaching qualifications, course requirements or academic standards. As a corollary, one would expect that overall

govermental intervention would be held at a minimum compatible with the actual task at hand.

(4) A limit should be set on the time a bureaucratic agency may take in considering a submitted plan. As pointed out by Dr. Flemming, at present, years can go by without word from the federal government on whether or not a plan has been accepted. This procedural custom has the substantive effect of transforming the judicial function of bureaucrats into a tormenting and harassing one, since one's case is always pending before a judge who at the same time sends his emissaries to make farther demands. If such a time limit were to be passed, the submitted plan should, like a Congressional bill, be considered accepted.

In addition, the point made in previous testimony by Mr. Stith, the lawyer who had worked on pertinent cases for Columbia University, is well taken. The power to deprive a university of funds should not be given to any official graced with a telephone and an intention to do so. A breathing space should be required before any funds are cut off. The regulations should provide for a reasonable and sufficient amount of time for the university to discuss and appeal the administrative decision.

(5) A system of graded sanctions should be adopted to punish breaches of obligations in various degrees, as proposed by Professor Jan Vetter of the Berkeley Law School in a report prepared for the Administrative Conference of the United States, "Affirmative Action in Faculty Employment Under Executive Order 11246."[1] The either/or of cutting off federal funding is an exceptionally clumsy way of meting out punishment. If the NCAA can control its member colleges through graded sanctions, it is hard to see why the United States Government cannot.

(6) The present practice that essentially the same group of officials produces regulations, investigates their application, passes judgment on possible noncompliance, metes out punishment and dictates the remedies should be abolished and the various functions should be vested in mutually independent entities. In particular, the determination of institutional noncompliance and the subsequent imposition of sanctions should be done by forums (commissions, tribunals, boards of inquiry and the like), which would include distinguished and knowledgeable members of the academic community.

(7) The present requirement of affirmative action programs that colleges and universities maintain effective and reliable grievance procedures should be retained. But as Mr. Stith pointed out in earlier testimony, there is no sense in mandating such programs if it is not also mandated that they be used.

Such a system of grievance proceedings throughout academic may do much to deal with the complaints of discrimination that do arise. Of course, it is understood that there should be an appellate system outside the given institution to which unsatisfied grievants may bring their case. Such an appellate system should be the heart of a genuine antidiscrimination program. We agree entirely with President Flemming of Michigan that it would not be hard to establish impartial boards of expert professionals to decide cases of discrimination in institutions not their own. Such boards could be set up in any number of ways. One possibility would be for the professional associations to develop lists of professionals willing to serve, on retainer, on such boards. The plaintiff and the defendant could each choose representatives from them to form an appellate board. The boards could either operate autonomously, under the aegis of federal officials who would make sure that the law was not broken, or as part of the federal enforcement system. In that case, the government could either select its expert for the board or even send its own representative to serve as chairman or chief ombudsman. The funding for this program would be trifling compared to the present expenses of arranging, complying and policing compliance with the unattainable goals and timetables.

The obvious and overwhelming advantage of these boards is that they would be competent and designed to deal with individual cases of discrimination as they occur to individuals wherever and whoever they may be. Whereas now only certain groups (identical with those thought relevant to the Philadelphia construction industry) are scouted for "underutilization" under this plan discrimination against ethnic Catholics, Sephardic Jews, the physically handicapped or anyone else, could be ferreted out and rectified. Administrative judges would not have to avoid discussion of the merits of the case because of professional incompetence or ignorance, though confidentiality should be maintained outside the hearing.

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[1] The Conference has not acted on or adopted this report as yet.

One could anticipate two major objections to this plan. The first is that the number of cases is so enormous that they cannot be dealt with on an individual basis. The second objection, raised by President Flemming, is that it would require an agreement to allow these appellate hearings to be final and that neither the bureaucracy or the courts should be allowed to grant *de novo* trials.

It is simply not true that such boards would be swamped with cases. The prime piece of evidence for the belief that they would be is the failure of the EEOC to cope with its enormous backlog of cases. However, of those hundreds of thousands of cases, only about sixteen hundred stem from post-secondary education, of which not all were faculty cases. In addition, the EEOC, with its limited number of regional offices, does not, in resolving these cases, have a large enough staff which could come close to replacing, either in knowledge or in number, the many independent experts who would work on all campuses. It should also be noted that the testimony of President Hester of NYU concerning the disposition of cases involving his university before the various boards in New York City and New York State, indicates that all 34 of the charges dealt with up to now turned out to be unjustified or were withdrawn. It is therefore only reasonable to predict that only a relatively small number of cases would remain active and perhaps travel all the way down the appellate road. Thus there is every reason to assume that a cooperative program, uniting government and academic forces, could easily cope with the complaints of discrimination, where the wholesale punitive measures used at present merely create additional cases of discrimination.

The second objection has two parts. Would the agencies and would the courts cooperate? Under this plan, the joint government-academic boards could easily *be* the agency grievance scheme, whether involving HEW or EEOC or some other governmental agencies. But certainly there should be no level of agency appeal above these boards. As far as the courts are concerned, the right to a trial *de novo* presumably cannot be challenged by either the executive or legislative branches and thus a disappointed plaintiff could still go to court under this plan. However, he or she can do so now.[2] It would thus be a very curious argument which saw in the fact that trials *de novo* are available to citizens unsatisfied with internal or agency grievance proceedings, an argument for abolishing any and all such procedures.

It is very unfortunate that to a large extent the present difficulties may have originated from a spirit of implacable mistrust which expresses itself in the belief that no group of expert academics can be trusted to be fair to women and minorities. In truth, however, this objection is without merit. The very fact that the HEW guidelines speak of remedying underutilization and not of correcting discrimination, indicates that the problem all along has been, as Dr. Richard Lester has so ably pointed out, for universities at the graduate level, a question of inadequate supply. The absence of substantial pools of unemployed women and minorities substantiates this. For example, even the discrepancy between the 5.2% unemployed women versus 1.1% unemployed men in physics achieves its true proportions when we reflect that it involves a total discrepancy of exactly 20 jobs, a truly insignificant number when compared to the number of physics departments in this country. Even where it can be presumed that there is a department or a dean that discriminates or would like to, on the basis of race, or sex, or religion, or national origin, it is wholly unrealistic to think that among the range and scope of American academics none can be found who will be fair to a complainant. The recent responses of the professional associations to the problem of pension benefits and the allocation of scholarships, confirm the exact opposite of this cynical belief.

The thoroughgoing suspicion that refuses to cooperate with those who are to be regulated and which seeks to treat them as guilty in principle, cannot possibly lead to nondiscrimination in an area in which so much depends on considerations of professional merit as judged by peers. It is absolutely necessary for the future that regulations be proposed, discussed and adopted in a spirit of openness, mutual respect and cooperation, and not imposed arbitrarily and in ignorance from above.

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[2] The plaintiffs whose cases were dismissed in the NYU case have not all plunged into litigation. After losing twice, on the merits, not everyone remains unconvinced. It is unlikely that universities would frequently go to court in such circumstances.

TESTIMONY OF PROF. MIRO M. TODOROVICH, ASSOCIATE PROFESSOR OF PHYSICS, BRONX COMMUNITY COLLEGE, CITY UNIVERSITY OF NEW YORK; COORDINATOR, COMMITTEE ON ACADEMIC NONDISCRIMINATION AND INTEGRITY

Mr. TODOROVICH. Mr. Chairman, before I try to disperse my duty just let me comment that it was music to my ears, some of the remarks you made a while ago.

I come from a part of the world where not so long, about 150 years, my grandfather was a slave in a foreign-dominated country. When I mention slavery I mean it in all of the most gruesome thing that one can muster.

I would really be very unhappy if after traveling a journey to these shores my child one day would like to go to get an education and into a profession, perhaps a little better grade at mathematics because I could give him some of that input, and then find the door shut.

Your proposal of making sure that the educational opportunities be widened to the point where everyone can be guaranteed who wants entry into a school of his choice and his capacities, it is really one of the best things that I heard in a long time in this area.

Ladies and gentlemen, I wish to express my appreciation and gratitude for the opportunity and privilege to present before the subcommittee the views of the Committee on Academic Nondiscrimination and Integrity on various aspects of antibias regulations in higher education promulgated by the Federal Government.

While preparing my written presentation I was keenly aware that most of the ground pertinent to the problem has already been covered by the many witnesses who preceded my in this chair.

Still I believe that no one can speak as eloquently as the ones of the plans and the participants themselves. I took therefore the liberty to include into the narrative excerpts from some of the more remarkable documents which cross my desk over a period of months.

For example, a letter from the president of the University of New Mexico. I do no know much about the admissions procedure at the School of Law of New Mexico beyond this morning. As a matter of fact I don't know very much about the Law School of New Mexico.

However I see from this letter that after many visits of compliance officers the president felt compelled to write to the head of the Dallas regional office of Civil Rights of HEW a letter saying in part:

> I am concerned when the Office of Contract Compliance of HEW feels that it must use threats and coercion to force "quotas" rather than to set goals and objectives as specified by Congress . . .
>
> I am concerned about the lost time and effort and the tremendous expense associated with the investigation and review merely because we were not given advance information about the nature of the investigation or the timespan of the study. We were told by members of the review team that the universities "could not be trusted with advance notices" because they would "change their records." This statement is a reflection on all institutions of higher education in this nation and cannot foster the cooperation needed to correct our historic problems of discrimination."

His colleague from the neighboring State of Arizona felt it necessary to write the officials of the office in San Francisco about the inner workings of supervision and writes in part:

> On the basis of these data it is evident that in over half of the departments listed there are not enough women doctorate holders available to justify the listing of these departments as deficient.
>
> In agronomy, for example, over the 9-year period examined only six Ph. D.'s were obtained by women; two were obtained in the same timespan in meteorology; eight in watershed management.
>
> Even doubling this degree output to estimate the number of degrees granted over a 20-year span does not provide a sufficient pool of females to justify the inclusion of these departments on the list.

It is important to point out that President Harvill of Arizona was not opposing an effort to include into the educational process all available qualified women.

What he did was to convey to the apparently ignorant officials his opposition to the demanded goals and timetables be prepared in hundreds of academic departments in disciplines in which there are only small total numbers of qualified women available.

In the same way the fact that there are presently 25 unemployed women physicists as indicated at these hearings the other day does not justify the demand that thousands of physics departments in this country expend an inordinantly large amount of time and energy to level up numerical goals and precise timetables for future hiring.

What we do need is to find for these 25 ladies jobs commensurate with their qualifications in an effective complaint mechanism to which they can turn if anyone is giving them a runaround.

There is a reason to believe that the confusion in understanding the interpretation of the various orders, regulations, and guidelines was not as spontaneous as one is made to believe.

In one of the letters of understanding J. Stanley Pottinger, the former Director of the Office for Civil Rights wrote to Robert Kibbee, chancellor of City University of New York, the following paragraph:

> In addition we wish to make clear that the contents of this letter apply specifically and only to the City University of New York. In no way do these temporary procedures necessarily express or imply procedures or policies for investigation with regard to other Federal contractors and we will appreciate your treating this letter with the confidentiality necessary to preserve this point.

Thus, not only were the university administrators and faculties most of the time in the dark as to what they were exactly expected to do. The uncertainty seems to have been deliberately perpetuated by some top officials of the crucial agency in question.

In his testimony to this committee Mr. Peter Holmes, present Director of the Office for Civil Rights for HEW, stated that:

> The recent recruitment analysis, selection analysis, salary equity analysis, promotion analysis are in our estimation so much more important to correcting discrimination factors in the employment process that we quite candidly do not attempt to make an issue of an institution that is establishing goals and timetables for itself that it must achieve parity at the end of a 5-year period.

However, the impression of gentle reasonableness conveyed by Mr. Holmes' statement has surely eluded Mr. Edward V. Grant, acting president of the University of Connecticut after reading the letter by John G. Bynoe, regional civil rights director of the Boston area in which he rejects the University of Connecticut plan. Mr. Bynoe states for example:

> An acceptable affirmative action plan is required by section 60-2.12 to have goals and timetables. These are provided as a means of measuring progress in the elimination of underutilization. Goals are to be developed separately for minorities and women based on the conclusions of the utilization analysis.

> The goals-setting process should involve department chairpersons and faculty, personnel relations staff and unit managers. Goals, timetables and affirmative action commitments must be designed to correct any identifiable deficiencies.

In other words, Mr. Grant is asked to use goals and timetables as "a means of measuring progress' and "to correct identifiable deficiencies." There is no talk of "good faith effort." You either satisfy the "measure" or risk losing the badly needed funds.

Actual numbers were discussed in an exchange between Miles Schulze, HEW's regional compliance officer in Dallas, and the president of New Mexico State University, Dr. Thomas.

Dr. Thomas wrote:

> In paragraph 3, page 1, you have indicated that we failed to meet the goals set for minorities. Our analysis of Chart I indicates that we did not meet our goals in the official-managers category (three projected, zero hired), technicians (10 projected, nine hired) and sales workers (one projected, zero hired.)
>
> We did exceed our goals in the professional category (five projected, 19 hired), and the office clerical category (40 projected, 55 hired).
>
> Our overall goal for these five categories was also exceeded (59 projected, 83 hired).
>
> In the technician and sales workers category we missed our goal by one individual.
>
> Although there were no minority new hires in the official-managers category, two Spanish-surnamed Americans were promoted into this category but have not been counted as new hires.
>
> In paragraph 1, page 2, you have indicated that we have no Native Americans on the faculty. Assistant Professor Richard J. Lease of the Police Science Department is three-fourths Cherokee, considers himself a Native American and is so shown in all of our reports since he joined the faculty in 1965. The new Director of the Agricultural Extension Service is part Cherokee Indian.

Thus there is not only a demand for an integral fulfillment of the numerical goals within a specified time but compliance extends even to a fraction of a person.

Numbers also figure prominently in a 1973 affirmative action plan of the University of Michigan that provides in all employment categories 777 new positions projected for the coming 3-year period should be filled by 698 additional minority members and 105 nonminority women for a net loss of 26 nonminority men.

No matter how flexibly one interprets these goals the stated targets are a reduction in nonminority employment, minus 26, compared to a colossal increase, 803, in the preferred category.

It is worth noting that these and many other goal-timetable projections of this 1 inch-thick affirmative action document, for which the "cost of compiling the information would"—I am quoting now President Fleming—"I think, astound members of this committee."

Despite the astounding cost the document was prepared. And it states:

> Both limited availability and keen competition for minorities makes it highly improbable that this percentage can be realized. In the current market minorities do not constitute one in five applicants for institutional positions.

Thus it is clear that the yearly goals grossly exceed the proportions of minorities and women on the labor market in programs not only approved by HEW but extracted, as in the case of Michigan, after long and arduous negotiations.

This despite the testimony to this committee that the goals are merely supposed to reflect, in each year's new hires, the existing availability proportions.

Among the far out interpretations of the order No. 4 as applied to universities are those of the Boston OCR officer who wrote to the President of the University of Connecticut:

> The University should undertake a feasibility study to investigate ways of improving transportation between Hartford and Storrs, Connecticut as a way of improving the minority applicant flow.

That they were deadly serious is shown in the following followup letter from the Office of Civil Rights:

> You also cite the local housing, transportation and social problems, which are all external to the university, as reasons for the meager workforce of minorities available for employment . . . Order No. 4 requires an institution to examine external problems and develop programs which will help to correct these problems where they inhibit minority employment.

Does this mean that the university must "develop programs which will help to correct these external problems" of "housing, transportation and social problems?"

Of course it does, as can be seen from another "recommendation" by the OCR official:

> Your response cites a transportation survey that is now 3 years old and relies on its continuing validity as a definitive answer to the request made in this recommendation.
>
> We believe the passage of time coupled with the obligation of an institution complying with affirmative action requirements to do more than ensure employment neutrality with regard to race, color, religion, sex and national origin demands that the university undertake specific efforts which can be documented to meet this problem. This is not evidenced by your response.

After this some faculty wrote to our CANI office to inquire, half jokingly, what steps could be taken for the university to get into the railroad business.

Commitments to goals of the type listed above lead inevitably to consequences of a most deplorable nature. Discriminatory actions of the type most of us thought had been pushed into the disrespected underground of human consciousness emerged suddenly with ugliness and vigor.

In order to fulfill the required goals within a stated period of time and in the words of Columbia's President McGill, to "get the Government off our back" departmental chairmen and other administrators began to write and mail announcements and letters like this:

> Dear Mr. Pittman: The recommendation for your appointment to the Department of Psychology at Prince George's Community College was disapproved by the Board of Trustees on August 15, 1972. The basis for disapproval was primarily that the position presently vacant in that department requires certain qualifications regarding the overall profile of the institution and department as well as educational qualifications of the individual involved.
>
> The disapproval in no way reflects upon your professional preparation or specific background in the area of Clinical Psychology. The decision was based primarily on the needs of the department in accord with its profile and qualifications.

I will spare you the reading of many similar communications.

I would comment on insinuations, made most recently yesterday at these hearings, that such letters are a devilishly convenient way for a chairman to put the blame for refusal on the affirmative action program.

I am stating this categorically that from all the extensi[illegible]formation at the disposal of our committee such an explanation is totally unwarranted and is based on the flimsiest of grounds.

While a scattering of wrongdoing may be expected to happen, like in all cases of possible malpractice, all the available intelligence points unfortunately to the discriminatory character.

Surveys have served to buttress Dr. Borgatta's conclusion that:

> In summary, with whatever limitations this abbreviated research may have it is doubtful that any conclusion can be reached other than that in a large proportion of academic institutions affirmative action has meant giving preference to women and minorities and in the words of Bernice Sandler, violating the very laws and regulations they are seeking to observe.
>
> In corroboration of the findings of this study another report recently appeared with findings that 35 percent of responding chairman from a broader sample of institutions indicated that their departments had formally determined a priority list for the hiring of women and minorities.

This was a report of March 1973.

Mr. Chairman, where do we go from here? The existing programs which have been so ardently tried over the past half of a decade have miserably failed. On this point there is a general agreement between both protagonists and the critics of the existing regulations.

They want more monitoring. They want more stringent rules. They want more bureaucratic power.

When a car model year after year seems to cause more than its share of accidents one begins to look at the design of the car. One tries to produce a better model. The present Governmental regulations are designed supposedly to implement the congressional statutes. And Presidential orders have proven grossly defective and inadequate and accident-prone.

We need a new look and a new design. Of greatest importance would be the dissociation of institutions of higher education from the Labor Department regulations which, even in their acceptable parts, reflect another domain of applicability and are poorly suited for institutions of higher learning.

Also the demands for numerical goals and timetables should be rescinded in the light of their proven ineffectiveness on the one side and their inordinate cost and enormous potential for harm on the other.

This would pave the way for the development by appropriate groups of experts under the overall supervision of the Department of Health, Education, and Welfare of a new set of antidiscrimination rules, implementing the pertinent statutes, which would be fair, just equitable, and workable.

The following suggestions might be useful in formulating an approach that places the best of the present congerie of programs into the context of a genuine nondiscrimination plan.

No. 1. Colleges and universities should be asked to comply with clearcut nondiscrimination directives in the areas of recruitment, hiring, promotion, retirement, salary and adjudication of grievances.

These would reflect the spirit as well as the letter of Executive Order 11246 which seeks to cast the net as widely as possible for all qualified applicants for a position and to guarantee that all are treated without regard to their race or sex.

No. 2. Antidiscrimination directives applicable to educational institutions should be the joint product of educators and Government officials aided by statistical and other experts. In the future there should be much greater cooperation between bureaucrats and academics on projects of common concern.

No. 3. Educational autonomy should be strongly reaffirmed in the fields of curriculum, staffing, and teaching. The attempts by Government officials to interfere with academic structures and content out of a desire to facilitate the fulfillment of the programs they oversee is one of the more alarming side effects of the present melange of programs.

Government officials are there to see that discrimination is halted, not to determine teaching qualifications, course requirements or academic standards.

As a corollary one would expect that overall governmental intervention would be held at a minimum compatible with the actual task at hand.

No. 4. A limit should be set on the time a bureaucractic agency may take in considering a submitted plan. As pointed out by Dr. Flemming, at present, years can go by without word from the Federal Government on whether or not a plan has been accepted.

I have just learned yesterday that many plans which have at this point been even accepted may not be in compliance with the most recent regulations which are currently emanating from the Office of Federal Contract Compliance.

This procedural custom has the substantive effect of transforming the judicial function of bureaucrats into a tormenting and harassing one, since one's case is always pending before a judge who at the same time sends his emissaries to make further demands.

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In particular the determination of institutional noncompliance and the subsequent imposition of sanctions should be done by forums, commissions, tribunals, boards of inquiry and the like, which would include distinguished and knowledgeable members of the academic community.

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Of course it is understood that there should be an appellate system outside the given institution to which unsatisfied grievants may bring their case.

Such an appellate system should be the heart of a genuine antidiscrimination program.

We agree entirely with President Flemming of Michigan that it would not be hard to establish impartial boards of expert professionals to decide cases of discrimination in institutions not their own.

Such boards could be set up in any number of ways. One possibility would be for the professional associations to develop lists of professionals willing to serve, on retainer, on such boards.

The plaintiff and the defendant could each choose representatives from them to form an appellate board. The boards could either operate autonomously, under the aegis of Federal officials who would make sure that the law was not broken, or as part of the federal enforcement system.

In that case the Government could either select its expert for the board or even send its own representative to serve as chairman or chief ombudsman. The funding for this program would be trifling compared to the present expenses of arranging, compiling and policing compliance with the unattainable goals and timetables.

The obvious and overwhelming advantage of these boards is that they would be competent and designed to deal with individual cases of discrimination as they occur to individuals wherever and whoever they may be.

Whereas now only certain groups, identical with those thought relevant to the Philadelphia construction industry, are scouted for underutilization, under this plan discrimination against ethnic Catholics, Sephardic Jews, the physically handicapped or anyone else, could be ferreted out and rectified. Administrative judges would not have to avoid discussions of the merits of the case because of professional incompetence or ignorance, though confidentiality should be maintained outside the hearing.

It is very unfortunate that to a large extent the present difficulties may have originated from a spirit of implacable mistrust which expresses itself in the belief that no group of expert academics can be trusted to be fair to women and minorities.

In truth however this objection is without merit. The very fact that the HEW guidelines speak of remedying underutilization and not of correcting discrimination indicates that the problem all along has been, as Dr. Richard Lester had so ably pointed out, for universities at the graduate level, a question of inadequate supply.

The absence of substantial pools of unemployed women and minorities substantiates this. For example, even the discrepancy between the 5.2 percent unemployed women versus 1.1 percent unemployed men in physics achieves its true proportions when we reflect that it involves a total discrepancy of exactly 20 jobs, a truly insignificant number when compared to the number of physics departments in this country.

Even where it can be presumed that there is a department or a dean that discriminates or would like to on the basis of race or sex or religion or national origin, it is wholly unrealistic to think that among the range and scope of American academics none can be found who will be fair to a complainant.

The recent responses of the professional associations to the problem of pension benefits and the allocation of scholarships confirm the exact opposite of this cynical belief.

The thoroughgoing suspicion that refuses to cooperate with those who are to be regulated and which seeks to treat them as guilty in principle cannot possibly lead to nondiscrimination in an area in which so much depends on considerations of professional merit as judged by peers.

It is absolutely necessary for the future that regulations be proposed, discussed and adopted in a spirit of openness, mutual respect and cooperation and not imposed arbitrarily and in ignorance from above.

Members of my committee would be eager to cooperate in these endeavors if anyone would invite them to be.

Mr. O'Hara. Thank you very much, Professor Todorovich.

Without objection your statement will be entered in full into the record prior to your oral testimony.

One of the things that has disturbed me about your testimony and about Professor Hook's testimony and about Professor Lester's study that I might as fell get off my chest is that in all three there is a hint that, well, maybe the numerical goals and what I would consider quotas under the Office of Contract Compliance of the Department of Labor, maybe they are OK in the industrial setting but not in the academic setting.

My feeling is that they are just as wrong in the construction industry as they are in universities.

Indeed, we had a vote some years ago around this place on the Philadelphia plan. I was one of the minority that voted against providing funds for implementation of the Philadelphia plan because I felt it was wrong there just as I feel it is wrong in universities.

I think you can argue that case. But I think really what you fellows are trying to do, if you don't mind my saying so, is you are trying to demonstrate that you aren't a bunch of sexists and racists and you are trying to appear to be moderates, you know, by saying, "Well, maybe it is OK for the construction trades." If I were you I would be a little careful on that. I don't think it is OK for the construction trades and I hope that you don't, inadvertently or carelessly, lend support to this same kind of thing in other areas or activities.

Mr. Todorovich. Mr. Chairman, let me answer this in two parts.

One, that back in 1970 when the problems seem to have started to crop up and many people like Dr. Hook, Professor Seabury from Berkeley, got aware and projected this into a possible trouble, we had a meeting in New York.

At that time Mr. Moynihan was a representative of the United States at the United Nations. So we met at his office down there and precisely this question was raised.

Here is a basic fundamental problem of justice. It would be totally inappropriate for the academy to take any elitist view that this is not good for them but it can be good for the others.

I must say in the intervening time we have gotten some backlash the other way. Some people say, "serves them right. They started the whole trouble and let us give them a little bit of their medicine. But not for us."

I would like to stress most emphatically that what we said was only in a sense we felt that this is the domain of competency with which we can best present our argument.

Between the time I wrote my presentation and now I already mentioned that a study for the administrative conference of the United States was brought to my attention, which is a very beautiful document, and I will try to see that your committee staff get one copy whenever a better draft comes from California.

These results parallel the studies of myself and Dr. Lestor. I was trying to find the precise pages and couldn't do it. But let me try to paraphrase.

These regulations perhaps better fit the clerical part, the janitorial part, of universities, formally.

But he points out in this document that this does not mean that he in any way condones the regulations. He just points out that what in one case would work with large numbers of more or less identical persons, bricklayers, where you have an easier way of at least statically handling the matter, this is a case where the whole thing completely collapses when you come to departments of the size of 10 persons or more where even these 10 people are distinguished between a medieval historian or an American historian within one department.

Mr. O'Hara. I appreciate that explanation because I don't think that they are, these kinds of guidelines, any easier to apply or any more just in other circumstances.

Let us take the case of the bricklayer. It is true that they have a hiring hall system in the construction unions. A contractor will call up a business agent and will say, "I need five bricklayers beginning on Monday" or whatever it is.

In all or substantially all of these trades they have developed within the trade a methodology thought to be fair for determining who the business agent will send.

In times of full employment it involves whatever five he can find can get to go.

In times of slack employment it usually involves a system whereby the first job goes to the one who has been out of work longest and the second job goes to the one who has been out of work second longest and so forth.

When you interfere with that system by saying, "Well, we are going to give a racial quota and it doesn't matter how long George here has been out of work, he is not going to go because the color of his skin is wrong" or something of that nature, I think that is just every bit as bad as the kind of discrimination about which you complain.

Mr. Todorovich. Mr. Chairman, I can add another parallel if you wish. You are probably very well aware that there are some attempts within the labor field to do away with certain seniority rights under a situation of tight employment.

Mr. O'Hara. Yes.

Mr. Todorovich. Institutions may get into the same tight situation and the question of tenure will be probed from all possible sides.

So we are fully aware that we are in the same boat. Again, I am just emphasizing that in our testimony we tried to stay on our best ground of competence.

Mr. O'HARA. I am glad you said that. I appreciate the testimony you presented to the committee. I appreciate your suggestions and your paper for ways that you think would be effective in remedying cases of discrimination affecting employment.

Mr. TODOROVICH. I only add, Mr. Chairman, that I am fully aware that as people in the academy we don't have a monopoly of wisdom to give a definitive answer on this. But we think that we can from our vantage point produce certain points of view which then can be processed by those who are more skilled in legislative work or whatever so that out of this comes something that is, as I said, fair and just.

Mr. O'HARA. Thank you very much, Professor Todorovich.

Mr. TODOROVICH. Thank you.

Mr. O'HARA. Our final witness today will be Dr. Stanley Dacher, who is vice president of the Queens Borough Jewish Community Council.

Dr. Dacher, we would appreciate hearing your views on this important subject.

TESTIMONY OF STANLEY DACHER, D.D.S., VICE PRESIDENT, QUEENS, N.Y., JEWISH COMMUNITY COUNCIL

Dr. DACHER. Mr. Chairman, let me thank you for your kind invitation to appear before this committee.

My name is Stanley Dacher. I am a practicing dentist. I practice in the city of New York. I am vice president of the Queens Jewish Community Council, which is a coordinating agency for some 65 temples, synagogues, and local chapters of national Jewish organizations based in the Borough of Queens.

We have been presented with many complaints from our constituents concerning the affirmative action programs being administered by HEW under Department of Labor guidelines.

On June 27, 1972, we had a meeting along with seven other Jewish organizations from the city of New York with the New York City congressional delegation at which we addressed some 15 members of the New York City delegation.

We reported to them at that time the complaints that were relayed to us and our feelings concerning them.

I would like to quote from that statement, just one portion of which refers to something you had spoken of earlier today, the use of quota systems, preferential racial hiring, which is affecting large portions of the general population.

"The Jewish minority has a special sensitivity to this problem. It is a sensitivity sadly earned. It is all the more tragic therefore when such ancient victims become victims again."

I think you made very clear reference to that earlier.

Despite publicity since the time of our report to the New York City congressional delegation and despite the creation of new HEW guidelines which were issued on October 1, 1972, and despite the appointment of an ombudsman at HEW to make sure that there was equitable treatment for all and no reverse discrimination, the situation has actually become worse now than it was before.

Later on in my testimony I will quote to you from the very latest guidelines of the Department of Labor for the month of July 1974 which I think should fully settle the question that was asked many times this morning as to the difference between "goals" and "quotas."

The ombudsman, as reported to you by the representative from the Anti-Defamation League yesterday, has used his position to bury rather than rectify any cases of reverse discrimination reported to him.

The use of quotas to satisfy the requirements of compliance review officers has spread to almost all universities in both hiring of professional staff and in the admissions policies of students.

You have heard testimony this week from people who represent the academic community and have been either witness to or victims of the sad state of affairs caused by the enforcement of Federal affirmative action programs.

My appearance here today is as an interested and concerned layman. I am not personally affected by affirmative action programs. I work in my own office. Nobody bothers me with compliance or review.

However I have a 12-year-old son. I worry about the effect this will have on him not too many years from now.

I cannot find the self-righteousness in myself that some find, as the dean of the law school this morning, in making the moral and ethical judgment that it is proper for him in his contribution to social justice to sacrifice the career of a deserving white applicant in favor of a black who may be or may not be poor, who may or may not be educationally deprived, the educationally and economically deprived white boy from Appalachia, or it's equivalent, does not earn the dean's sympathies.

He has made this judgment. I in good conscience cannot.

The Jewish-American minority is particularly affected by affirmative action programs at the universities. We are caught on the horns of a dilemma. On the one hand in those areas in which we have generally not found a friendly reception and from which we are still excluded, there has been no effective Federal affirmative action program toward opening opportunities up for us.

On the other hand where our qualifications have won us positions in the past inequitable enforcement of Federal affirmative action programs are pushing white male applicants, and many of them are Jews, aside in favor of other groups who may or may not be as well qualified.

Add to this the present crunch and difficulties of college graduates in getting jobs in general you can then understand the serious situation that the young people find themselves in.

The Queens Jewish Community Council first became involved in affirmative action as a result of a recruitment leaflet from the State University at Albany which was turned over to us.

The recruitment leaflet was from the chairman of the Department of Judaic Studies at the State University of New York at Albany.

It stated:

Position available and brief description of duties. The department is searching for a biblical scholar who is either female or a member of a minority group, black, American Indian, Spanish-surnamed or Oriental-American. If possible we would like this person to be capable of chairing our department.

This would be comical were it not serious and were it not factual. In fact, I was so skeptical of this leaflet that I had it checked out to make sure that it was indeed authentic. And it is authentic.

I have a leaflet here from the gentleman who wrote the letter. He makes clear that "your understanding of my intentions was absolutely correct. I was seeking all the very best qualified for the position."

This brings up several interesting points. He speaks of "best qualified." We have run into this problem. What does "qualified" mean? How can we determine qualifications?

Well, for an academic position, he speaks of the qualifications for the chairman of the Judaic Studies Department as being "a biblical scholar."

I suppose it is true that a biblical scholar could do the job. But I think we would all agree that a person who is well versed in the Talmud, Jewish law, Jewish history, customs of the Jewish people, problems of the disapora, Zionism and its problems and a mass of other things that go into Jewish studies—I think that we would all agree that this person would certainly be a more qualified person than one who is merely a biblical scholar.

It is apparent that the intentions of the person who initiated this leaflet were to hire a non-Jew. The easiest way he could do this was to make the qualifications fit who he was looking to hire.

A biblical scholar could surely be an Oriental American or a black American or a Spanish-trained American. The question of whether they would be the best qualified for the job and would do the best job for the students in that department is left unanswered.

I present this material along with some other material that I think will be revealing to you. We felt that with the evidence we had there was serious dereliction of duty in the Department of HEW at the highest levels; namely, the Secretary of HEW, Richardson, and at the Office for Civil Rights, the man in charge of affirmative action programs, Pottinger.

On May 18, 1972, Mr. Richardson and Mr. Pottinger held a meeting with representatives of such national Jewish organizations as the American Jewish Committee, the American Jewish Congress, the Anti-Defamation League, the Jewish Labor Committee, Jewish War Veterans and the Agudath Israel.

I have copies of minutes from two people who were at this meeting and both of them tell us the same thing.

No. 1. Mr. Richardson professed that his Department, HEW, had no authority over the admission practices of the universities. He denied that his Department had authority concerning admissions.

This was later clarified by Pottinger who noted that while under the Executive order this was true, HEW did have authority concerning college admissions under the Civil Rights Act of 1964.

In addition Pottinger was quoted as saying that where quotas were voluntarily established by universities because of "excesses of zeal" he felt that it would be inappropriate for him to object.

The other minutes report, Mr. Pottinger stated further that while HEW does not endorse quotas he feels that HEW has no responsibility to object if quotas are used by universities on their own initiative.

The New York City congressional delegation was very upset. They sent a letter to Mr. Richardson and asked Mr. Richardson,

Under affirmative action guidelines are there circumstances in which merit is not the sole criterion related to hiring and employment decisions? Is it ever the policy or practice of HEW to encourage the hiring or promotion of minimally qualified persons when a more qualified person is available?

Then they asked, "Did Mr. Stanley Pottinger in your presence and without dissent from you tell the delegation of leaders of national Jewish organizations that he would not object if universities in executing affirmative action programs displayed an excess of zeal by establishing job quotas?"

Mr. Richardson answered. His answer to the first question, "is it ever the policy or practice of HEW to encourage the hiring of minimally qualified persons over more qualified," is that, he did not answer yes or no.

He answered, "The affirmative action requirements do not obligate a university to hire or promote minority persons or women who are considered less qualified than other candidates."

The question remained unanswered.

As far as what Mr. Pottinger said Mr. Richardson's reply was, "As I recall Mr. Pottinger replied to the question of whether he would condone quotas. He replied that 'such an endeavor might in many cases be awkward.' "

It was pointed out in the letter of the congressional delegation to Mr. Richardson that there seemed to be a disparity between provisions of the Civil Rights Act of 1964, section 703J, which states that "nothing contained in this title shall require preferential treatment to any group because of a previous imbalance."

The Congressional delegation thought this was at variance with revised order No. 4 which sets up affected classes and minorities who have certain rights.

Mr. Richardson replied, again quoting something you referred to, Mr. Chairman, to the case concerning the *Contractors Association of Eastern Pennsylvania* v. *Shultz, Secretary of Labor.* This was the case of the Philadelphia plan. In that case the court held that section 7.03J of the Civil Rights Act of 1964 is a limitation only upon title 7 of the act, not upon any other remedy, State or Federal.

The third circuit held that section 7.03J is inapplicable to the Executive order.

The courts seem to have set up a conflict. On the one hand there is a certain method or approach that Congress has set forth. On the other hand there is a certain method which has emanated out of the Department of Labor. There is a never-never land as to which shall have precedence in court.

This is an area which begs for clarification.

The abuses we complained of were to have been corrected by the appointment of the ombudsman by the Secretary of HEW. I have filed correspondence with him, some of which was presented yesterday by ADL, in which he consistently ignores or refuses to take action when cases of quota selection are shown to him in college admission and hiring practices.

However, since the Secretary of HEW held himself to be unaware of his responsibility concerning college admissions, it is not surprising when we find ourselves the victims of poor guidelines administered by officials of poor judgment.

I would like to turn my attention to the guidelines themselves. I hope to present some interpretation and information which may be new to you and which may be helpful in putting a handle on controlling the abuses we have spoken of.

As we know, the guidelines were issued under the auspices of several Presidential orders. The language of these orders states:

> that it is the policy of the Federal Government of the United States to provide equal opportunity in federal employment for all qualified persons, to prohibit discrimination in employment because of race, color, religion, sex or national origin and to promote the full realization of equal employment opportunity through a positive continuing program in each department.

The Executive order empowers the Secretary of Labor to draw up guidelines, as we all know. Something happened on the way to the Department of Labor because what comes out of the Department of Labor seems to be entirely different from equal opportunity for all qualified persons.

The guidelines are divided up into several sections. Three of the sections are of interest in particular—these are title 41, chapter 60 of the Code of Federal Regulations, part 60–2, those regulations deal with affirmative action programs under the Executive orders. There is quite a lot of material in here which concerns the purpose of affirmative action programs to require utilization analyses, establishment of goals and timetables.

It goes through quite a bit of material here. Here we are told for the first time that there is to be relief for members of an affected class although nowhere in this part is the affected class identified.

From usage we found out who the affected classes were and later on in further guidelines it comes out who the affected classes are. Part 60–2.11 includes those requirements for utilization analysis. This part doesn't speak so much of identifying discrimination and correcting discrimination as it does speak of underutilization of a particular portion of the work force. Whereas the presidential order speaks of equal employment opportunity 60–2.11 speaks of equal utilization of minority groups.

On January 19, 1973, part 60–50 was published. These are guidelines on discrimination because of religion or national origin.

We are told in here that the employment problems of blacks, Spanish-surnamed Americans, Orientals and American Indians are treated under part 60–2. Their problems are treated in this special way.

The purpose of 60–50 is to eliminate discrimination against various religious and ethnic groups, primarily but not exclusively of eastern, middle, and southern European ancestry, such as Jews, Catholics, Italians, Greeks and Slavic groups. The concern about these groups is that they are excluded from executive, middle management or other job levels. These groups are not protected against entry level discrimination.

The guidelines only call for outreach and positive recruitment. No provisions are made for utilization analysis, as is done for preferred minority groups in part 60–2.11.

Part 60–50 also provides for accommodation for religious observance and practice.

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As far as we know nothing has ever been done to enforce part 60–50.

But it gets more interesting as we go along because now we have the very latest. The latest was issued on July 18, 1974. This is part 60–60 of title 41, Code of Federal Regulations.

This answers a lot of questions because these are the procedures for contract evaluation, how a compliance officer is supposed to review compliance.

Again, we have this divided into two sections. There is one compliance review for those classes that are protected under part 60–2, which occupies five and three-quarters pages.

There is perhaps a quarter of a column for those who are protected under the guidelines for religious and national origin discrimination.

I spoke before that I think we can probably answer what a goal is and what a quota is because I think we are told here.

This goal is defined under the protection for affected classes, not for religious or national minorities.

> A goal must be established for each job group in which underutilization exists and must be designed to completely correct the underutilization. The goal must be stated as a percentage of the total employees in the job group and must be equal to the percentage of minorities or women available for work in the job group in accordance with criteria set forth in the previous section.

It tells us further that "numerical goals based on openings are required but cannot be used in place of percentage goals." These provisions are found under section 60–60.9 part B XII A and B. Please see also subsection XIII which indicates the weak provisions for those who are to be protected against discrimination because of religion or national origin.

I think this pretty well defines for us what a goal is. A goal is a way of getting to a quota, a quota being "exact portions of the work force as are in the population."

That seems to be what it is.

There has been talk about the fact that it is difficult to draw up minimum standards for certain types of jobs.

There is a very sensitive area which is not well treated in the guidelines; that different jobs have different standards.

One of the problems with the guidelines is that instead of being job-related they are related to groups of people who may be applying for any kind of job.

This doesn't seem to be sensible. Certain kinds of jobs need certain guidelines and provisions should be made for that.

The intent here seems to be rather than to achieve equal treatment or opportunity, it seems to be an attempt to create equal achievement for all. I don't know if we are at the point where we have decided that this is the proper remedy that we should achieve, that we should have equal achievement for all in any given field of endeavor.

There are certainly individual differences in ability, interest, et cetera, that would rule that out.

I have spoken up to this point mainly about the problems occurring in the hiring of personnel. If I still have time, I would like to comment for a few moments on the subject of college admissions.

This has presented a very large problem to us. It has become common practice now for many professional schools on their admissions questionnaires to ask the following question:

"Special education opportunities are sometimes available" for special racial or ethnic backgrounds. If your background is listed below and you wish to identify yourself please respond to the item."

Listed are: "Afro-American black," "American Indian," "Caucasian White," "Mexican-Spanish-American" and "Oriental Americans." This is very widespread in many colleges and almost all professional schools. We don't have to guess. We know what the use of the form is for. We were told this morning by the dean of the law school. So no guessing is necessary.

Yale Law School, I have been told, uses two sets of standards on the law school aptitude test. They have one set of standards for white male applicants who must achieve a certain score and minority group applicants who are accepted on another score.

Scholarships are a problem. Very often scholarship money is earmarked depending on not whether a student is deserving but for those who are from a particular racial, ethnic or sex background.

The Education Act of 1972, title I, in the educational opportunity grants, contains some very fine language. The law states those are qualified who are from low-income families and who, but for the lack of such a grant, would be unable to obtain the benefits of a postsecondary education. This is the way equitable law should be written.

In New York City the City University has a program called by the acronym of SEEK. This is search for education, elevation and knowledge. It is partly funded under the aforementioned act.

But the way the program was set up the selection of students was based on geographical areas in which they lived. The geographical areas were limited to those of black ghettos and Spanish-origin Puerto Rican ghettos. The area of Williamsburg where many poor Jews live who are really impoverished was not included. The program of SEEK is almost entirely funded for black and Puerto Rican students.

I think this committee should perhaps investigate into why this has occurred since the grant was not made specifically for that purpose.

City University of New York has a combined medical program with one of the medical schools. Last year 19 students who were selected dropped out of the program and they had to be replaced. The University replaced each of the 19 with a replacement from the same ethnic, racial, or sex background. If one was dropped who was Chinese, a Chinese was selected for that spot. If one was dropped who was Catholic, a Catholic was selected to fill that spot. The University denied that they were imposing a quota in doing this.

Harvard University Dental School in the American Dental Association News of October 22, 1973, placed a story of which they were obviously very proud, that 8 women, who represented 36 percent of the 22 freshmen dental students, were selected for admission.

Something very interesting comes up here when you look at these statistics. Sixty women had applied for enrollment. Eight were selected. Fourteen men were selected. One out of seven women who applied were selected out of 500 men who applied. This means that 1 out of 35 men were selected.

In other words, a woman had a 7-to-1 better chance of being selected for admission. This could only have happened because a quota was being imposed.

The *De Funis* case has been spoken about and we need not go into that.

What we have spoken of today, of course, is only a tip of the iceburg. There are many, many other areas of our society where this goes on.

I beg your indulgence to just digress for a moment to speak to you about another agency of the Government that also sets quotas—I don't what to say about the sensibility of this agency, the Small Business Administration.

In March of 1973 they decided to set up new regulations which were designed to restrict white participation in the aid setaside program. This program was a program designed to help minority businessmen.

Under the new provisions the minority must be 60 percent in the company instead of the current 51 percent and prohibited a nonminority company from investing in more than one minority company.

One of the problems with these plans is that the minority people didn't want them because without their nonminority financial backers and without their say so a lot of companies just couldn't make it.

But in its wisdom the Small Business Administration in a colossal misuse of power decided this would be good for the small minority businessman.

As further evidence of the chaos I have the New York Times of March 20, 1974. There is a classified ad. It says: "Affirmative action is the law" and a big exclamation point. It is apparently from an employment agency which has "250,000 qualified candidates." It will "help you find your candidates if you can't find them yourself."

A whole industry is growing up around affirmative action programs.

At New York University 3 weeks ago there was a program at the college which would explain affirmative action programs to employers.

Now I would like to make some suggestions, as to what we feel would help to find a way out of this morass.

It is very obvious that the Labor Department guidelines are unwise and unequal in treatment of different individuals and certainly they must be called to task and they must be if at all possible compelled to make these guidelines conform to equal treatment for all as they were supposed to.

I think we should write into the law something that would strongly prohibit preference because of race, that nobody should be denied opportunities because of race, religion, color, sex or national origin.

But we find the situation is happening where people are being granted jobs and admission opportunities because of race, color, sex, religion or national origin.

The conflict between the Department of Labor and Congress' will in this matter may not be settled unless there is either a congressional law passed that would specifically say "one may not use sex, religion, to give a job or to withhold a job."

I can see nothing else short of an amendment to the Constitution which would do the same thing, if there is going to be this opposition between the executive body and the legislative on the proper remedies for discrimination in this country.

I want to thank you very much for the opportunity to have spoken to you. I appreciate your indulgence.

[Matters referred to follow:]

[From the New York Times, Sunday, March 18, 1973]

NEW MINORITY-BUSINESS RULES DELAYED

(By Paul Delaney)

WASHINGTON, March 17—The Nixon Administration has backed off somewhat on a set of regulations that minority businessmen protested would destroy one of the Administration's most popular minority captalism programs.

Officials of the Small Business Administration agreed to delay and possibly to modify the proposed regulations, which minority organizations complained would have forced minority companies with substantial white capital out of the program.

The agreement came yesterday during a three-hour meeting between S.B.A. officials, aides to President Nixon, Congressional representatives and black and Spanish-speaking businessmen.

The S.B.A. proposed two weeks ago new regulations designed to restrict white participation in the "8A set-aside" program. Officials of the agency said the regulations were meant to make certain that most of the benefits went to minority businesses.

RECONSIDERATION SET

But minority businessmen protested that many of them would become ineligible to participate in the program because many of their companies depend heavily on white money and white business partners.

The "8A" program refers to section 8A of the Small Business Act. The section sets aside certain noncompetitive Federal contracts specifically for minority companies.

The S.B.A. agreed to reconsider the proposed changes and to delay putting them into effect until after April 10. The regulations could become law any time after March 26, when they are to be published for the second time in the Federal Register.

"We will re-evaluate the regulations and consider the protests of the minorities," said Marshall J. Parker, S.B.A. associate administrator.

PROPOSED CHANGES

"We hope to clear up the whole thing by April 10. We might not settle all their conmplaints, but we are certain we can arrive at some satisfactory agreement," he said.

"We promulgated the new regulations because we wanted to make sure the benefits were going to minorities."

The proposed changes stipulate that to be eligible a company must be "owned and controlled [operated]" by minorities. At present, the wording is "owned or controlled."

The new regulations would also do the following:

Prevent a white company or individual that provided equity capital from becoming a partner in the new minority company.

Provide the minority ownership must be 60 per cent instead of the current 51 per cent.

Stipulate that participating companies could use only minority subcontractors.

Prohibit a nonminority company from investing in more than one minority company participating in the program.

Make minority companies ineligible for contracts after three years of participation in the program.

"Those regulations would force many minority companies out of business because they have a lot of white money invested in them, and the companies need the 8A contracts to survive," commented Theodore A. Adams Jr., executive director of the National Association of Black Manufacturers.

"We want and we need white capital," he continued. "A lot of our companies just couldn't make it without it. The intent of S.B.A. might have been good, but the proposed changes would do much more harm than good."

The meeting yesterday was called after complaints against the proposed regulations began to mount. Besides minority businessmen, those joining in the protests included the predominantly white National Small Business Association; Senator Alan Cranston of California and Alan Bible of Nevada, both Democrats, and Representative Parren J. Mitchell, Democrat of Maryland.

Mr. Mitchell and Carolyn D. Jordan, Senator Cranston's legislative assistant, attended yesterday's meeting. All the Congressmen involved had requested the delay and modifications in the regulations.

"They are a rather weird set of proposals, crudely written and certainly pushed without benefit of minority comment prior to being published in the Federal Register," Miss Jordan said.

"We would like to see them withdraw the entire package and start over again," she said.

The White House was represented at the meeting by Stanley Scott, special assistant to the President.

[From the New York Times, March 20, 1974]

AFFIRMATIVE ACTION IS THE LAW

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Mr. O'Hara. Thank you very much, Dr. Dacher. I appreciate very much your interest in this matter. You were the first one who had asked for an opportunity to testify before this subcommittee on this particular subject.

You have done all this work as a volunteer. You have taken an interest as a citizen in the problems that have arisen in connection with affirmative action and numerical goals and quotas. I think you are to be commended for that.

So many people hang back because they don't want to be identified as racist or sexist, as one of the bad guys. This is exactly how you get identified when you start raising these questions.

So obviously there is a reluctance to get yourself into that situation. But somebody has to do it. I think you are to be commended.

Dr. Dacher. I trust and hope that that reluctance will not fall upon the work of this committee. It is not a popular stance to take.

In the courts the remedies have been settled on the basis of quotas for the most part, that you shall hire so many in one group in proportion to another and so many from another group.

The Federal judges who issue these quota orders are doing it under the 14th amendment. We hold that they are being granted unequal treatment because of race, color, creed, when quotas are set up.

Mr. O'Hara. I recognize that problem. The courts, of course, contend that you have no power to limit the ways in which——

Dr. Dacher. Except by a constitutional amendment to clarify what they are.

Mr. O'Hara. We are dealing with actions of the executive and actions by private organizations. Clearly we can legislate in that area.

Dr. Dacher. I wonder how many times the remedies of title VII of the Civil Rights Act of 1964 are actually used and how many times administrators go to other sections; namely, the Department of Labor guidelines?

Mr. O'HARA. I can't give you a numerical——

Dr. DACHER. It probably isn't used as much as the other remedies.

Mr. O'HARA. Title VII is not used nearly as much because it is much more——

Dr. DACHER. I think it is a serious situation in which the will of Congress is not being used.

Mr. O'HARA. That is right. It is not the only case though. We have an awful lot of them that are just that way.

The subcommittee will now stand in adjournment until the 23d of this month, when we will meet in this room at 9:30, to hear additional witnesses on the subject that we pursued this morning.

[Whereupon, at 12:27 p.m. the subcommittee adjourned, to reconvene at 9:30 a.m., Monday, September 23, 1974.]

CIVIL RIGHTS OBLIGATIONS OF INSTITUTIONS OF POSTSECONDARY EDUCATION

MONDAY, SEPTEMBER 23, 1974

House of Representatives,
Special Subcommittee on Education
of the Committee on Education and Labor,
Washington, D.C.

The subcommittee met at 9:30 a.m., pursuant to recess, in room 2261, Rayburn House Office Building, Hon. James G. O'Hara (chairman of the subcommittee) presiding.

Present: Representatives O'Hara and Dellenback.

Staff members present: Jim Harrison, staff director; Webb Buell, counsel; Elnora Teets, clerk; Yvonne Franklin, minority counsel.

Mr. O'Hara. The subcommittee will come to order.

Today we are continuing our current set of hearings with respect to what an institution of postsecondary education must be and what it must do in order to be eligible, or for it to be considered an eligible institution as far as title 4 programs and other aspects of the Higher Education Act are concerned.

We have been looking particularly into questions of discrimination in employment and admissions on the basis of sex, race, and ethnic groups.

Our first witness this morning on that subject will be Prof. Miguel Rios of the California Polytechnic Institute at Pomona. Professor Rios, if you will take a place at the witness table here in front, the committee would be very happy to hear from you.

STATEMENT OF MIGUEL RIOS, PROFESSOR, CALIFORNIA POLYTECHNIC INSTITUTE AT POMONA

Mr. Rios. I would like to say first of all that I am gratified to have the opportunity to express some opinions and some concerns which I believe are widely shared by the Spanish-surnamed population in California and to convey some personal observations which I hope will illustrate the difficulties that confront the Spanish-surnamed minority with respect to equal opportunities in institutions of higher education.

As you know, about one out of every six people in California is Spanish surnamed. Most of these Spanish surnamed are Chicanos; that is, they are Americans of Mexican descent. The Chicanos, as an ethnic minority, retain an economic status that is considerably below that of the average American in the total population.

This, of course, is equivalent to saying that we are grossly underrepresented, not only in the higher paying skilled jobs but also in the professions requiring postsecondary education and in particular in those requiring advanced degrees.

For example, of the approximately 20,000 physicists with a Ph. D. in the United States, only about 20 to 30, roughly one-tenth of 1 percent, are Chicano. This is to be compared with the total population of at least 10 million, greater than 5 percent, Mexican Americans in the total population.

Either you have to believe we are inherently incapable of the same level of achievement in physics and the other professions or that our society and its component institutions of higher education do not afford the Chicano the opportunity which rightfully belongs to us.

Now, many people would like to believe that these inequities are rapidly being diminished, but unfortunately this is not the case. As a member of the American Physical Society Committee on Minorities in Physics, I recently participated in a review of the statistics on the population of physicists in this country—students, that is, undergraduates, as well as postgraduates. Of the 200 undergraduates in physics at UCLA and of the 140 undergraduates in physics at Berkeley, only two at each institution are in physics. That is roughly 1 percent in each of these institutions.

Now, if our students are not entering the physics profession in universities which presumably serve the Spanish-speaking population, then where are the Chicano physicists going to come from? In fact, from the statistics it was not clear whether these students were, in fact, American citizens; they may have been foreign students.

The overall projection is that our representation in physics is not going to increase significantly in the near future. It may, in fact, decline. The same is true in other disciplines.

Recently I was invited to come over to UCLA to a little conference that was initiated by the faculty at UCLA, and the Dean of Graduate Studies was there, and they clearly indicated that the percentage of Chicano graduate students at UCLA has been decreasing during the past 2 years.

The reasons for the decline are undoubtedly complex but certainly a major contributing factor has to be the fact that equal opportunity for Chicanos is not yet a reality. This is particularly true of the major universities.

Most Chicanos in the teaching professions—about 75 percent—are at 2-year colleges or small 4-year institutions. Three years ago, when I was completing my doctorate in nuclear physics at the University of Maryland, I applied at every University of California campus for a 2-year postdoctoral appointment and I would like to indicate very briefly to you the kind of response that I got.

A letter from Prof. Byron Wright of UCLA:

> Thank you very much for your letter of November 25 in which you express an interest in joining the Nuclear Structure Group at UCLA. At the moment, it appears only one appointment will be made, and a tentative selection has already been made. So, unfortunately, the chance for your appointment here does appear to be small.

And indeed it was small and it continues to be small. I have similar letters from Irvine, San Diego, Berkeley, and every campus at the University of California.

[Letters referred to follow:]

University of California, Los Angeles,
December 15, 1970.

Dr. Miguel Rios, Jr.
College Park, Md.

Dear Dr. Rios: Thank you very much for your letter of November 25 in which you express an interest in joining the nuclear structure group at UCLA. I shall circulate it to the members of the group for consideration.

At the moment it appears that only one postdoctoral appointment will be made and a tentative selection has already been made, so, unfortunately, the chance for your appointment here does appear to be small.

Sincerely yours,

Byron T. Wright,
Professor of Physics.

University of California, Los Angeles,
January 5, 1971.

Dr. Miguel Rios, Jr.
College Park, Md.

Dear Mr. Rios: Your letter of December 18 has been forwarded to Professor Eugene Commins and Kenneth Crowe for consideration in the award of postdoctoral appointments. They will communicate with you if such a position is available. Unfortunately, due to budgetary restrictions, the chances of appointment are very slim.

I appreciate your interest and regret having to respond in such a negative manner.

Sincerely,

George H. Trilling, *Chairman.*

University of California, Irvine
January 4, 1971.

Mr. Miguel Rios, Jr.
College Park, Md.

Dear Mr. Rios: Thank you for your letter and resume of December 18, in which you inquire about the possibility of a faculty position in our department.

I regret having to inform you that it is already clear at this early point in the present academic year that we will have no new faculty positions for the coming academic year for which you might be considered.

I appreciate your interest in Irvine, and am sorry that we cannot take advantage of it.

Sincerely,

Alexei A. Maradudin, *Chairman.*

University of California, San Diego
February 5, 1971.

Mr. Miguel Rios, Jr.
College Park, Md.

Dear Mr. Rios: Thank you for your letter of December 18, 1970. I regret that due to budgetary restrictions, we do not have any positions open at the postdoctoral level for the coming year.

Thank you for your interest in the University of California, San Diego.

Sincerely yours,

George E. Masek,
Professor of Physics.

University of California, Santa Barbara,
December 4, 1970.

Mr. Miguel Rios, Jr.,
College Park, Md.

Dear Mr. Rios: Thank you for your letter of November 25, 1970 in which you expressed an interest in our department.

I am sorry that we do not have a position at this time for a physicist of your research area and experience.

We appreicate your interest in our department. I wish you success in your search for a desirable position.

Very truly yours,

V. JACCARINO, *Chairman.*

UNIVERSITY OF CALIFORNIA, SANTA CRUZ,
December 29, 1970.

Mr. MIGUEL RIOS, Jr.,
College Park, Md.

DEAR MR. RIOS: In response to your recent letter, I regret to tell you that we do not have available any physics positions for next year. Should this situation change, I will be pleased to get in touch with you.

Sincerely,

MICHAEL NAUENBERG,
Chairman, Board of Studies in Physics.

UNIVERSITY OF CALIFORNIA, DAVIS
February 3, 1971.

Mr. MIGUEL RIOS, Jr.
College Park, Md.

DEAR MR. RIOS: Thank you for your letter and your interest in Davis. At the present time there are no faculty positions open and we do not yet know whether we will have a new position available for next year. Your résumé will be retained in our file for consideration when a position does become available.

Sincerely,

W. J. KNOX, *Chairman.*

UNIVERSITY OF CALIFORNIA, RIVERSIDE
January 28, 1971.

Mr. MIGUEL RIOS, Jr.
College Park, Md.

DEAR MR. RIOS: Thank you for inquiry about a faculty position for the 1971–72 academic year in the Physics Department of the University of California at Riverside. I am sorry that we do not have an opening here at this time. However, we will keep your letter on file in case the situation should change.

Sincerely yours,

R. STEPHEN WHITE, *Chairman.*

UNIVERSITY OF CALIFORNIA,
LOS ALAMOS SCIENTIFIC LABORATORY,
Los Alamos, N. Mex. January 29, 1971.

Mr. MIGUEL RIOS, Jr.
College Park, Md.

DEAR MR. RIOS: Your application for employment with this Laboratory has been received and we are pleased to have this opportunity to review your qualifications.

To insure a comprehensive review, copies of your employment application are being forwarded to our technical divisions for appraisal by our professional staff. If your qualifications meet the requirements of any existing openings, you will be advised of our interest.

As Dr. H. T. Motz pointed out to you in his letter of December 29, 1970, the Physics Division does not anticipate any full-time staff positions during this year. Also, the Director of this Laboratory recently established a ceiling of 25 for postdoctoral appointments. The present "on-board" appointments, plus outstanding accepted offers exceed this new ceiling and except for the possibility of early terminations of appointments, it appears that we are temporarily "out-of-business" as far as any additional postdoctoral appointments go.

However, we allow thirty days from the date of this letter for our professional staff to complete their review of your application. If you are not contacted within this thirty day period, you should assume that no position exists which matches your qualifications.

In the event there is no interest expressed in your qualifications within this thirty day period, your application for employment will be retained for a period of one year and reviewed for any appropriate position which may become available.

Your interest in this Laboratory is appreciated.

Yours very truly,

JAMES C. TROUT,
Personnel Representative.

UNIVERSITY OF CALIFORNIA,
LAWRENCE RADIATION LABORATORY,
Berkeley, Calif. January 11, 1971.

Mr. MIGUEL RIOS, Jr.
College Park, Md.

DEAR MR. RIOS: We wish to thank you for the resume which you submitted to the Lawrence Radiation Laboratory.

Unfortunately, at the present time there are no suitable vacancies here which would effectively utilize your education and experience. We will, however, keep your file active in the event that an opening does occur which would make use of your background.

I have taken the liberty of forwarding your resume to the following Laboratories and contacts. They will advise you directly should they have a suitable vacancy.

Esquibel, Larry
Employment Manager and EEO Officer
Stanford Linear Accelerator Center
P.O. Box 4349
Stanford, California 94305
415-854-3300 Extension 2859
Maestas, Joe
Assistant EEO Officer
Los Alamos Scientific Laboratory
P.O. Box 1663
Los Alamos, New Mexico 87544
505-667-5109
Salazar, Lorella
Sandia Laboratories
Staff Public Relations
P.O. Box 5800
Albuquerque, New Mexico 87115
505-264-2900 Extension 4143
Zaragoza, Manuel
Lawrence Radiation Laboratory
P.O. Box 808
Livermore, California 94550
415-447-1100 Extension 7371
Tijerina, Fidencio
Fenix & Scisson, Inc.
P.O. Box 50
Las Vegas, Nevada
702-385-6394
Poitras, Chuck
U.S. Atomic Energy Commission
Idaho Falls Operations Office
P.O. Box 2108
Idaho Falls, Idaho 83401
208-526-1565

UNIVERSITY OF CALIFORNIA

Garcia, William
Organization 3233
Sandia Laboratories
P.O. Box 5800
Albuquerque, New Mexico 87115
505-264-5543
Toya, Tony
Organization 4137
Sandia Laboratories
P.O. Box 5800
Albuquerque, New Mexico, 87115
505-264-6031
Rodriquez, Roy
EEO Office
National Accelerator Laboratory
Batavia, Illinois 60510
312-231-6600 Extension 415
Chacon, Jose A.
4321 San Marcos Drive
Fairfax, Virginia 22030
202-343-4693 or 703-591-6339
Rosa, Mill
U.S. Atomic Energy Commission
New York Operations Office
376 Hudson Street
New York, New York 10014
212-989-1000 Extension 300
Prof. Isadore Perlman
c/o Doral Bucholz
Nuclear Chemistry Department
Lawrence Radiation Laboratory
Berkeley, California 94720
415-843-2740 Extension 5146
Hinckley, Robert
Physics/Judd Group
Lawrence Radiation Laboratory
Berkeley, California 94720
415-843-2740 Extension 5421

Your interest in the Laboratory is appreciated, and I am sorry that a more favorable reply cannot be made at this time.

Sincerely yours,

Nick Gonzales,
Personnel Representative.

Sandia Laboratories,
Albuquerque, New Mex., May 4, 1971.

Mr. Miguel Rios, Jr.
College Park, Md.

Dear Mr. Rios: Thank you for submitting the information we requested.

We have reviewed your qualifications against our anticipated personnel requirements and have found that they do not match our needs. Our limited openings make it impossible to offer employment to all the qualified candidates we are given the opportunity to consider.

We appreciate your interest and regret we cannot give you any encouragement.

Very truly yours,

P. M. Alarid,
Recruiting Coordinator, Organization 3251.

In spite of the failure of the University of California system to open the doors to Chicanos and other minorities and to women, the Federal Government recently released a $5.4 million grant to Berkeley although they did not have an acceptable affirmative action plan on paper, let alone in reality.

This action by the Federal Government, in my opinion, was a serious setback to minorities in our efforts to take our rightful place in this society.

The situation is not much better at the 19 California State colleges and universities. This system is different from the University of California system, as you may know. At present, I am assistant professor of physics at California State Polytechnic University in Pomona. Our student enrollment is approximately 10,000, with only 6 percent Spanish-surnamed, about 600 students, possibly 700. Now, this number has been relatively constant, I would say, for the past 2 or 3 years.

This is to be compared with the Mexican-American population at Pomona, for example, which has better than 25 percent Mexican-Americans and better than 25 percent blacks in a total population of over 100,000.

Now, Pomona is not the entire service area for Cal Poly but there are similar percentages in the surrounding cities which belong to what is defined as the Cal Poly service area and, if you include East Los Angeles, where there are over 1 million Mexican-Americans, the percentage of Chicanos could possibly be higher.

Now, of the 600 faculty members, only about 10 or 15—roughly 2 percent—are Mexican-Americans. This abysmal representation is due, in my opinion, to the discriminatory policies and practices of the university.

Now I would like to take a few minutes to summarize those policies and practices if I may. With respect to hiring, for example, Jose Jimenez and Robert Catlin, a black, were initially hired for the 1972–73 academic year as lecturers at the E–3 level in the Department of Urban Planning. They were told that the university was hiring only at the lecturer level. Mr. Frank Ducote, a white, had just been hired at the assistant professor step 4 level.

Their qualifiactions were as follows: Frank Ducote, master of science degree, urban planning, 3 years' experience; Jose Jimenez, master of science degree, urban planning, 7 years' experience; Robert Catlin, master of science degree, urban planning, 11 years' experience.

Not only was the salary for the Chicano and black lower than for the white, but, in addition, their rank was much lower than that of Mr. Ducote's in that service, as a lecturer does not have to be credited toward tenure. In addition, there are academic privileges that accrue to faculty members with rank of assistant professor or higher that do not accrue to lecturers.

Alfredo Diaz, master of science in business administration, Harvard, was hired at the assistant professor step 4 rank for the 1972–73 academic year. His rank and salary were not commensurate with those held by non-Chicano instructors in the school of business administration.

He outlined clearly what the situation was in the school of business administration and he has submitted a summary of his case and an affidavit. I would just like to briefly make one quick comparison here.

He has a list of people here, when they were hired, when they were tenured, and promoted. Before he was hired, he was told, that promotion would be based on merit alone, but he was not told that he could not be promoted to associate professor until he received tenure and he was not told that tenure would require a doctorate degree. The facts were withheld from him and misrepresented to him.

To make a comparison here, here is some data on Mr. James Petersen, a white male faculty member with a master's degree from the University of Arizona. Mr. Petersen was hired in 1969 at a salary of $18,733; Alfredo Diaz, in the same department, master's degree from Harvard, hired in 1972 at a salary of $11,600.

In my case, I was hired at exactly the same time as one of my colleagues, Dr. Robert Bush, and we had both just completed our requirements for the doctor's degree. Now, our institution uses the degree as a very strong criterion, you might say, as to rank and salary that you receive, although the policy is administered rather capriciously, which is basically what the problem is.

But, in principle, I think, their policy would have been that we would have been hired at the same level since we completed our doctorate at exactly the same time and started at the same time. Dr. Bush, however, was hired at the assistant professor step 3 level at a salary of $12,790, while I was hired at the step 2 level at a salary of $11,600. The job announcement for the two positions was the same.

With respect to tenure and promotions, for example, Jose Vadi, assistant professor, step 5, political science department, has been denied tenure and has not been promoted because the university has imposed the requirements that he must have a Ph. D. in order to receive tenure and promotion, although he has completed all requirements for his Ph. D. at the University of Wisconsin and will defend his thesis in the near future. It is my opinion that the requirement is discriminatory because two nonminority members of the department have been tenured and/or promoted prior to completion of their doctorates, They are Bruce Wilson, promoted to associate professor

August 1968, prior to receipt of his Ph. D., and Ronald Peterson, tenured and promoted to associate professor on October 1, 1972, prior to receipt of his Ph. D.

I have already mentioned that Alfredo Diaz was also promised that promotions would be based strictly on merit. He was not told that tenure would be required for promotion to associate professor and that, in fact, a Ph. D. would be required for tenure.

In my case, this past year I was denied tenure for the 1974–75 academic year.

Now, the criticism here is that the university does not take the tenure evaluations, the promotion evaluations, the hiring evaluations, and the retention evaluations seriously. They are done very capriciously and basically depend upon the feelings of the faculty members. The university manual states that the performance evaluations are to be based on teaching performance, professional growth, and service to the college and the community.

Now, I submitted three dossiers, each one relevant to the three criteria stated above, for evaluation of my tenure and, in spite of my achievements, I was never seriously considered for tenure, as evidenced by the following:

1. The reason given for denial of tenure was that, quote, "his classroom presentation has certain weaknesses," unquote. This is to be contrasted with the fact I was voted outstanding physics teacher of the year by the Society of Physics Students for the 1973–74 year.

2. The university manual, appendix 17, specifically states that the department will develop and consult written criteria to be used in tenure evaluations. No such criteria, if they exist, were consulted by the tenured members. It is doubtful they exist. I think there may be a few notes jotted down but nobody paid attention to them.

3. At least three members of the department cast votes in favor of denying tenure without having attended at least one of my lectures to evaluate my teaching abilities. This is the minimum that is done for nonminority instructors. They at least go to the class for 10 or 15 minutes.

4. Prior to the vote on tenure, I was informed by Dr. V. E. Parker, dean of the school of science, and Drs. Keith Brown and Ed Kelley, physics department, that President Kramer would not grant tenure to anyone who had not completed four years of service. The implication was that I could not expect a favorable outcome even though the tenure requirements call for a minimum of 2 years of service and I had completed 3.

5. Dr. Douglas Giancoli, a tenured member who voted in favor of tenure for me, officially expressed doubt that I had been granted a fair tenure evaluation. He wrote a very short memo to all members of the department as follows:

[The memorandum referred to follows:]

CALIFORNIA STATE POLYTECHNIC UNIVERSITY,
Pomona, April 14, 1974.

Memorandum

To: Physics and Earth Sciences Tenured Faculty

From: Douglas Giancoli

Last week I was informed that a meeting of the tenured faculty to discuss tenure for Dr. Rios would be held Tuesday, April 16, at 11a.m., after (or in place of) our regular faculty meeting. On Monday, April 15, I was informed about noon time that the tenured faculty was to meet instead that afternoon (Monday) at 3 p.m., to discuss the matter. Although, I had information of importance to put before that meeting, I had a previous commitment for that hour which could not be changed at such short notice, and thus I was unable to attend. I therefore raise the following questions, to which I hope someone can give me answers:

(1) Who has the power to call a meeting of the tenured faculty?

(2) Is it ethical to call a meeting (or change the time of a meeting) of such importance at very short notice. (N.B., this is not the first time this has happened in our department.)

Finally, in view of these questions, I suggest that perhaps the recommendation not to grant tenure to Dr. Rios was made without sufficient deliberation and input, and should be reconsidered.

Mr. RIOS. That memo from Dr. Giancoli was never answered.

There is, in addition, a great deal of discrimination with respect to job assignments and conditions of work. For example, Manuel Vizcaino, M.A. in linguistics and Spanish, was denied the opportunity to teach a Spanish language class by the department of English and modern languages in the winter quarter of 1974. The class was assigned to a professor who was not qualified to teach the class. This resulted in a large number of students approaching Mr. Vizcaino and complaining about Mr. Rudolf Zrimo's competency to teach Spanish.

I have some comments about my situation in the physics department, in which I have undergone a great deal of harassment, Mr. Chairman. I don't want to dwell on that and I would rather go to discuss other people in the university and simply state that recently a woman in our department, not the first woman but certainly the only woman who was in our department, resigned because of the conditions of employment. I have a letter of resignation which I will submit in which she clearly states that one of the reasons she resigned is because of harassment she was subjected to by Dr. Johannes Tuul, chairman of the department.

[Letter of resignation referred to follows:]

CALIFORNIA STATE POLYTECHNIC UNIVERSITY,
Pomona, July 29, 1974.

Dr. HUGH O. LABOUNTY, Jr.
Vice President for Academic Affairs, California State Polytechnic University, Pomona, Calif.

DEAR DR. LABOUNTY: Thank you for your letter of July 19, 1974 and offer of a full-time instructional position as Lecturer in the Physics and Earth Sciences Department, for the fall 1974 and winter 1975 quarters. I regret to inform you that I cannot accept the position at this time. During the past year, I have *already* been a Lecturer in Physics, starting with an appointment for the fall 1973 quarter, and renewed on a *quarterly basis*. The present position is *still renewable quarterly*, even though the initial period of appointment is for two quarters. I do not find it possible to accept such a position, since it does not allow for any professional growth. I am sure you realize that, apart from the lack of benefits, the temporary nature of the position requires continuous job hunting, which, when coupled with the usual teaching overload, makes it difficult for me to devote the full measure of my time and energies to my work.

In addition, I would also find it difficult to function under the chairmanship of Dr. J. Tuul. I have already found it necessary to file complaints with the School of Science Affirmative Action Committee and with Dean Parker, in connection with discriminatory recruiting and hiring practices, as well as a breach of professional ethics and elementary courtesy. These complaints, as presented in three memos (June 6, 1974 to Mr. Yu Chang, Chairman of the SSAAC, of July 9 and July 12, 1974, to Dean Vincent E. Parker) have not been dealt with, as yet, and have met with little more than administrative pussyfooting.

I hope this explains my inability to accept the position in question. Thank you for your consideration.

Sincerely,

ELIZABETH A. ATHANASSIOU,
Lecturer, Physics and Earth Sciences Department.

P.S.: In case it should be necessary for you to contact me in the near future, please note my new home address: E. Athanassiou, 465-B County Rd., Pomona, California 91766. I had already submitted it to your office, but the change did not take effect as yet, and caused some delay in receipt of your present offer of appointment.

Cal Poly discriminates with respect to job assignments and conditions of work (the discrimination is not restricted just to faculty but it certainly extends to the staff). For example, Genevieve Andazola, a staff employee in the office of financial aids, has also been subject to harassment and oppressive conditions of work. She was not only given more menial jobs than her white counterparts in the office but her supervisor allowed a coworker and an employee not directly connected with the office of financial aids to interject themselves as her supervisors in a manner demeaning to Ms. Andazola. Subsequently attempts were made to force her to seek a position in another office. There is an attached memo from her in which she outlines her situation to the vice president at the university.

[The memorandum referred to follows:]

CALIFORNIA STATE POLYTECHNIC UNIVERSITY,
Pomona, May 15, 1974.

Memorandum to: Dr. James Bell, Vice President, Admin. & Student Affairs
To: Dr. James Bell, Vice President, Admin. & Student Affairs
From: Genevieve Andazola
Subject: Memo of April 22, 1974 to Harry Jacobs

In your memo of April 22, 1974, to Mr. Harry Jacobs, Director of Financial Aids, you state that it is mutually agreed upon that it would be in the best interests of all concerned for me to seek a position in some other office. As I read this memo, I perceive certain implications which I feel should be clarified. Your memo does not explain why I wish to transfer.

In the one year that I have worked in the Financial Aids Office, as a Chicana, I have been terated differently from the rest of the staff members in the office. I have been discriminated against in the following ways:

1. As one of the permanent employees in the office, I have not been given the opportunity to progress. For example, many times have passed when certain information and tasks have been given out and I am one of the last ones to know.
2. In our conversation, I was accused of exploiting my sick leave time. If my absentee record were to be checked prior to the sixth of March, it would show that more than half of the absenteeism was approved vacation-time.
3. I have been supervised by a non-Chicana, fellow worker who was also a Clerical Assistant II-A.
4. Mr. Jacobs has suggested that I seek a new position stating, in my October, 1973 evaluations and again in April, 1974, that my productivity was declining. But, he neglected to point-out that for about two-three months, I have been doing some of the most menial work in the office (typing numbers on cards all day) which required much less expertise than I have.

There are other ways in which I have been treated differently and denied opportunity to demonstrate my abilities which I will not go into at this time.

I want to emphasize that these are the reasons why I am willing to transfer and not because I have been negligent or incapable on the job.

Mr. RIOS. With respect to termination, the university pursues a termination policy which has a disproportionate adverse effect on Chicanos. Manuel Vizcaino, after having been denied tenure on grounds which were not valid predictors of ability, performance, and qualifications, was denied a leave of absence and had to terminate. White faculty members have received a much more favorable policy on leaves of absence.

Benjamin Hernandez, assistant professor of ethnic studies, has been terminated on grounds which are definitely discriminatory. The reasons given were twofold: (1) low enrollment in his classes and (2) unsatisfactory evaluations in one art class. Examination of enrollment statistics in music and art, however, show that enrollment in his classes has been quite acceptable and equivalent, if not better, than enrollment in similar classes taught by his nonminority colleagues.

This is in spite of the fact that he received unequal and disadvantageous treatment with respect to course assignments and scheduling. The university has also failed to insure that criteria used to evaluate his performance in art classes are valid predictors of qualifications.

Mr. Hernandez studied art at the University of Guadalajara, Mexico, and brings a perspective to his music and art classes which has heretofore been absent at Cal Poly. The traditional criteria, therefore, should be justifiably challenged. Consequently, the unsatisfactory evaluation of his art class should not have been taken at face value by the university.

The people I mentioned—Frank Ducote, Robert Catlin, and Jose Jimenez—have all resigned because of these policies and practices. I myself will resign at the end of this quarter.

Now, I respectfully submit that these policies and practices are in noncompliance with Executive Order 11246 and that these policies and practices at Cal Poly are not atypical but, in fact, are endemic not only to the California State colleges and universities but also to the University of California itself.

Now, it is clear to me that the situation would be greatly alleviated if the Federal Government were to insure that the institutions of higher education comply with the Execuive order. Thank you, Mr. Chairman and members of the committee.

[Attachments to Mr. Rios' prepared statement follows:]

AFFIDAVITS

This is to affirm that, on numerous occasions, Dr. Johannes Tuul has made statements depreciating the teaching performance of Dr. Miguel Rios. I was not given any evidence in support of these statements, nor do I have any independent knowledge of my own to substantiate the statements in question.

ELIZABETH A. ATHANASSIOU, Ph. D.
Lecturer in Physics, Department of Physics and Earth Sciences,
California Polytechnic State University, Pomona, Calif.

MAY 12, 1974.

To Whom It May Concern:

The reason why I resigned my position as an Assistant Professor, Business Management Department, California State Polytechnic University, are as follows:

a. Facts concerning the personnel policies and practices of California State Polytechnic University, and the opportunities for advancement available, were misrepresented and concealed from me by a recruiter from the school and by Dr. William E. Fox, Dean of the School of Business Administration.

b. The grade and step which I was granted were not commensurate with my education and experience, and there was no provision for revision.

c. The personnel policies and practices of the university, whether by design or by refault, tend to have a discriminatory effect against Chicanos and other persons with Spanish surnames.

ALFRED M. DIAZ.

CASE OF ASSISTANT PROFESSOR ALFRED M. DIAZ

On February 24, 1972, I was interviewed by Assistant Professor Leonard R. Fuller, from the Business Management Department, School of Business Administration, of California State Polytechnic College (Cal Poly). The interview took place at the Placement Office of the Harvard University Graduate School of Business Administration, in Boston, Massachusetts, where I was completing my Master's Degree in Business Administration.

Professor Fuller misrepresented the personnel policies and procedures of Cal Poly, and the career opportunities available there, in the following ways:

a. By assuring me that opportunities for advancement were not arbitrarily limited and were based solely on merit. Professor Fuller did not mention the fact that a new rule precluded promotion before tenure, and he withheld information concerning an arbitrary budgetary rule which limits the number of faculty members in the grades of associate professor and full professor to 60% of the total faculty, the so-called "60–40 rule."

b. By assuring me that the grade of Assistant Professor, Step 4, which I would probably be offered was much higher than the usual level for Cal Poly Business School faculty members without a doctorate. Fuller withheld the fact that a large percentage of the faculty members in Cal Poly's School of Business, who did not have doctorates, held the ranks of associate professor and full professor. In fact, I was later to learn one full professor had no more than a bachelor's degree.

c. By stating that promotion to Associate Professor was virtually assured after two years, subject to progress in doctoral studies. Fuller failed to mention that a new rule preclude promotion before tenure, and he withheld information concerning the so-called "60–40 rule," which limits the number of faculty members in the top two grades to 60% of the faculty.

d. By assuring me that I would have substantial time off from a normal teaching load in order to pursue doctoral studies. No such time off was granted, and the scheduling of classes was done with no thought or consideration given to persons pursuing doctoral studies.

e. By stating that tuition-free doctoral studies would be available at three nearby universities by special arrangement. No such arrangements existed, and the cost of doctoral studies turned out to be approximately $100 per unit, plus commuting expenses and books.

f. By assuring me of summer employment at a rate equivalent to one third of the normal yearly salary. Therefore, the expected salary for an Assistant Professor Step 4, with summer employment, would add up to $16,000. No mention was made of a rule which limited summer employment to one summer out of every three.

g. Fuller lauded the excellent health benefits provided, which turned out to be $16.00 per month toward hospital insurance, after six months of employment. Fuller failed to mention the fact that no employer contributions were made during the first six months of employment, or the fact that the employer's contribution did not even fully cover a single person.

h. Fuller lauded the retirement benefits provided, while withholding information about mandatory employee contributions.

In late April, 1972, I was notified by telephone, by Dr. William E. Fox, Dean, School of Business Administration, California State Polytechnic College, that I would soon receive a formal job offer signed by Dr. Robert C. Kramer, President, California State Polytechnic College. Dr. Fox misrepresented the personnel policies and procedures of Cal Poly, and the career opportunities available there, in the following ways:

a. By withholding all information concerning the criteria for determining salary and grade offers for faculty positions and within each faculty grade. Fox assured me that I was getting an excellent offer for a person without a doctorate. Fox withheld the fact that a substantial percentage of the associate and full professors had no more than a bachelor's degree.

b. By assuring that eligibility for promotion to the grade of Associate Professor (Vocational) could be based upon completion of course work toward a doctorate in business. Fox withheld information concerning a new rule which required tenure before promotion.

c. By assuring me that while promotion to the grade of Associate Professor (Vocational) would be based on merit, few individuals in the School of Business had been denied such promotions in recent years. Fox withheld information concerning an arbitrary "60–40 rule," which limits the number of faculty members in the top two grades to 60% of the faculty. Several months later I found out that it was an intentional policy to withhold information concerning the "60-40 rule" from prospective business school faculty members.

d. By assuring me that I would have substantial time off in order to pursue doctoral studies. No time off from a normal teaching load was ever granted, and classes were scheduled with no thought or consideration given to creating an atmosphere conducive to doctoral studies.

e. By assuring me that scholarships would be readily available for tuition-free doctoral studies at nearby universities by special arrangement. It turned out that no special arrangements existed, and that the limited number of scholarships available were all based upon severe financial need.

f. By assuring me that Cal Poly had excellent retirement benefits, while withholding information about mandatory employee contributions to the retirement plan.

g. By assuring me that Cal Poly had an excellent health benefits plan, while withholding the fact that employer contributions would not begin until after six months of employment, and withholding the fact that the employer contributions were not even sufficient to cover a single employee.

h. By telling me that summer employment would increase my expected earnings by one third, while withholding information about a rule which limited summer employment to one summer out of every three.

i. By assuring me that partial reimbursement for moving expenses was a virtual certainty. As late as November, 1972, I was assured that funds were available. Then in December, 1972, I was notified that no reimbursement would be forthcoming.

SAMPLE SALARIES IN SCHOOL OF BUSINESS ADMINISTRATION DURING 1972-73 SCHOOL YEAR

Professor Paul, Frank
  Masters, University of San Francisco 1958.
  Tenured.
  Promoted August 29, 1968.
  $20,664.
Professor Schoning, Richard H.
  Masters, University of Pennsylvania 1959.
  Tenured
  Promoted August 30, 1968.
  $20,664.
Associate Professor Petersen, James C.
  Masters, University of Arizona 1965.
  Non-tenured.
  New hire September 1, 1969.
  $18,733.
Professor Worley, G. Dow, Jr.
  Masters, North Texas State 1954.
  Tenured.
  Promoted August 31, 1972.
  $16,992.
Associate Professor Wagner, Gerald E.
  Masters, University of Northern Iowa 1963.
  Tenured.
  Promoted August 30, 1968.
  $16,164.
Associate Professor Johnson, Arthur
  Masters, University of Southern California 1962.
  Tenured.
  Promoted September 1, 1969.
  $15,408.
Associate Professor Williams, D. Wayne
  Masters, University of Southern California 1967.
  Tenured.
  Promoted August 31, 1972.
  $13,308.
Assistant Professor Diaz, Alfred M.
  Masters, Harvard University.
  Nontenured.
  New hire August 31, 1972.
  $11,616.

Mr. O'Hara. Thank you very much, Professor Rios. Professor Rios, tell me, with respect to the specific cases mentioned by you, were complaints regarding discrimination in employment made to agencies of the Government and, if so, to whom and what was the disposition of those complaints?

Mr. Rios. Well, I filed a class action complaint with the Equal Employment Opportunity Commission—I believe it was last June—and we have not heard from the Equal Employment Opportunity Commission and we are rather skeptical about whether we are going to hear from them or not. They have a history of inaction with respect to institutions of higher learning.

We submitted, through the Raza Urban Coalition, a civic organization in Pomona, an outline of the situation to the Office of Civil Rights of Health, Education, and Welfare in San Francisco and we have yet to see what kind of response we will receive from that office.

Mr. O'Hara. Have any complaints been made to State agencies?

Mr. Rios. In the case of the complaint with the EEOC, I think the procedure is that the complaint usually goes first to the Fair Employment Practices Commission unless it is a class action, in which case it does not have to go, and it did not go to the Fair Employment Practices Commission in California.

Mr. O'Hara. Does the California State law cover discrimination in employment at the State colleges and universities?

Mr. Rios. I can't answer that question. The only thing I can say is that I know of no case in which a university has been asked to explain policies and practices or complaints of discrimination to a State agency.

Mr. O'Hara. Well, it seems to me that the specific cases you have brought up are of a sort which would fall under the traditional areas of jurisdiction of the State fair employment practices commission and of the Federal Equal Employment Opportunities Commission, because, unlike some of the other complaints that we have heard, these involve specific cases in which some individuals were treated less well than others when it comes to tenure or to gaining employment or to promotion and the allegation is made that the reason they were treated not as well was because of their ethnicity.

Now, those are classic discrimination in employment cases, you see, and that is why I wanted to say that.

With respect to your own particular case, you said there was something about a mention of the president of the institution had a policy or allegedly had a policy that no faculty members who had not been members of the faculty for at least 4 years would be granted tenures in spite of the law saying 2 years?

Mr. Rios. The situation is as follows: Up until a few years ago, the requirement was 4 years minimum before you would receive tenure, although the university had ways of sidestepping the rule whenever it wanted to bring somebody in. In the fifth year, you were to be notified whether you were going to receive tenure or were given a terminal year, which would be your fifth year.

That rule was changed in the State colleges and universities shortly before I arrived there. The requirement now is: You have to be there a minimum of 2 years and any time subsequent to that you can receive tenure.

Now, the president, or, in fact, both the president and the vice president for academic affairs, arbitrarily decided not to grant tenure to any one who had been there less than 4 years for that year, possibly for budgetary reasons, but without any consideration as to the adverse effects that it might have.

If you take, for example, the fact that we have only 10 to 15 Spanish-surnamed Chicano faculty and we are all at lecturer and assistant professor level and then if you then put a restriction on promotion and tenure, then who is it going to affect adversely as a group? If there are only a few promotions that are granted, what chance do we have, say 10 or 15 of us, in competing with 200?

What I am trying to say is that the decision was quite arbitrary, without due regard to the repercussions, the effects it would have.

Mr. O'Hara. But there are non-Chicano faculty members who have also been denied tenure because they have not been there for 4 years?

Mr. Rios. Well, I think the point is that there are non-Chicano faculty members who have been granted tenure at the end of a year or two.

Mr. O'Hara. But in the last year or two?

Mr. Rios. I would think so. I will try to verify that. Of course, this is difficult, because I asked the university for information, detailed listing on the tenures that were granted, the people that were granted tenures and by year, and, of course, they would not give it to me.

So in this case I cannot say specifically, but I did go around and ask some of the more senior faculty members in the biology department and so on, and they tell me there are one or two people who have been granted tenure at the end of 1 year.

Mr. O'Hara. I am not familiar with the California State law but I would hope that specific complaints could be made to the California Fair Employment Practices Commission as well as to the Federal Equal Employment Opportunity Commission in the form of a class action so that a particular fact or the particular facts of some of these cases—I am quite certain that the California commission has power of subpena and power to inspect records and so forth and so on—so that we can nail down just exactly what the situation is in some of these cases and get a clearer idea and, if there is discrimination, then highlight that discrimination as well as to do something about it.

Mr. Rios. But isn't it the case that both the University of California system and California State colleges are big Federal contractors, especially the University of California system, which receives millions and millions of dollars from the Federal Government? Isn't it also true that the cases I have outlined are directly in noncompliance, for example, with the Executive order, so that they do come under Federal jurisdiction?

Mr. O'Hara. That would depend somewhat on all of the factual circumstances. In short, it requires the contractor to take affirmative action to insure that applicants are employed and are treated during employment without regard to race. Now, that is a factual question.

Mr. Rios. I presented some of the relevant facts in my summary.

Mr. O'Hara. Yes, I agree it is in violation if there has been in fact, discrimination. It is a violation in which the Labor Department's Office of Contract Compliance ought to be interested and in which the

Department of Health, Education, and Welfare and the Office of Civil Rights ought to be interested and in which the Federal Equal Employment Opportunity Commission ought to be interested as well as the California enforcement agencies, whatever they are.

But our testimony here has suggested that, in the Office of Civil Rights Compliance of the Department of Health, Education, and Welfare, there is a backlog of tremendous size. We have been told, for instance, that those institutions that have submitted affirmative action programs, most of them, have never heard from the Office of Civil Rights Compliance, or whoever the agency is, as to whether their affirmative action proposal is acceptable. You know, they just don't answer. And they send in these reports annually, or at intervals, and they never hear back on whether their reports are acceptable. They just have no answers.

Mr. Rios. Doesn't that indicate, then, that some corrective action is required by some agency of the Federal Government?

Mr. O'Hara. Yes, it does, and you are looking at two Members of Congress who have voted consistently to provide more funds for enforcement activities of the Equal Employment Opportunity Commission; but, in fact, they have a greater backlog than the Office of Civil Rights Compliance.

Mr. Rios. I have to emphasize: In the physical science, I think the established sacrosanct policies are very entrenched and I think they are discriminatory, and the fact that the Federal Government released large amounts of funds to Berkeley, I think, shows that the Federal Government was not taking the Executive order very seriously and I think it was a real setback.

That is particularly true with respect to our coming into the physical sciences or all areas of the physical sciences, and it is a matter of great concern to all of us in California.

To be honest with you, we had a very difficult case in the teacher preparation center in which the director of the teacher preparation center was definitely biased against minorities and, in fact, a case was taken all the way up to the assembly. It was taken up on the floor of the assembly because the president refused to take some corrective action. Finally the director resigned, which is the manner in which the university has solved problems. They just wait until the people resign.

But this director refused to make some changes that were necessary with respect to training teachers to go into the schools that serve primarily the Mexican-Americans. So even in that case we had a very difficult time. We couldn't get any action from the State although we had backing of the United Professors of California and other organizations, and, in fact, the United Professors of California led the case because it was of vital concern to them. Even in that case we could not get any action.

So I think what little progress we have made is due to the fact that the Federal Government has taken some action in these matters, but it is not nearly enough.

Mr. O'Hara. I am going to ask you—not this morning because I don't think it would be fair to ask you to react to a complicated proposal offhand—I am going to ask you to look at a proposal that President Robben Fleming of the University of Michigan made to this committee with respect to a manner of handling the discrimination complaints at universities, and I will have the staff give you a copy of that report also, and I would like to get your reaction in writing; and, without objection, I will offer it to be printed in the record following your testimony and questioning here today.

Although there have been complaints about Dr. Fleming's proposal, one of the advantages would be that you would at least get some kind of a forum and hearing and determination quickly and then there would be an appeal right from the adverse decision, but at least there would be something happening within a reasonable length of time. I am going to ask you to take a look at that and see what your reaction to it is.

Before we begin questioning, I am going to have to leave for a few minutes and I will ask Mr. Dellenback to assume the chair.

[Subsequently, Dr. Rios submitted the following:]

CALIFORNIA STATE POLYTECHNIC UNIVERSITY, POMONA,
October 18, 1974.

Mr. WEBSTER BUELL,
Counsel, Committee on Education and Labor, Special Subcommittee on Education, Washington, D.C.

DEAR MR. BUELL: Enclosed is a summary of my opinion on Dr. Robben Fleming's suggestion that a procedure for binding arbitration of civil rights complaints against institutions of higher education be adopted. I have taken the liberty of soliciting the opinion of several Chicano educators and have enclosed a review of Dr. Fleming's suggestion by Dr. J. V. Martinez, Chairman of the Physics Department of St. John Fisher College, Rochester, New York. In general we feel that adoption of such a procedure would be highly regressive.

I hope that these opinions are given due consideration and I appreciate the opportunity to comment on this matter.

Respectfully,

MIGUEL RIOS, Ph. D.,
Assistant Professor, Physics and Earth Sciences Department.

Enclosure.

COMMENTS ON TESTIMONY BEFORE HOUSE COMMITTEE ON EDUCATION AND LABOR, SPECIAL SUBCOMMITTEE ON EDUCATION

It is my opinion that there are some serious flaws in Dr. Fleming's suggestion for binding arbitration of civil rights complaints against institutions of higher education. Dr. Fleming first asserts that the federal government treats colleges and universities as if they were industrial plants, the implication being that different criteria should be applied to institutions of higher education and perhaps that they should even be subject to different laws. If colleges and universities should be subject to regulations different from those applicable to private enterprise, it should be in the direction opposite to that implied by Dr. Fleming. Specifically, federal requirements for non-discrimination and affirmative action should be more stringently and more rigorously enforced with respect to institutions of higher education than with industry. The reasons for this are: (1) the progress of minorities in this country is critically dependent on the educational system and this system will not properly serve the minority community until this group has adequate representation at all levels of education, (2) because academicians are imbued with the belief that "objectivity and truth" is the quintessense of their profession, the attitudes which have excluded minorities from higher education are much more entrenched and perceived as equitable than in private enterprise, rendering changes much more difficult, and (3) the criteria for hiring retention, promotion and tenure of faculty members is much more subjective and much more amenable to petty personal considerations than in industry and at the same time these criteria are infinitely more difficult to challenge in a court of law.

In diirect contradiction to his implication that universities should not be subject to the same regulations as industry, Dr. Fleming suggests that the procedure of binding arbitration, commonly used in industry, be adopted in complaints against institutions of higher education. Not only is this suggestion contradictory to the first part of his comments but it is also illogical. To begin with, the suggestion that the university "provide an impartial system" is unsound. Past history shows that universities have not been impartial and no meaningful changes have come about that would suggest that a university would provide an "impartial tribunal". Secondly, while there is a direct analogy between the university and big-business management, there is no comparison between the big labor unions such as the UAW and a minority staff or faculty member seeking relief from discrimination or harassment. Neither university administrations nor the predominantly white faculties are amenable to complaints of discrimination or to challenges to entrenched practices that are disadvantageous to minorities. Labor unions bargain from a position of power. A minority faculty member is literally at the mercy of the administration and the predominant white faculty. Adoption of binding arbitration as suggested by Dr. Fleming would have an extremely adverse effect on the efforts of minorities to gain fair representation in institutions of higher education.

The enormous number of cases backlogged with federal agencies, however, clearly indicates that some action is required. I agree with Dr. Fleming that one agency should have jurisdiction but it should also have the funding necessary to enforce the law. In this connection I also agree with his statement that universities should be held accountable for their selection of faculty members. But it should go beyond this. It is my opinion that there is a great need to challenge traditional hiring, retention and tenure criteria. My limited experience in academia has taught me that these matters are often decided on very shallow considerations. It could very well be that there is no need for new legislation in this area. The guidelines in Executive Order 11246 offer a good starting point if the authority and resources to enforce the Order and Civil Rights Laws are vested in one agency. Universities will simply not bring about meaningful changes until the consequences for failure to eliminate discrimination and implement affirmative action is loss of federal funds.

REVIEW OF "TESTIMONY BEFORE HOUSE COMMITTEE ON EDUCATION AND LABOR, SPECIAL SUBCOMMITTEE ON EDUCATION" DATED AUGUST 12, 1974 AND AUTHORED BY DR. R. W. FLEMING, PRESIDENT OF THE UNIVERSITY OF MICHIGAN

Dr. Fleming gives the impression that, as far as implementing the law is concerned, institutions of higher education require special treatment. Apparently, the suggestion is that there should be a separate law applicable to universities and colleges. It is true that for the unenlightened on these matters, one would hold that such institutions are the pinnacle of truth and justice, knowledge and understanding. However, there is no evidence to indicate that universities on the whole have even attempted to comply with affirmative action programs. Dr. Fleming cities bureaucracy and related costs as major obstacles and states that the usefulness of a law is tied in to the acceptability of legislative statutes. He refers to the difficulties that are coupled to affirmative action programs. He seems to object to the consideration of institutions of higher education along with industrial plants and factories. He did not note that the law behind affirmative action was applied to industrial concerns first and was delayed in its application to universities. There is no evidence available which indicates that the institutions of higher learning can voluntarily cope with a sociological problem short of using external force. The problem was brought upon the universities by their inaction. As being in the forefront of knowledge, such learned communities should have accepted the challenge to bring about corrective measures. They did not! Presently their track record is worse than non-educational institutions. The people in academia are not sufficiently different that the law of supply and demand, and the laws of economics do not apply to them; yet, they still insist on support from the taxpayer. Presently, affirmative action is a law of the land and must be obeyed irregardless of duty station: although the law can be repealed or ruled unconstitutional. Dr. Fleming suggests that officials concerned with implementing the law request too much material from the university; so much that much of it goes unanalyzed. It is doubtful if this judgment should be within Dr. Fleming's purvue. The universities have brought the problem upon themselves and to a large extent because of ignorance and indifference. On page 2, next to last paragraph, Dr. Fleming seems to support better planned affirmative action programs. There is no disagreement with this. He suggests that cooperative arbitration would produce the required results. It would not do so in the span of time available. Dr. Fleming's suggestions that universtities cooperate in forming legislation for affirmative action is like asking a bear to guard honey. His suggestions are tantamount to having a criminal concur with the jury on the sentence. Dr. Fleming must understand that human nature must be constrained to bring about a meaningful change within the required time. Personnally, I am worried that if minorities cannot participate equitably, they will seek any action such that non-minority segment will not reap benefits either. The lack of positive results from universities are dismal indeed. There is no reason why they should require special consideration. Congress has the power to bring about a positive change and it has the obligation. Dr. Fleming's suggestions are idealistically sound but human nature is far short of being ideal. They must be led and I tend to think that university presidents have the obligations not to shirk from this responsibility in this matter.

Mr. Dellenback [presiding]. Thank you, Mr. Chairman.

Mr. Rios. I am sorry to have missed the first part of your testimony. I spent last night flying back from the west coast myself. I am pleased to have gotten the thrust of what you said, and also gotten from the questions some of the details.

May I ask this about your own situation? Has the basis for tenure in the schools in Cal Poly been reduced to writing? Is it just oral tradition; is it an ephemeral policy? Or, is there some document to which you can go that will spell out what the grounds for granting or refusing tenure are?

Mr. Rios. Basically, the university manual states that evaluations are to be based on teaching performance, professional growth, and service to the colleges and to the community, and it does not go any further than that. Of course, professional growth will vary from department to department, so, in principle, our physics department should have an outline of what constitutes professional activity and therefore that would identify what constitutes professional growth.

In general, it is assumed that one aspect of professional activity in physics is research, for example. So, what I am saying is that as far as the university manual is concerned, it only stipulates these three things and it stipuates the department is to develop additional written criteria and that is to be used in evaluations. What I am saying is no such criteria were used.

Mr. Dellenback. No such criteria have ever been reduced to writing or no such criteria was used?

Mr. Rios. I asked one of the faculty members and he said possibly a couple of years ago a couple of people sat down and wrote some things down and they may be in the files someplace.

Mr. Dellenback. But, it is not generally available to new instructors?

Mr. Rios. I have never seen new written criteria. I asked, as I say, two members and they say they don't recall any written criteria within the department.

Mr. Dellenback. Under the procedure at your school, how large is the committee that votes on tenure?

Mr. Rios. All tenured members—there are at the present time 11 faculty members.

Mr. Dellenback. Who have tenure?

Mr. Rios. No, permanent. Nine of them have tenure.

In addition, there is a very unprofessional manner in which tenure is granted in the sense that we have a joint department with the Department of Earth Science. Our department is the Department of Physics and Earth Science.

The tenured members of the Earth Science also get to vote.

Mr. DELLENBACK. How many are there?

Mr. RIOS. I think at the present time we have six people in the earth science and at least three or four are tenured. So, there is a total of 15 people that probably vote on tenure in our department.

The point is that in most schools—well, I won't say "most schools" because I can't, or I couldn't verify that—but certainly, the sensible way to do it is that earth science faculty would not be casting a vote on the competency of a faculty member in other fields, neither would I want to cast a vote on the competency of an earth scientist.

One could conceivably make some comments as to how clear he is in his classroom presentation.

Mr. DELLENBACK. Anyway, the thrust of our committee is not really to analyze tenure procedures. Nor are we attempting to evaluate competence or incompetence or fairness or lack of fairness. However, I am interested in knowing whether or not, in whatever system they do use, they are discriminating. You are indicating that insofar as a new faculty member coming aboard, you are not given, nor are you able to obtain the grounds and the criteria that will be used to determine tenure.

When it came to the actual voting on this, was it a case of a majority vote or unanimous vote or what kind of a decision was it?

Mr. RIOS. There again, it is not really well defined.

Mr. DELLENBACK. Who told you that you were not going to get tenure?

Mr. RIOS. Well, of course, the official notification comes from the president.

But, one does get to see the vote of the tenured faculty members.

Mr. DELLENBACK. Is it individual by individual?

Mr. RIOS. Well, there is a majority opinion that is written usually. As I indicated, all it said was my classroom presentation had some deficiencies. That is all it said.

Then, anyone who disagrees with the vote can state his opinion. There were three people who disagreed and indicated they felt I should receive tenure. But, then, the department chairman submits his own recommendation and, who knows, it is not clear, but generally, the dean will follow the recommendations of the department chairman, and even if all faculty vote against the individual he may recommend tenure and he may get it.

On the other hand, the majority of the tenured faculty may recommend tenure and the chairman may recommend against tenure and the individual may not get tenure, because, after the recommendations go to the dean, then the dean makes the recommendations to the academic vice-president, and, again, he can change and overrule the decision.

So, the ultimate authority rests with the president.

Mr. DELLENBACK. And he has reduced nothing to writing as to the criteria upon which he will grant tenure or not?

Mr. RIOS. Only the university statements which are in the university manual.

Mr. **DELLENBACK.** You indicated earlier when you joined the faculty, there were two of you who joined?

Mr. **RIOS.** That is correct.

Mr. **DELLENBACK.** Is the other man who came in when you came in still with the faculty?

Mr. **RIOS.** Yes.

Mr. **DELLENBACK.** Were you the only two who did not have tenure at the beginning of this year?

Mr. **RIOS.** That is correct.

Mr. **DELLENBACK.** Was he granted tenure at this time?

Mr. **RIOS.** No.

Mr. **DELLENBACK.** So, insofar as your case is concerned—and I am not arguing but just trying to get this clear in my mind—while it may well be unfair in the sense you don't like the system that is applied, you are not testifying there was discrimination practiced in your situation in a way that somebody else who was on a peer basis with you was granted tenure and you were not granted tenure?

Mr. **RIOS.** No; I am saying there was discrimination.

Mr. **DELLENBACK.** Was it against him?

Mr. **RIOS.** No, against me, because he received a serious tenure evaluation and I did not. The majority, I don't know if it was a majority, but certainly most of the senior faculty in his case recommended tenure.

Mr. **DELLENBACK.** And he was not granted it?

Mr. **RIOS.** Only because of the recommendation of the chairman. I don't know what the situation was. But the gist of what I am trying to say is that these rules and regulations, not only with respect to tenure but also with respect to hiring and retention and so forth, can be applied capriciously. One would like to believe that criteria are objective, but in fact, it is very doubtful that is the case.

Mr. **DELLENBACK.** Are there any other examples that you know of outside of the physics department, where peers who had been there the length of time you were part of the faculty were granted tenure this year?

Mr. **RIOS.** That, I can specifically identify, not at this time. I can't identify any.

Mr. **DELLENBACK.** So, we don't have any cases before us at present, in the language of the law that says, "Here are two cases which are identical, except for the racial situation, and this one was granted tenure and this one was not granted tenure."

We don't have specific information you can give us that would allow us to examine and compare with your situation?

Mr. **RIOS.** Only by word of mouth because, as I say, the university caused this situation.

Mr. **DELLENBACK.** You have knowledge there are people in that position that were given tenure?

Mr. **RIOS.** I have word of mouth by the chairman of the Biology Department., who has been chairman for 20 years, that there have been people in the past 3 years who have come to Cal Poly and at the end of 2 years received tenure.

Mr. **DELLENBACK.** Were there any in the last year?

Mr. **RIOS.** That, I don't know, because I couldn't get information from the university.

Mr. DELLENBACK. Switching from tenure to the matter of salary, you indicated when you came to Cal Poly, two of you joined the faculty at the same time—one was a Chicano and one was a non-Chicano. Did you indicate you were brought aboard at different salaries?

Mr. RIOS. That is correct.

Mr. DELLENBACK. Did you ever discuss that difference in salary with anybody in a position of authority and get any explanation as to why the difference?

Mr. RIOS. Well, first of all, what I did was, I attempted to get a promotion on the basis of merit and at one time, in fact, I have a memo from the dean of the School of Science, recommending to the vice president that I be given a multiple step increase because of my performance, a multiple step increase based on merit, which I did not receive.

Mr. DELLENBACK. Did your new colleague get an increase at that time?

Mr. RIOS. No, this was strictly on the basis of outstanding performance and the dean was willing to recommend it, although everybody in my department was opposed to it, and I did not receive that multiple step increase.

Mr. DELLENBACK. Did you get any increase at that time?

Mr. RIOS. Not at that time, no. The procedure is that you get an automatic increase, step increase, at the end of each year. That is as long as you are within a certain rank.

In other words, there are five steps within the assistant professor's rank. There are no provisions for remedial action if someone was brought in at too low a step or no provisions for taking into account outstanding performance. A promotion is considered a step from assistant professor to associate professor. You cannot get it if you are not at the top step in your rank, although the university has done it in special cases. But normally, you go through the five steps and you cannot be considered for promotion to associate until you reach the fifth step of assistant professor rank. So, had I been brought in at the same level I would have been eligible for consideration for a promotion to associate professor this past year, but there is no way that the administration takes to remedy the situation if there was an inequity.

Mr. DELLENBACK. You understand what this subcommittee is struggling with, and what I am reaching for in trying to get information for our record from you. We are looking at the question of discrimination. We are not looking at the question of "is the system a good system in the sense of should they weigh this more than that, or should they give multiple step increases or not give multiple step increases, or should they have a policy against 2-year or 4-year tenure", and that kind of thing. It might sound like we are investigating these problems, but what I am thrusting for is this: Do we have evidence from you of discrimination in connection with your own particular situation?

As I understand it, there are areas where you apparently feel you have not been treated on a balanced basis as your peer was treated; namely, first, in salary and, secondly, in tenure. From what you say about tenure, we don't have any hard evidence from you there was discrimination on tenure. Your peer was not granted it, and we don't have any examples of anyone on the faculty getting it that came in at the same time you did. Consequently, I move the tenure item back on the basis of evidence.

Now, you talk about salary, and you are talking about two different things in connection with salary. One, the initial salary when you came aboard as a faculty member, and two the amount of increases.

Now, dealing with the first one, you indicated you came aboard at a different salary than another?

Mr. RIOS. That is right.

Mr. DELLENBACK. You were paid something like $1,000 less than he was?

Mr. RIOS. Yes.

Mr. DELLENBACK. Did you ever raise the question with the hiring authorities as to why you were not paid the same initial salary as he was? Did you ask about the differences in qualifications?

Mr. RIOS. I certainly discussed it with the dean and department chairman and have to very frankly state that my department chairman conceded at one point to me in private that indeed I should have been brought in at a step higher.

Mr. DELLENBACK. And the reason you were not was because of race?

Mr. RIOS. Well, of course, he wouldn't say that.

Mr. DELLENBACK. Were there differences in qualifications between you and your non-Chicano peer?

Mr. RIOS. It depends on what you call "qualifications." I would say "no."

Mr. DELLENBACK. Had he had any teaching experience you did not have?

Mr. RIOS. He had teaching experience and I had some teaching experience.

Mr. DELLENBACK. Were they equivalent?

Mr. RIOS. No.

Mr. DELLENBACK. Yours was more or yours was less?

Mr. RIOS. No; his was somewhat more.

Mr. DELLENBACK. He had more teaching experience. How about the degrees?

Mr. RIOS. The degrees were equivalent.

Mr. DELLENBACK. Were you the same insofar as the institutions from which the degrees came?

Mr. RIOS. Well, yes, I wouldn't want to say my institution was any better, although I think it is.

Mr. DELLENBACK. But, if either institution was better, you would say yours is better? Your doctorate was from where?

Mr. RIOS. University of Maryland.

Mr. DELLENBACK. And his?

Mr. RIOS. From Northwestern.

Mr. DELLENBACK. In Illinois?

Mr. RIOS. Yes.

Mr. DELLENBACK. Insofar as the quality of the work done, was there any appreciable difference in the level of the grades that you achieved all the way down through your undergraduate degree, and the level of the grades he received?

Mr. RIOS. I don't know what his academic record is. I am sure it is quite good

Mr. DELLENBACK. Is yours quite good?

Mr. Rios. In general, it was, except I had to work full time as an undergraduate. I was going to school full time whereas he didn't have to.

Mr. Dellenback. Is it possible to examine his record?

Mr. Rios. As an undergraduate, I didn't get financial assistance until I got well into graduate school.

Mr. Dellenback. Which is one of the reasons why it is sometimes unfair to look at the academic record, but I am looking for some indicants of "why" here. His academic record, then, might have been superior?

Mr. Rios. Yes. As you go along you start to recognize I am making big contributions that he cannot make because of my experience. For example, I am an experimentalist and he is not. There were no laboratories at Cal Poly when I got there and I had been the first one to build up a sophisticated advanced nuclear physics laboratory requiring quite a bit of expertise, and a substantial amount of money was invested which I supervised.

Mr. Dellenback. This laboratory has been developed since you have been there?

Mr. Rios. Yes, and that is the expertise I bought since I came in. Working in a laboratory as an experimentalist—and this is the experience I brought to the department. When you first come in you don't notice that perhaps the criteria used didn't take into account the expertise that I brought in, so the point I am trying to make is that the criteria you use, what they call qualifications, are subject to a great deal of debate.

Mr. Dellenback. And I, from prior testimony, think that the members of the subcommittee would agree that sometimes there are inadequate or inexact criteria used in making points of distinction. I am not attempting to try the case, but, for the record, I am attempting to see that we have a spelling out in simple form of the differences. Were there any other areas besides salary and tenure in which you think there was perhaps discrimination practiced?

Mr. Rios. Well, I mentioned the case of promotion and tenure is involved here for Jose Vadi, who is being held back because he has not received a doctorate in hand, but just prior to his reaching that level, two white members had been promoted and granted tenure prior to receipt of their Ph.D.

I gave a date for one of them. In fact, there is a member in the political science department who had been promised tenure and promotion upon receipt of his Ph. D. and when he received the Ph. D. he didn't get the promotion and that fellow is a black member.

So, I complain that the system is poor, but for purposes of this committee, what I am saying is, given the fact that it is a bad system, if it were uniformly applied, then we would not have any basis for complaints of discrimination. That is what I am saying.

Mr. Dellenback. You are indicating that in this promotion matter, not in this situation involving yourself but in the other situation you mentioned, you feel the system was not uniformly applied?

Mr. Rios. That is right, in the other case, it is very clear the case in the department of urban planning, where Jose Jamenez and Robert Catlin were brought in as lecturers and prior to that they hired a white faculty member with less experience at an acadamic rank a step higher. In fact, Robert Catlin filed a complaint and his academic status was changed to that of assistant professor and I think he went to step 4 or whatever. But, there was no back pay to make up for the difference.

Jose Jimenez, when he discovered the inequity, asked that his situation be remedied. One of the difficulties he encountered, as a lecturer, is that you are not reappointed until late in the summer because you don't even have to get a evaluation. So, if you are not reappointed, you can't find another academic position late in the summer because appointments are made early. So, he asked them before the end of the academic year, "Either change my status and clarify my reappointment or I will have to resign." The administration did nothing, so he was forced to resign at the end of the second quarter.

Mr. DELLENBACK. Thank you very much, Dr. Rios. I hope, as the chairman indicated before he left, you will give us the benefit of your comments on Dr. Flemming's suggestions. We will appreciate getting your perspective on those suggestions, and we appreciate your taking the time to appear.

Our next witnesses will be representatives of the American Association of University Professors, Dr. Mary Gray and Carolyn Polowy.

STATEMENTS OF MARY W. GRAY AND CAROLYN POLOWY, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

Ms. POLOWY. I am Carolyn Polowy and this is Dr. Mary Gray.

Mr. DELLENBACK. We are appreciative of your coming. We have statements from each of you, and you can give them to us in any manner that seems most appropriate.

In view of the shortage of time, I will, without objection. order both of your complete statements to be made part of the record.

Ms. POLOWY. Thank you.

[The statements referred to follow:]

PREPARED STATEMENT OF CAROLYN POLOWY, FOR COMMITTEE W, ON THE STATUS OF WOMEN IN THE ACADEMIC PROFESSION, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

Good morning. We are pleased to be here this morning to present testimony on behalf of the American Association of University Professors. My name is Carolyn I. Polowy. I am Associate Counsel and Associate Secretary for the AAUP. I am here today with Dr. Mary Gray who is Chairperson of the Association's Committee W on the Status of Women in the Academic Profession. Dr. Gray, who is a professor of mathematics and statistics at American University, will testify about the myth and reality in the implementation of affirmative action in higher education institutions. I would like to briefly summarize for you the Association's policies and activities which have given support to the implementation of equal opportunity through affirmative action on higher education.

At the outset, it is important to note a few facts about the AAUP. The Association has been in existence since 1915. It is the largest organization of teachers and research scholars from higher education institutions in the country. The AAUP has approximately 1350 chapters at private and public colleges and universities. The Association's members number over 80,000. Approximately three-quarters of the Association's membership is male.

From its inception, the Association has focused its attention on the maintenance of a true spirit of academic freedom throughout higher education. In order to further the development of an atmosphere in which academic freedom would be respected and protected, the Association has developed policies and suggested institutional operating procedures which have become a part of the reference base for higher education. Thus, in 1940 the Association, together with the Association of American Colleges, formulated a *Statement on Academic Freedom and Tenure* (Appendix A). This *Statement* provided the procedural framework through which academic tenure would be awarded while recognizing that the basic purpose of tenure is the protection of freedom in teaching, research and extramural activities.

Another priority of the Association has been the implementation of a shared governance system in higher education institutions. In a college or university, each operational component—the faculty, the administration and the governing board—has a special area of expertise and a particular area of concern. All, however, share in their desire to see that the institution performs its primary functions of educating students and advancing knowledge. Therefore, there has been a general agreement within the educational community that the institution's components should share in the responsibility for accomplishment of the institution's mission. This agreement was expressed in the *Statement on Government of Colleges and Universities* (Appendix B) which was jointly prepared in 1966 by the AAUP, the American Council on Education and the Association of Governing Boards of Universities and Colleges. The *Statement*, *inter alia*, provides that "[f]aculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal." There are two primary reasons for the concept of peer review incorporated into the *Statement*. First, the faculty's judgment on such matters is inter-related with the general educational policy of the institution. Second, scholars in a particular field have the chief competence to judge the work of their colleagues.

Before discussing the inter-relationship of the principles of academic tenure and shared governance with the implementation of affirmative action, let me briefly review some of the Association's activities on behalf of minorities and women in higher education.

The Association has consistently recognized and reminded its constituents that academic freedom cannot exist where fundamental human freedoms are denied. Thus, the Association has investigated and condemned, whenever necessary or possible, discrimination which violates or interferes with the basic rights of students to an education and the rights of teachers to pursue their profession. Several examples of the Association's expressions of concern include its support for the Supreme Court's decision in *Brown vs. Board of Education*, 347 U.S. 483 (1954) and the subsequent implementation of desegregation requirements. The Association continued to lend its support to desegregation of higher education institutions and to the students and faculty affected by the sometimes violent resistance to change. In 1964, at its 50th Annual Meeting, the AAUP deplored the closing of schools by public officials to avoid racial integration. The Association restated its opposition to racial segregation in education:

> [The Association] recognizes that the talents of all its people, regardless of race, constitute a priceless asset of this nation. Hence, it must condemn all attempts to continue racial criteria for educational opportunity, wherever they occur, and it commends the growing number of institutions which have abandoned such discrimination in the selection of both faculty and students.

The Association went on to endorse speedy consideration and passage of Civil Rights legislation then pending before Congress.

While the Association's particular concern for the rights of racial minorities continued throughout the 1960's, by the end of that decade academic women were also asking the Association to give serious consideration to the problems of sex discrimination on college and university campuses. Therefore, in 1970, the Association's Committee W on the Status of Women in the Academic Profession was reactivated after 42 years of dormancy. Many of the concerns of the original Committee W remained valid in 1970. For example, a survey on the status of women in colleges and universities conducted in 1921 and referred to in early Committee W reports, strikes a contemporary chord. The Committee found that although women represented 74 percent of the faculty in women's colleges, only 22 percent of these women were found at the full professor rank, compared with 52 percent of the men. At men's colleges, only two women faculty members were found in a total of nearly 2000 professors. At coeducational institutions in which women constituted 31 percent of the students, women represented only 13 percent of the faculty, though, again like the contemporary reports, this varied markedly by rank, women being 4 percent of full professors but 23 percent of instructors.[1]

In the area of salaries, the early AAUP reports indicate that academic women were ready to unite in support of the principle of equal pay. For example, an early report relates that at one institution the trustees voted maximum salary of $1800 for women and a maximum of $3000 for men at the same rank. When it was reported to the trustees that the women on the faculty were going to file a protest, the trustees promptly published a new salary schedule which made no distinctions on the basis of sex.[2]

I need not tell you that sex-based rank and salary discrimination still exist in many of our institutions of higher education. A survey prepared by the National Education Association in 1972 indicated that the number of women faculty members at the ranks of professor, associate professor, and assistant professor, had actually declined from 1959 to 1972, an era of great expansion for higher education. Moreover, one of two salary studies reported in the Carnegie Commission Report on *Opportunities for Women in Higher Education* (pp. 115–119) concluded that women in academic were being paid on an average of $1040 less than comparable male colleagues and the second study showed a wider disparity.

The efforts of Committee W have concentrated on the elimination or modification of policies and procedures which inhibit the employment of women in the academic professions or which limit their economic or professional status as faculty and research scholars in higher education institutions. The annual reports of Committee W set out more fully the concerns and activities of the Committee since its reactivation in 1970 and I am incorporating those reports as a part of my testimony (Appendix C).

I would like to point out two areas developed by Committee W which have received full Association support. As you may know, many women have been foreclosed from academic employment or faculty status in an institution or department in which their husband is a faculty member. Much discrimination has occurred as a result of so-called antinepotism regulations. In 1971, the Association adopted Committee W's *Statement on Faculty Appointment and Family Relationship* (Appendix D) urging the discontinuance of antinepotism policies and practices, and the rescinding of laws and institutional regulations which perpetuate them.

Recently, the Association has adopted Committee W's recommended *Statement on Leaves of Absence for Child-bearing, Child-rearing and Family Emergencies* (Appendix E). The Statement, applicable to both faculty men and women, recognizes that leaves of absence are necessary "to assist faculty members with parental responsibilities in meeting their obligations both to their professional careers and to their families, and to prevent the loss to the institution and to the academic community of substantial professional skills." Morever, the Statement recommends that in conformity with Title VII Sex Discrimination Guidelines, institutional leaves of absence for pregnancy and pregnancy-related disabilities be treated like other leaves in terms of permitted duration and compensation or benefits received during the leave of absence.

It should, by now, be obvious that the Association has found the goals of affirmative action in higher education to be completely compatible with AAUP policies and activities and consistent with continuing high achievement in higher education institutions. In 1971, when implementation of federal contract compliance requirements under Executive Order 11246 as amended was just beginning, the Association adopted the following statement at its Fifty-Seventh Annual Meeting:

> [We] strongly support all efforts in institutions of higher education to seek, as a minimum, full and uniform compliance with governmental policies and directives which prohibit discrimination on the basis of sex by any agency receiving government funds whether such discrimination is directed toward students, staff, or faculty. [We] further urge that colleges and universities cooperate with local and national efforts in the development and implementation of affirmative action programs directed toward the elimination of discriminatory practices and their consequences.

Based on a resolution of the Fifty-Seventh Annual Meeting calling upon the Association to develop as quickly as possible procedures and policies furthering the elimination of discrimination of higher education institutions, the AAUP Council appointed a special committee on discrimination. In its first Reports presented in the spring of 1972 (Appendix F), the Committee made several recommendations for the implementation of equal opportunity principles in institutional policies and practices, including:

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[1] See Report of Committee W, 1970–71.

[2] Ibid.

1. Publicizing faculty vacancies as widely as possible. In this regard, the Committee noted that word-of-mouth recruitment had worked a disservice to both candidates and the institution by limiting opportunity for appointment for reasons unrelated to potential merit.
2. Establishing a faculty committee to study institutional practices concerning appointments, salaries, tenure and other features of professional status and to determine if patterns of discrimination existed.
3. Establishing appropriate institutional grievance procedures for the handling of faculty discrimination complaints.

The Committee also directly addressed itself to the issue of utilizing affirmative action to remedy the effects of past discrimination in college and university faculties. First, the Committee expressed a desire that affirmative action be implemented in response to faculty pressure from within the academic community. Moreover, the Committee found such faculty action wholly consistent with the principles and practices of shared governance. The Committee's words express several important concepts:

> Under the *Statement on Government of Colleges and Universities*, matters concerning faculty status are primarily a faculty responsibility. We believe that this responsibility carries with it an obligation to make decisions affecting faculty status on the basis of standards of judgment which have not on their face excluded certain groups of people, standards which have not served to limit opportunity for certain groups of people because of considerations other than academic merit. We wish to stress that the concept of affirmative action calls for rejection of standards and practices which do not allow equal opportunity for all who may be qualified. It calls for genuine and tangible efforts to bring into faculties members of those groups which have previously been denied full equality of opportunity. Under an affirmative action program, a faculty is aksed to reassess its recruiting practices and, if necessary, to attempt to expand the sources from which it has traditionally drawn its new members. Affirmative action may also imply that a faculty consider providing advantage in the selection process for previously excluded groups, as a result of a faculty's desire to look to such additional factors, in evaluating an individual's potential contribution to the institution, as the values which diversity in perspective and experience may infuse into the academic program as a whole. A properly conceived affirmative effort, it must be emphasized, neither requires nor implies the placement of unqualified persons in any position, nor does it require the dilution of valid standards for appointment or promotion to any position. It does, however, make possible a broader interpretation of the criteria which have defined the parameters of academic excellence when this is deemed desirable by those responsible for decisions in this area.

Moreover, throughout its Report the Committee acknowledged that the members of the profession would have to examine and change their own attitudes to conform to equal opportunity standards, if the principles of equal opportunity were to be realized in a shared governance system. Thus, faculty would have to be educated to their responsibilities so that decisions made on tenure, appointments and salary would not be influenced by irrelevant and discriminatory considerations.

In 1973, the Council Commission on Discrimination reiterated in its Annual Report (Appendix G) the belief that "affirmative action in the improvement of professional opportunities for women and minorities must be (and readily can be) devised wholly consistent with the highest aspirations of universities and colleges for excellence and outstanding quality" without becoming, itself, a tool for discrimination. I believe that the Report discusses in detail some of the controversial areas related to the implementation of affirmative action in higher education institutions. I am, therefore, incorporating the entire Report in my testimony. However, I would like to quote a portion of the Committee's Report which summarizes the Association's approach to the implementation of affirmative action:

> The Committee believes that the further improvement of quality in higher education and the elimination of discrimination due to race or sex are not at odds with each other but at one. What is sought in the idea of affirmative action is essentially the revision of standards and practices to assure that

institutions are in fact drawing from the largest marketplace of human resources in staffing their faculties, and a critical review of appointment and advancement criteria to insure that they do not inadvertently foreclose consideration of the best qualified persons by untested presuppositions which operate to exclude women and minorities. Further, faculties are asked to consider carefully whether they are requiring a higher standard and more conclusive evidence of accomplishment of those women and minorities who are considered for appointment and advancement. What is asked for in the development of an affirmative action plan is not a "quota" of women or blacks, but simply a forecast of what a department or college would expect to occur given the nondiscriminatory use of *proper* appointment standards and recruiting practices—with the expectation that where the forecast turns out to be wide of the mark as to what actually happens, the institution will at once make proper inquiry as to why that was so. In essence, it is measures such as these which the Committee believes to be required by the Office for Civil Rights of HEW of universities using federal funds, and we do not see that there is in such requirements anything which the AAUP should find inconsistent with its own goals. Indeed, there may be more reason for concern that affirmative action of this kind which is critical to the abatement of discrimination may fail to be pursued with vigor than that it may be pursued too zealously. At the present moment, the politics of reaction are a greater source for concern than the possibility that affirmative action might lend itself to heavy-handed bureaucratic misapplication.

Finally, we would find it highly unusual if an exemption were carved out of the Executive Order affirmative action requirements for colleges and universities. The Executive Order program finds support in the Fifth and Fourteenth Amendments to the Constitution, as well as in the Congressional mandate for equal employment opportunity embodied in Title VII of the 1964 Civil Rights Act as amended.[3] The federal government may not, through its contracts programs or any other progrm, give aid and support to illegal and prohibited discrimination. We would, therefore, suggest that emphasis be placed on full and fair enforcement of the Orders by both HEW and OFCC.

Respectfully submitted,

CAROLYN I. POLOWY,
Associate Counsel.

APPENDIX A

ACADEMIC FREEDOM AND TENURE—1940 STATEMENT OF PRINCIPLES AND INTERPRETIVE COMMENTS

(Reprinted from AAUP Bulletin Summer, 1974)

In 1940, following a series of joint conferences begun in 1934, representatives of the American Association of University Professors and of the Association of American Colleges agreed upon a restatement of principles set forth in the 1925 Conference Statement on Academic Freedom and Tenure. This restatement is known o the profession as the 1940 Statement of Principles on Academic Freedom and Tenure.

The 1940 Statement is printed below, followed by Interpretive Comments as developed by representatives of the American Association of University Professors and the Association of American Colleges during 1969.

The following organizations officially endorsed the 1940 statement in the years indicated.

Association of American Colleges	1941
American Association of University Professors	1941
American Library Association (adapted for librarians)	1946
Association of American Law Schools	1946
American Political Science Association	1947
American Association of Colleges for Teacher Education [1]	1950
American Association for Higher Education [2]	1950
Eastern Psychological Association	1950

[1] Endorsed by predecessor, American Association of Teachers Colleges, in 1941.
[2] Formerly the Association for Higher Education, National Education Association.

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[3] See, *Legal Aid Society v. Brennan*, 8 F.E.P. Cases 179, 182 (N.D. Calif., 1974).

American Philosophical Association:	
Western Division	1952
Eastern Division	1953
Southern Society for Philosophy and Psychology	1953
American Psychological Association	1961
American Historical Association	1961
Modern Language Association of America	1961
American Economic Association	1962
American Farm Economic Association	1962
American Philosophical Association, Pacific Division	1962
Midwest Sociological Society	1963
Organization of American Historians[3]	1963
American Philological Association	1963
American Council of Learned Societies	1963
Speech Association of America	1963
American Sociological Association	1963
Southern Historical Association	1963
American Studies Association	1963
Association of American Geographers	1963
Southern Economic Association	1963
Classical Association of the Middle West and South	1964
Southwestern Social Science Association	1964
Archaeological Institute of America	1964
Southern Management Association	1964
American Educational Theatre Association	1964
South Central Modern Language Association	1964
Southwestern Philosophical Society	1964
Council for the Advancement of Small Colleges	1965
Mathematical Association of America	1965
Arizona Academy of Science	1965
American Risk and Insurance Association	1965
Academy of Management	1965
American Catholic Historical Association	1966
American Catholic Philosophical Association	1966
Association for Education in Journalism	1966
Western History Association	1966
Mountain-Plains Philosophical Conference	1966
Society of American Archivists	1966
Southeastern Psychological Association	1966
Southern Speech Association	1966
American Association for the Advancement of Slavic Studies	1967
American Mathematical Society	1967
College Theology Society	1967
Council on Social Work Education	1967
American Association of Colleges of Pharmacy	1967
American Academy of Religion	1967
American Catholic Sociological Society	1967
American Society of Journalism School Administrators	1967
John Dewey Society for the Study of Education and Culture	1967
South Atlantic Modern Language Association	1967
American Finance Association	1967
Catholic Economic Association	1967
United Chapter of Phi Beta Kappa	1968
American Society of Christian Ethnics	1968
American Association of Teachers of French	1968
Appalachian Finance Association	1968
Association of Teachers of Chinese Language and Culture	1968
American Society of Plant Physiologists	1968
United Chapters of Phi Beta Kappa	1968
American Dialect Society	1968
American Speech and Hearing Association	1968

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[3] Formerly the Mississippi Valley Historical Association.

Association of Social and Behavioral Scientists	1968
College English Association	1968
National College Physical Education Association for Men	1969
American Real Estate and Urban Economics Association	1969
History of Education Society	1969
Council for Philosophical Studies	1969
American Physicists Association	1969
American Musicological Society	1969
American Association of Teachers of Spanish and Portuguese	1969
Texas Junior College Teachers Association	1970
College Art Association of America	1970
Society of Professors of Education	1970
American Anthropological Association	1970
American Association of Theological Schools	1970
American Association of Schools and Departments of Journalism	1971
American Business Law Association	1971
American Council for the Arts in Education	1972
New York State Mathematics Association of Two-Year Colleges	1972
College Language Association	1973
Pennsylvania Historical Association	1973
Massachusetts Regional Community College Faculty Association	1973

The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to assure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher [4] or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights. **[1]** [5]

Tenure is a means to certain ends; specifically: (1) Freedom of teaching and research and of extramural activities and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

ACADEMIC FREEDOM

(a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. **[2]** Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment. **[3]**

(c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman. **[4]**

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[4] The word "teacher" as used in this document is understood to include the investigator who is attached to an academic institution without teaching duties.

[5] Bold-face numbers in brackets refer to Interpretive Comments which follow.

ACADEMIC TENURE

(a) After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice:

(1) The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.

(2) Beginning with appointment to the rank of fulltime instructor or a higher rank, [5] the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution it may be agreed in writing that his new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. [6] Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period. [7]

(3) During the probationary period a teacher should have the academic freedom that all other members of the faculty have. [8]

(4) Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges against him and should have the opportunity to be heard in his own defense by all bodies that pass judgment upon his case. He should be permitted to have with him an advisor of his own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from his own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution. [9]

(5) Termination of a continuous appointment because of financial exigency should be demonstrably bona fide.

1940 INTERPRETATIONS

At the conference of representatives of the American Association of University Professors and of the Association of American Colleges on November 7–8, 1940, the following interpretations of the 1940 *Statement of Principles on Academic Freedom and Tenure were agreed upon:*

1. That its operation should not be retroactive.

2. That all tenure claims of teachers appointed prior to the endorsement should be determined in accordance with the principles set forth in the 1925 Conference Statement on Academic Freedom and Tenure.

3. If the administration of a college or university feels that a teacher has not observed the admonitions of Paragraph (c) of the section on *Academic Freedom* and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning his fitness for his position, it may proceed to file charges under Paragraph (a)(4) of the section on *Academic Tenure*. In pressing such charges the administration should remember that teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility and the American Association of University Professors and the Association of American Colleges are free to make an investigation.

1970 INTERPRETIVE COMMENTS

Following extensive discussions on the 1940 Statement of Principles on Academic Freedom and Tenure *with leading educational associations and with individual faculty members and administrators, a Joint Committee of the AAUP* *and the Association of American Colleges met during 1969 to reevaluate this key policy statement. On the basis of the comments received, and the discussions that ensued, the Joint Committee felt the preferable approach was to formulate interpretations of the Statement in terms of the experience gained in implementing and applying the Statement for over thirty years and of adapting it to current needs.*

The Committee submitted to the two Associations for their consideration the following "Interpretive Comments." These interpretations were approved by the Council of the American Association of University Professors in April, 1970, and endorsed by the Fifty-sixth Annual Meeting as Association policy.

In the thirty years since their promulgation, the principles of the 1940 *Statement of Principles on Academic Freedom and Tenure* have undergone a substantial amount of refinement. This has evolved through a variety of processes, including customary acceptance, understandings mutually arrived at between institutions and professors or their representatives, investigations and reports by the American Association of University Professors, and formulations of statements by that Association either alone or in conjunction with the Association of American Colleges. These comments represent the attempt of the two associations, as the original sponsors of the 1940 Statement, to formulate the most important of these refinements. Their incorporation here as Interpretive Comments is based upon the premise that the 1940 Statement is not a static code but a fundamental document designed to set a framework of norms to guide adaptations to changing times and circumstances.

Also, there have been relevant developments in the law itself reflecting a growing insistence by the courts on due process within the academic community which parallels the essential concepts of the 1940 Statement; particularly relevant is the identification by the Supreme Court of academic freedom as a right protected by the First Amendment. As the Supreme Court said in *Keyishian* v. *Board of Regents* 385 U.S. 589 (1967), "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

The numbers refer to the designated portion of the 1940 Statement on which interpretive comment is made.

1. The Association of American Colleges and the American Association of University Professors have long recognized that membership in the academic profession carries with it special responsibilities. Both Associations either separately or jointly have consistently affirmed these responsibilities in major policy statements, providing guidance to the professor in his utterances as a citizen, in the exercise of his responsibilities to the institution and students, and in his conduct when resigning from his institution or when undertaking government-sponsored research. Of particular relevance is the *Statement on Professional Ethics*, adopted by the Fifty-second Annual Meeting of the AAUP as Association policy and published in the *AAUP Bulletin* (Autumn, 1966, pp. 290–291).

2. The intent of this statement is not to discourage what is "controversial." Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for the teacher to avoid persistently intruding material which has no relation to his subject.

3. Most church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 Statement, and we do not now endorse such a departure.

4. This paragraph is the subject of an Interpretation adopted by the sponsors of the 1940 Statement immediately following its endorsement which reads as follows:

> If the administration of a college or university feels that a teacher has not observed the admonitions of Paragraph (c) of the section on Academic Freedom and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning his fitness for his position, it may proceed to file charges under Paragraph (a)(4) of the section on Academic Tenure. In pressing such charges the administration should remember that teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility and the American Association of University Professors and the Association of American Colleges are free to make an investigation.

Paragraph (c) of the 1940 Statement should also be interpreted in keeping with the 1964 "Committee A Statement on Extramural Utterances" (*AAUP Bulletin, Spring*, 1965, p. 29) which states inter alia: "The controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his position. Extramural utterances rarely bear upon the faculty member's fitness for his position. Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar."

Paragraph V of the *Statement on Professional Ethics* also deals with the nature of the "special obligations" of the teacher. The paragraph reads as follows:

> As a member of his community, the professor has the rights and obligations of any citizen. He measures the urgency of these obligations in the light of his responsibilities to his subject, to his students, to his profession, and to his institution. When he speaks or acts as a private person he avoids creating the impression that he speaks or acts for his college or university. As a citizen engaged in a profession that depends upon freedom for its health and integrity, the professor has a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom.

Both the protection of academic freedom and the requirements of academic responsibility apply not only to the full-time probationary as well as to the tenured teacher, but also to all others, such as part-time and teaching assistants, who exercise teaching responsibilities.

5. The concept of "rank of full-time instructor or a higher rank" is intended to include any person who teaches a full-time load regardless of his specific title.[*]

6. In calling for an agreement "in writing" on the amount of credit for a faculty member's prior service at other institutions, the Statement furthers the general policy of full understanding by the professor of the terms and conditions of his appointment. It does not necessarily follow that a professor's tenure rights have been violated because of the absence of a written agreement on this matter. Nonetheless, especially because of the variation in permissible institutional practices, a written understanding concerning these matters at the time of appointment is particularly appropriate and advantageous to both the individual and the institution.

7. The effect of this subparagraph is that a decision on tenure, favorable or unfavorable, must be made at least twelve months prior to the completion of the probationary period. If the decision is negative, the appointment for the following year becomes a terminal one. If the decision is affirmative, the provisions in the 1940 Statement with respect to the termination of services of teachers or investigators after the expiration of a probationary period should apply from the date when the favorable decision is made.

The general principle of notice contained in this paragraph is developed with specificity in the *Standards for Notice of Nonreappointment*, endorsed by the Fiftieth Annual Meeting of the American Association of University Professors (1964). These standards are:

Notice of nonreappointment, or of intention not to recommend reappointment to the governing board, should be given in writing in accordance with the following standards:

> (1) *Not later than March 1 of the first academic year of service*, if the appointment expires at the end of that year; or, if a one-year appointment terminates during an academic year, at least three months in advance of its termination.
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> (3) At least twelve months before the expiration of an appointment after if the appointment expires at the end of that year; or, if an initial two-year appointment terminates during an academic year, at least six months in advance of its termination.
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> (3) At least twelve months before the expiration of an appointment after two or more years in the institution.

Other obligations, both of institutions and individuals, are described in the *Statement on Recruitment and Resignation of Faculty Members*, as endorsed by the Association of American Colleges and the American Association of University Professors in 1961.

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[*] For a discussion of this question, see the "Report of the Special Committee on Academic Personnel Ineligible for Tenure," *AAUP Bulletin*, Autumn, 1966, pp. 280–282.

8. The freedom of probationary teachers is enhanced by the establishment of a regular procedure for the periodic evaluation and assessment of the teacher's academic performance during his probationary status. Provision should be made for regularized procedures for the consideration of complaints by probationary teachers that their academic freedom has been violated. One suggested procedure to serve these purposes is contained in the *Recommended Institutional Regulations on Academic Freedom and Tenure*, prepared by the American Association of University Professors.

9. A further specification of the academic due process to which the teacher is entitled under this paragraph is contained in the *Statement on Procedural Standards in Faculty Dismissal Proceedings*, jointly approved by the American Association of University Professors and the Association of American Colleges in 1958. This interpretive document deals with the issue of suspension, about which the 1940 Statement is silent.

The 1958 Statement provides: "Suspension of the faculty member during the proceedings involving him is justified only if immediate harm to himself or others is threatened by his continuance. Unless legal considerations forbid, any such suspension should be with pay." A suspension which is not followed by either reinstatement or the opportunity for a hearing is in effect a summary dismissal in violation of academic due process.

The concept of "moral turpitude" identifies the exceptional case in which the professor may be denied a year's teaching or pay in whole or in part. The statement applies to that kind of behavior which goes beyond simply warranting discharge and is so utterly blameworthy as to make it inappropriate to require the offering of a year's teaching or pay. The standard is not that the moral sensibilities of persons in the particular community have been affronted. The standard is behavior that would evoke condemnation by the academic community generally.

APPENDIX B

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMERICAN COUNCIL ON EDUCATION, AND ASSOCIATION OF GOVERNING BOARDS OF UNIVERSITIES AND COLLEGES—STATEMENT ON GOVERNMENT OF COLLEGES AND UNIVERSITIES

(Reprinted from AAUP Policy Documents and Reports, 1973 Edition)

EDITORIAL NOTE. The Statement which follows is directed to governing board members, administrators, faculty members, students, and other persons in the belief that the colleges and universities of the United States have reached a stage calling for appropriately shared responsibility and cooperative action among the components of the academic institution. The Statement is intended to foster constructive joint thought and action, both within the institutional structure and in protection of its integrity against improper intrusions.

It is not intended that the Statement serve as a blueprint for government on a specific campus or as a manual for the regulation of controversy among the components of an academic institution, although it is to be hoped that the principles asserted will lead to the correction of existing weaknesses and assist in the establishment of sound structure and procedures. The Statement does not attempt to cover relations with those outside agencies which increasingly are controlling the resources and influencing the patterns of education in our institutions of higher learning; e.g., the United States Government, the state legislatures, state commissions, interstate associations or compacts and other interinstitutional arrangements. However it is hoped that the Statement will be helpful to these agencies in their consideration of educational matters.

Students are referred to in this Statement as an institutional component coordinate in importance with trustees, administrators, and faculty. There is, however, no main section on students. The omission has two causes: (1) the changes now occurring in the status of American students have plainly outdistanced the analysis by the educational community, and an attempt to define the situation without thorough study might prove unfair to student interests, and (2) students do not in fact presently have a significant voice in the government of colleges and universities; it would be unseemly to obscure, by superficial equality of length of statement, what may be a serious lag entitled to separate and full confrontation. The concern for student status felt by the organizations issuing this Statement is embodied in a note "On Student Status" intended to stimulate the educational community to turn its attention to an important need.

This Statement, in preparation since 1964, is jointly formulated by the American Association of University Professors, the American Council on Education, and the Association of Governing Boards of Universities and Colleges. On October 12, 1966, the Board of Directors of the ACE took action by which the Council "recognizes the Statement as a significant step forward in the clarification of the respective roles of governing boards, faculties, and administrations," and "commends it to the institutions which are members of the Council." On October 29, 1966, the Council of the AAUP approved the Statement, recommended approval by the Fifty-third Annual Meeting in April, 1967,[1] and recognized that "continuing joint effort is desirable, in view of the areas left open in the jointly formulated Statement, and the dynamic changes occurring in higher education." On November 18, 1966, the Executive Committee of the AGB took action by which that organization also "recognizes the Statement as a significant step forward in the clarification of the respective roles of governing boards, faculties and administrations," and "commends it to the governing boards which are members of the Association."

I. INTRODUCTION

This Statement is a call to mutual understanding regarding the government of colleges and universities. Understanding, based on community of interest, and producing joint effort, is essential for at least three reasons. First, the academic institution, public or private, often has become less autonomous; buildings, research, and student tuition are supported by funds over which the college or university exercises a diminishing control. Legislative and executive governmental authority, at all levels, plays a part in the making of important decisions in academic policy. If these voices and forces are to be successfully heard and integrated, the academic institution must be in a position to meet them with its own generally unified view. Second, regard for the welfare of the institution remains important despite the mobility and interchange of scholars. Third, a college or university in which all the components are aware of the interdependence, of the usefulness of communication among themselves, and of the force of joint action will enjoy increased capacity to solve educational problems.

II. THE ACADEMIC INSTITUTION: JOINT EFFORT

A. Preliminary Considerations

The variety and complexity of the tasks performed by institutions of higher education produce an inescapable interdependence among governing board, administration, faculty, students, and others. The relationship calls for adequate communication among these components, and full opportunity for appropriate joint planning and effort.

Joint effort in an academic institution will take a variety of forms appropriate to the kinds of situations encountered. In some instances, an initial exploration or recommendation will be made by the president with consideration by the faculty at a later stage; in other instances, a first and essentially definitive recommendation will be made by the faculty, subject to the endorsement of the president and the governing board. In still others, a substantive contribution can be made when student leaders are responsibly involved in the process. Although the variety of such approaches may be wide, at least two general conclusions regarding joint effort seem clearly warranted: (1) important areas of action involve at one time or another the initiating capacity and decision-making participation of all the institutional components, and (2) differences in the weight of each voice, from one point to the next, should be determined by reference to the responsibility of each component for the particular matter at hand, as developed hereinafter.

B. Determination of General Educational Policy

The general educational policy, i.e., the objectives of an institution and the nature, range, and pace of its efforts, is shaped by the institutional charter or by law, by tradition and historical development, by the present needs of the community of the institution, and by the professional aspirations and standards of those directly involved in its work. Every board will wish to go beyond its formal trustee obligation to conserve the accomplishment of the past and to engage seriously with the future; every faculty will seek to conduct an operation worthy of scholarly standards of learning; every administrative officer will strive to meet his charge and to attain the goals of the institution. The interests of all are coordinate and related, and unilateral effort can lead to confusion or conflict. Essential to a solution is a reasonably explicit statement on general educational policy. Operating responsibility and authority, and procedures for continuing review, should be clearly defined in official regulations.

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[1] The Annual Meeting approved the Statement.

When an educational goal has been established, it becomes the responsibility primarily of the faculty to determine appropriate curriculum and procedures of student instruction.

Special considerations may require particular accommodations: (1) a publicly supported institution may be regulated by statutory provisions, and (2) a church-controlled institution may be limited by its charter or bylaws. When such external requirements influence course content and manner of instruction or research, they impair the educational effectiveness of the institution.

Such matters as major changes in the size or composition of the student body and the relative emphasis to be given to the various elements of the educational and research program should involve participation of governing board, administration, and faculty prior to final decision.

C. Internal Operations of the Institution

The framing and execution of long-range plans, one of the most important aspects of institutional responsibility, should be a central and continuing concern in the academic community.

Effective planning demands that the broadest possible exchange of information and opinion should be the rule for communication among the components of a college or university. The channels of communication should be established and maintained by joint endeavor. Distinction should be observed between the institutional system of communication and the system of responsibility for the making of decisions.

A second area calling for joint effort in internal operations is that of decisions regarding existing or prospective physical resources. The board, president, and faculty should all seek agreement on basic decisions regarding buildings and other facilities to be used in the educational work of the institution.

A third area is budgeting. The allocation of resources among competing demands is central in the formal responsibility of the governing board, in the administrative authority of the president, and in the educational function of the faculty. Each component should therefore have a voice in the determination of short- and long-range priorities, and each should receive appropriate analyses of past budgetary experience, reports on current budgets and expenditures, and short- and long-range budgetary projections. The function of each component in budgetary matters should be understood by all; the allocation of authority will determine the flow of information and the scope of participation in decisions.

Joint effort of a most critical kind must be taken when an institution chooses a new president. The selection of a chief administrative officer should follow upon cooperative search by the governing board and the faculty, taking into consideration the opinions of others who are appropriately interested. The president should be equally qualified to serve both as the executive officer of the governing board and as the chief academic officer of the institution and the faculty. His dual role requires that he be able to interpret to board and faculty the educational views and concepts of institutional government of the other. He should have the confidence of the board and the faculty.

The selection of academic deans and other chief academic officers should be the responsibility of the president with the advice of and in consultation with the appropriate faculty.

Determinations of faculty status, normally based on the recommendations of the faculty groups involved, are discussed in Part V of this Statement; but it should here be noted that the building of a strong faculty requires careful joint effort in such actions as staff selection and promotion and the granting of tenure. Joint action should also govern dismissals; the applicable principles and procedures in these matters are well established.[2]

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[2] See the 1940 *Statement of Principles on Academic Freedom and Tenure* and the 1958 *Statement on Procedural Standards in Faculty Dismissal Proceedings.* These statements have been jointly approved or adopted by the Association of American Colleges and the American Association of University Professors; the 1940 Statement has been endorsed by numerous learned and scientific societies and educational associations.

D. External Relations of the Institution

Anyone—a member of the governing board, the president or other member of the administration, a member of the faculty, or a member of the student body or the alumni—affects the institution when he speaks of it in public. An individual who speaks unofficially should so indicate. An official spokesman for the institution, the board, the administration, the faculty, or the student body should be guided by established policy.

It should be noted that only the board speaks legally for the whole institution, although it may delegate responsibility to an agent.

The right of a board member, an administrative officer, a faculty member, or a student to speak on general educational questions or about the administration and operations of his own institution is a part of his right as a citizen and should not be abridoged by the institution.[3] There exist, of course, legal bounds relating to defamation of character, and there are questions of propriety.

III. THE ACADEMIC INSTITUTION; THE GOVERNING BOARD

The governing board has a special obligation to assure that the history of the college or university shall serve as a prelude and inspiration to the future. The board helps relate the institution to its chief community: e.g., the community college to serve the educational needs of a defined population area or group, the church-controlled college to be cognizant of the announced position of its denomination, and the comprehensive university to discharge the many duties and to accept the appropriate new challenges which are its concern at the several levels of higher education.

The governing board of an institution of higher education in the United States operates, with few exceptions, as the final institutional authority. Private instructions are established by charters; public institutions are established by constitutional or statutory provisions. In private institutions the board is frequently self-perpetuating; in public colleges and universities the present membership of a board may be asked to suggest candidates for appointment. As a whole and individually when the governing board confronts the problem of succession, serious attention should be given to obtaining properly qualified persons. Where public law calls for election of governing board members, means should be found to insure the nomination of fully suited persons, and the electorate should be informed of the relevant criteria for board membership.

Since the membership of the board may embrace both individual and collective competence of recognized weight, its advice or help may be sought through established channels by other components of the academic community. The governing board of an institution of higher education, while maintaining a general overview, entrusts the conduct of administration to the administrative officers, the president and the deans, and the conduct of teaching and research to the faculty. The board should undertake appropriate self-limitation.

One of the governing board's important tasks is to insure the publication of codified statements that define the over-all policies and procedures of the institution under its jurisdiction.

The board plays a central role in relating the likely needs of the future to predictable resources; it has the responsibility for husbanding the endowment; it is responsible for obtaining needed capital and operating funds; and in the broadest sense of the term it should pay attention to personnel policy. In order to fulfill these duties, the board should be aided by, and may insist upon, the development of long-range planning by the administration and faculty.

When ignorance or ill-will threatens the institution or any part of it, the governing board must be available for support. In grave crises it will be expected to serve as a champion. Although the action to be taken by it will usually be on behalf of the president, the faculty, or the student body, the board should make clear that the protection it offers to an individual or a group is, in fact, a fundamental defense of the vested interests of society in the educational institution.[4]

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[3] With respect to faculty members, the 1940 *Statement of Principles on Academic Freedom and Tenure* reads: "The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinion of others, and should make every effort to indicate that he is not an institutional spokesman."

IV. THE ACADEMIC INSTITUTION: THE PRESIDENT

The president, as the chief executive officer of an institution of higher education, is measured largely by his capacity for institutional leadership. He shares responsibility for the definition and attainment of goals, for administrative action, and for operating the communications system which links the components of the academic community. He represents his institution to its many publics. His leadership role is supported by delegated authority from the board and faculty.

As the chief planning officer of an institution, the president has a special obligation to innovate and initiate. The degree to which a president can envision new horizons for his institution, and can persuade others to see them and to work toward them, will often constitute the chief measure of his administration.

The president must at times, with or without support, infuse new life into a department; relatedly, he may at times be required, working within the concept of tenure, to solve problems of obsolescence. The president will necessarily utilize the judgments of the faculty, but in the interest of academic standards he may also seek outside evaluations by scholars of acknowledged competence.

It is the duty of the president to see to it that the standards and procedures in operational use within the college or university conform to the policy established by the governing board and to the standards of sound academic practice. It is also incumbent on the president to insure that faculty views, including dissenting views, are presented to the board in those areas and on those issues where responsibilities are shared. Similarly the faculty should be informed of the views of the board and the administration on like issues.

The president is largely responsible for the maintenance of existing institutional resources and the creation of new resources; he has ultimate managerial responsibility for a large area of nonacademic activities, he is responsible for public understanding, and by the nature of his office is the chief spokesman of his institution. In these and other areas his work is to plan, to organize, to direct, and to represent. The presidential function should receive the general support of board and faculty.

V. THE ACADEMIC INSTITUTION: THE FACULTY

The faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process. On these matters the power of review or final decision lodged in the governing board or delegated by it to the president should be exercised adversely only in exceptional circumstances, and for reasons communicated to the faculty. It is desirable that the faculty should, following such communication, have opportunity for further consideration and further transmittal of its views to the president or board. Budgets, manpower limitations, the time element, and the policies of other groups, bodies and agencies having jurisdiction over the institution may set limits to realization of faculty advice.

The faculty sets the requirements for the degrees offered in course, determines when the requirements have been met, and authorizes the president and board to grant the degrees thus achieved.

Faculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal. The primary responsibility of the faculty for such matters is based upon the fact that its judgment is central to general educational policy. Furthermore, scholars in a particular field or activity have the chief competence for judging the work of their colleagues: in such competence it is implicit that responsibility exists for both adverse and favorable judgments. Likewise there is the more general competence of experienced faculty personnel committees having a broader charge. Determinations in these matters should first be by faculty action through established procedures, reviewed by the chief academic officers with the concurrence of the board. The governing board and president should, on questions of faculty status, as in other matters where the faculty has primary responsibility, concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail.

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[4] The American Association of University Professors, recognizing the growth of autonomous state-wide bodies superordinate to existing Boards of Trustees, regards the objectives and practices recommended in the 1966 *Statement* as constituting equally appropriate guidelines for such bodies. As newer, and more influential components of the academic community, they bear particular responsibility for protecting the autonomy of individual institutions under their jurisdiction and for implementing policies of shared responsibility as outlined in Section II when they displace functions of institutional governing boards. (Adopted by the AAUP Council in May, 1972.)

The faculty should actively participate in the determination of policies and procedures governing salary increases.

The chairman or head of a department, who serves as the chief representative of his department within an institution, should be selected either by departmental election or by appointment following consultation with members of the department and of related departments; appointments should normally be in conformity with department members' judgment. The chairman or department head should not have tenure in his office; his tenure as a faculty member is a matter of separate right. He should serve for a stated term but without prejudice to re-election or to reappointment by procedures which involve appropriate faculty consultation. Board, administration, and faculty should all bear in mind that the department chairman has a special obligation to build a department strong in scholarship and teaching capacity.

Agencies for faculty participation in the government of the college or university should be established at each level where faculty responsibility is present. An agency should exist for the presentation of the views of the whole faculty. The structure and procedures for faculty participation should be designed, approved, and established by joint action of the components of the institution. Faculty representatives should be selected by the faculty according to procedures determined by the faculty.

The agencies may consist of meetings of all faculty members of a department, school, college, division, or university system, or may take the form of faculty-elected executive committees in departments and schools and a faculty-elected senate or council for larger divisions or the institution as a whole.

Among the means of communication among the faculty, administration, and governing board now in use are: (1) circulation of memoranda and reports by board committees, the administration, and faculty committees, (2) joint *ad hoc* committees, (3) standing liaison committees, (4) membership of faculty members on administrative bodies, and (5) membership of faculty members on governing boards. Whatever the channels of communication, they should be clearly understood and observed.

ON STUDENT STATUS

When students in American colleges and universities desire to participate responsibly in the government of the institution they attend, their wish should be recognized as a claim to opportunity both for educational experience and for involvement in the affairs of their college or university. Ways should be found to permit significant student participation within the limits of attainable effectiveness. The obstacles to such participation are large and should not be minimized: inexperience, untested capacity, a transitory status which means that present action does not carry with it subsequent responsibility, and the inescapable fact that the other components of the institution are in a position of judgment over the students. It is important to recognize that student needs are strongly related to educational experience, both formal and informal. Students expect, and have a right to expect, that the educational process will be structured, that they will be stimulated by it to become independent adults, and that they will have effectively transmitted to them the cultural heritage of the larger society. If institutional support is to have its fullest possible meaning it should incorporate the strength, freshness of view, and idealism of the student body.

The respect of students for their college or university can be enhanced if they are given at least these opportunities: (1) to be listened to in the classroom without fear of institutional reprisal for the substance of their views, (2) freedom to discuss questions of institutional policy and operation, (3) the right to academic due process when charged with serious violations of institutional regulations, and (4) the same right to hear speakers of their own choice as is enjoyed by other components of the institution.

Appendix C

Report of Committee W 1973–74

Reprinted from AAUP Bulletin, Summer, 1974

"Five hundred dollars and an air conditioner are what I finaly got," related a women who has been trying for years to get her salary raised the several thousand dollars by which it falls short of those of her male colleagues with the same experience and qualifications. Many similar stories of frustration and meager results persuaded Committee W that the most important focus of its work during the 1973–74 academic year should be on economic issues, resolution of which we believe to be an indispensible precondition for achieving true equality for women in the academic profesion. These issues go beyond inequities in salary, and include abuses relating to fringe benefits and confinement to irregular or low-status faculty positions.

This past year has also been a time for consolidating the AAUP's position on the national level on policy issues of concern to academic women, for helping local chapters put into practice the principles of nondiscrimination and equal treatment for which AAUP stands, and for developing Committee W's program in broader directions on the national, state, and local levels. Committee W believes that the most immediate and effective means for redress of grievances and expansion of opportunities for women lie within the academic institution. While a number of laws against sex discrimination now exist, and court suits may well prove effective in resolving specific cases of discrimination, widespread change can only come when a strong commitment to equal opportunity is fully supported by the academic community itself.

ACTIVITIES OF THE NATIONAL COMMITTEE W IN 1973–74

The Committee gained the assistance of two new members during the past year: Professor Esther B. Chu, of Jersey City State College, who brings to the Committee considerable chapter and conference experience; and Professor Barbara R. Bergmann, of the University of Maryland, whose expertise in economics has been extremely valuable to us.

Committee W has acted in the following areas:

1. *Leaves of Absence for Child-bearing, Child-rearing, and Family Emergencies.*—This satement, prepared by Committee W, was first published in the Summer, 1973, *AAUP Bulletin*, with an invitation for comments and suggestions. It has now been adopted by the Council and endorsed by the Sixtieth Annual Meeting as Association policy. (The text of the statement appears elsewhere in this issue.)

A number of the learned societies have endorsed similar positions in this area. In addition, the Department of Labor's Office of Federal Contract Compliance has proposed a change in its regulations which brings them into accord with the Association position and with Equal Employment Opportunity Commission guidelines on leaves of absence in connection with pregnancy and childbearing. This change would define disabilities caused or contributed to by pregnancy or childbirth for all job-related purposes as temporary disabilities, to be treated as such under any available health or disability policies or sick-leave plans relating to employment. Committee W has written to the Director of the OFCC endorsing the change but taking exception to a proposed provision that such disabilities be "medically verifiable," since this may subject such disabilities to a more rigorous standard than other disabilities.

2. *Tenure and Affirmative Action.*—Committee W believes it important to note the recommendation of the Commission on Academic Tenure that in assessing an institution's tenure profile special attention should be given to achieving the diversity in a faculty which comes from the presence of women and minority group members. The proportion of tenured faculty which comes from these groups is almost always less than their proportion of the entire faculty, and the selection process has traditionally been harsher on them.

Committee W supports the recent statement formulated by Committee A in opposition to tenure quotas. Fixed tenure quotas have a particularly severe impact on the aspirations of academic women, since a substantially larger proportion of women currently do not have tenure than is true of the profession as a whole. We believe that tenure quotas must be vigorously opposed for this reason as well as for those set forth explicitly in Committee A's statement.

As to whether tenure and affirmative action can coexist, we feel not only that both are necessary, but that the two principles reinforce each other when properly applied. Those who have traditionally been discriminated against in terms of eligibility for tenure perhaps have a particular need for the protection of a fair tenure systme. Committee W has adopted the following position on "irregular and off-track appointments."

> Committee W notes with concern that a large number of faculty members, a significant proportion of them women, are serving in full-time, regularly funded positions which may be continued indefinitely from year to year but which provide no expectation of promotion in rank or of tenure after the successful completion of a probationary period. Most of these appointments are at the rank of instructor or at nonregular ranks dseignated as "nontenure bearing" or as "temporary."
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> Certain college and university positions, although they require special training and skills, are essentially separate from or supportive of the work of the regular teaching and research faculty, and generally these do not carry regular faculty rank and faculty tenure. In addition, special faculty appointments of limited duration are by definition removed from long-range considerations. Committee W's concern is addressed to the practice of misusing these positions which are not designed for regular faculty by appointing people to them who do in fact function as regular and ongoing full-time faculty members.
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> It is the policy of the American Association of University Professors, as set forth in the 1940 *Statement of Principles on Academic Freedom and Tenure*, and amplified in the Association's *Recommended Institutional Regulations on Academic Freedom and Tenure*, that all full-time faculty appointments (excepting only special appointments of a specified limited duration and reappointments of retired faculty members on special conditions) should be either probationary relating to continuous tenure or with continuous tenure.[1] The report of the Association's Special Committee on Academic Personnel Ineligible for Tenure, approved by Committee A in 1969, states that people who are appointed to full-time teaching positions should be treated as candidates for tenure under the requirements of the 1940 *Statement of Principles*, "no matter what rank or title" may be given them.
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> Special appointments renewed several times cease to be temporary. When appointments to full-time faculty positions extend beyond the maximum permissible period of probation, the rights of tenure should accrue. People who function as regular and ongoing full-time faculty members, but who have no prospect of tenure, because of the way in which their position is defined, serve with their academic freedom in continued jeopardy. In addition, they are frequently deprived of the compensation and of the right to participate in academic government to which they would otherwise be entitled. The fact that a disproportionate number of these persons are women, who for one reason or another have found themselves obliged to accept these inequitable and often demeaning appointments, places an unwarranted limitation upon the opportunities for advancement of women in the academic profession. Committee W urges that this abuse of sound academic practice be discontinued.

3. *Equal Pay*—The threat of outside action from external agencies on the issue of equal pay has prompted some instiutions to act to remove sex-based salary inequities; other institutions have achieved salary equity through action of enlightened administrations and faculties, in some cases through the collective bargaining process; still others have done little or nothing to recognize and correct inequities, often because they lack a salary structure which lends itself to rational examination. Though almost everyone will now endorse the principle of equal pay for equal work, interpretations of this principle are subject to great variations. Does equal treatment mean that everyone should be paid equally for performing the same duties? Does it permit or require salaries based on merit, on seniority, on need? If merit is to be a component of salary deter-

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[1] The 1940 *Statement* provides that "beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years. . . ." Interpretive comments adopted in 1970 note that "the concept of 'rank of full-time instructor or a higher rank' is intended to include any person who teaches a full-time load regardless of his specific title."

mination, how is it to be measured? Should research be weighed more or less heavily than teaching in determining salary?

Given the diversity which exists in higher education, it is difficult to enunciate a general policy on salaries; however, some general observations and recommendations can be made. Fundamental to the establishment of equitable salary standards is the participation of the faculty in the process. With or without collective bargaining, the method of compensation should be formulated through consultation with the faculty. The AAUP has long urged faculty involvement in the academic budgetary process, and salaries are a large share of such budgets (see particularly "The Role of the Faculty in Budgetary and Salary Matters," *AAUP Bulletin*, Summer, 1972, p. 170). It is important that all faculty are aware of the criteria which determine salaries and how they are applied. There should be periodic reviews to discover whether salary discrimination exists, with faculty members informed of the procedures for review.

In many state institutions, salaries are a matter of public record, but in other institutions, public and private, not only individual salaries, but also detailed statistical information, are carefully guarded secrets. It is our view that at least the mean and quartiles of salaries by unit of the insitution should be available to the faculty as a whole.

4. *Committee Z salary survey.*—The 1973 Annual Meeting recognized a greater need for openness of salary information in its resolution "that Committee Z in cooperation with Committee W undertake a systematic study of compensation differentials between male and female faculty members."

In considering how best to implement this resolution, Committee W has recommended that: (a) the 1975 salary survey forms sent to institutions include a request for data on salary by rank and sex; (b) census data collected in connection with the 1975 Committee Z salary survey (number of faculty by rank, number of tenured and nontenured faculty) be broken down by sex; (c) a "do-it-yourself" kit be developed to assist faculties and administrations in undertaking a comprehensive study of salaries at their institution. The kit would permit analysis of salary data from an institution taking into account such variables as terminal degree, years of experience, publications, and field, so that residual sex-based differentials can be identified and then corrected.

Committee Z has agreed to proceed with the second of Committee W's recommendations. The first is still under discussion. The do-it-yourself kit is now being developed by members of the Committee and the staff, and it is hoped that a package will be ready to use by fall.

5. *Sex-based differentials in fringe benefits.*—Committee W believes that the standard of equal pay for equal work requires the payment of equal annual retirement benefits to women and men with the same employment records.

The Department of Labor has proposed a revision of its guidelines on retirement benefits which would bring its position on this issue into conformity with that of Committee W. The General Secretary has written to request that hearings be held on the issue, and Committee W is prepared to present its position in testimony.

The federal government and many state retirement systems do not ask female retirees to adopt a lower standard of living than their male counterparts. While TIAA is not the only retirement plan having sex-based differentials in monthly benefits, it is the carrier for a substantial number of AAUP members, and we find TIAA's active campaign in support of the existing system—a system which Committee W believes discriminates against women—especially disturbing. The Committee sees no justification for TIAA's departure from a neutral position on a question whose outcome is not seen by us as having a potential impact one way or the other on TIAA's own interests. Committee W has asked the President of the Association to send a letter of protest to TIAA on the matter.

6. *Graduate education.*—A variety of concerns relating to graduate education have surfaced in the past year. We have considered whether the AAUP and in particular Committee W is meeting its responsibilities to our future colleagues—many of whom are already AAUP members. What can be done to alleviate the shortage of trained graduate students to finish their degrees and obtain jobs, indeed to encourage women to enter graduate school? The Committee discussion has centered on such items as graduate admission policies, prejudicial conditions for the award of fellowships, and faculty responsibility for the counselling of students. A subcommittee is working to identify and propose ways of dealing with issues of special concern to women in graduate education.

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Also in the matter of students, both graduate and undergraduate, the Committee has expressed its concern with the delay in issuing guidelines for the enforcement of Title IX of the Education Amendments of 1972, which prohibits sex discrimination in educational programs and activities. Particularly distressing is the interest expressed by universities, with National Collegiate Athletic Association backing, in having athletic programs excluded from coverage under these guidelines.

7. *Chapter and conference Committee W's.*—As part of the Committee's effort to encourage establishment of conference Committee W's, the staff wrote to each conference where a committee had not yet been established asking that this be done. Mailings from the national office to existing conference Committee W's have been continued, and several Conference Committee W newsletters are now being regularly issued. Since Committee W feels that progress on such issues as affirmative action can best be made locally, it reiterates its belief that women on campus—faculty, staff, and students—should organize to further their own interests. A great deal has been accomplished in the past year, and we commend the significant efforts of AAUP women on the local and state levels. There is a great deal more to be done, however, and concerted action is one important key to success.

Committee W organized a workshop at the Sixtieth Annual Meeting focusing on pressure tactics for women's adbancement—through faculty organization, through collective bargaining, through administrative positions, and through federal agencies—and we believe that the approach would be useful on the state and local levels. The Committee notes that several chapter and state Committee W's have been continued, and several conference Committee W newsletters are now being regularly issued. Since Committee W feels that progresss on such issues as affirmative action can best be made locally, it reiterates its belief that women on campus—faculty, staff, and students—should organize to further their own interests. A great deal has been accomplished in the past year, and we commend the significant efforts of AAUP women on the local and collective bargaining, stand ready to respond to requests for visits and conference meetings.

FUTURE ACTIVITIES OF COMMITTEE W

Many of the actions reported above need to be pursued further in the coming year, and many other problems are far from solution. Some areas of future concern are:

1. *Collective bargaining.*—We are working on informative material on issues of special concern to women for chapters contemplating, or in various stages of, collective bargaining.

2. *Employment roster.*—As in previous years, Committee W has been inundated with job announcements and requests for assistance in filling all sorts of positions. The Committee does not have the resources to serve as an employment register, though it has suggested that positions be advertised in *Academe*. It is hoped that the several women's groups now working on a roster of professional women will have it in operation next year. The Committee suspects that many of the announcements it has seen are *pro forma* attempts to comply with affirmative action guidelines rather than sincere attempts to locate women for faculty and administrative positions. We recommend local monitoring of the actual results of recruiting efforts.

3. *Part-time appointments.*—Committee W recognizes the difficulties in trying to address all issues raised in the context of part-time appointments in a single comprehensive policy statement, but expresses its continuing concern that persons serving in a part-time capacity, many of whom are women, are generally denied benefits and responsibilities to which they should have access. There has always been some reluctance on the part of Committee W to emphasize concerns relating to part-time positions, since we do not believe that part-time service should be considered a "women's issue," nor do we wish to encourage the appointment of women to part-time rather than full-time positions. The Committee is interested in having the Association undertake a comprehensive study of part-time appointments. Meanwhile, the staff is able to offer useful advice on various issues connected with part-time positions on the basis of existing Association policy.

A new issue has recently come to my attention, namely, the sharing of single academic appointments by married couples. This may well be an ideal solution for some couples; however, my own opinion is that the dangers may well outweigh any benefits. Sound policies on part-time appointments should be able to provide the advantages of sharing without the artificial linking of two separate professional identities and careers implicit in the concept of shared appointments. Moreover, administrators may seize on the possibility of shared appointments to avoid appointing women to full-time positions. It seems clear to me that each faculty member should stand or fall on her or his own merits, and that academic women should be careful not to devise a new way to exploit themselves.

MARY W. GRAY,
Mathematics, American University Chairperson.

REPORT OF COMMITTEE W, 1972–73

This has been an active but worrisome year of work on the national Committee W. The broader issues of concern to all members of academe this year—poor employment prospects for recent Ph.D.'s staff reduction as a consequence of financial duress in many institutions, problems in collective bargaining elections, affirmative action (or inaction), the dialogue about academic tenure stimulated by the Tenure Commission report—all have special dimensions of great concern to academic women, and profound bearing on the future status of women in academe.

In this third report of the national Committee W since its re-activation in 1970, I shall summarize the activities and accomplishments of the Committee to date; outline the kinds of items that remain on the Committee's agenda for future attention and action; and suggest a few issues that will hopefully receive Committee attention during the coming year.

RESPONSE TO 1972 WOMEN'S CAUCUS

I would like to begin, however, by responding directly to the complaints and requests registered by the impromptu women's caucus that formed at last year's Annual Meeting in New Orleans. I think the women who attended that meeting were justifiably disappointed to find so little focus in the program in the problems of great and continuing concern to academic women. As an organizer of a women's caucus in my own professional discipline, I appreciate the important role a caucus can serve not only in initiating action but in serving as a continual guard against apathy or the curse of invisibility that all too frequently attends the political efforts of women. The absence of a Committee W report to the Annual Meeting was the unhappy consequence of overcommitment on the part of the chairperson and the press of such issues as collective bargaining that required major attention at the Annual Meeting. The spring of 1972 was a critical period in terms of my work on a volume on academic women under a Russell Sage Foundation grant, the idea for which grew out of the first meeting of Committee W in 1970. I made the judgment, perhaps erroneously, that this volume was as much a contribution to the efforts of Committee W as a more active and visible role at the Annual Meeting. But Committee W is hopeful that those attending the St. Louis meeting this year are pleased by the contrast with last year. Partly in response to the women's caucus and partly as a reflection of our own conscience and commitment, we have tried to compensate for last year's low profile by sponsoring a workshop at the Annual Meeting; by preparing an advance summary of the findings in *Academic Women on the Move* for distribution at the workshop; by presenting a new policy statement for Council approval; and by meeting over luncheon with those involved in the AAUP's Special Project on Developing Institutions.

We have also been guided by the women's caucus requests in other respects: the national Committee has been enlarged and strengthened this year by the appointments of Vilma Hunt, Georgina Smith, Mary Gray, and Lois Moreland, academic women who bring to the committee both new strength and varied experiences from their numerous activities in professional associations, local chapter and state conference Committee W's. Since this report represents the last one under my chairmanship, the new Committee members this year will be important assets in the transition of the Committee to new leadership next year.

ACTIVITIES OF THE NATIONAL COMMITTEE W IN 1972–73

Committee W has held two formal meetings this year, though much of our real work is handled by numerous telephone contacts and a large volume of correspondence. We find that with each year, as a new recommendation or policy guideline is adopted by the Association, we not only move on to new issues, but take on the role of monitor in the implementation of adopted policies. Thus, the work of the Committee has grown with each year. The most important formal actions taken by the Committee this year as follows:

1. *Policy Recommendation*

Committee W approved a final draft of a new policy statement at its February, 1973, meeting on "Leaves of Absence for Child-bearing, Child-rearing and Family Emergencies." This was a complex issue that had absorbed committee energy since our first year, but I am pleased to announce that I brought an approved statement to this annual meeting for Council discussion, which has been approved by the Council for publication in the *AAUP Bulletin* to solicit membership response and comments, and which will be submitted next year to the Annual Meeting for action by the membership. Committee W views the statement as a supplement to and amplification of the *Statement of Principles on Leaves of Absence*, which aims to assist faculty members with parental responsibilities in meeting their obligations both to their professional careers and to their families, and to prevent the loss to the institution and to the academic community of substantial professional skills. We urge flexibility in institutional leave policies for child-bearing and family emergencies, with the timing and duration of absence determined by mutual agreement between the faculty member and the institution, and with compensation that is consistent with customary institutional practices in cases of illness or temporary disability. We also urge the adoption of policies by which leaves of absence or the alternative of a temporarily reduced workload for a semester or more should be available to men and women faculty members with child-rearing responsibilities, with the same considerations with respect to salary increments, insurance coverage, retirement annuities, and the like, as are received by faculty members on leave for public or private sedvice outside the institution.

Committee W invites comments and suggestions from AAUP members when you have had a chance to study the document in the *AAPU Bulletin*.

2. *AAUP Membership Eligibility*

Committee W has endorsed the recommendation of Committee F that active membership in AAUP be opened to faculty members who serve on less than a half-time basis, a change in membership eligibility that we welcome because it will encourage an increase in the proportion of women and of young persons to the ranks of AAUP members.

3. *Publication*

We are pleased to announce that *Academic Women on the Move*, edited by myself and Ann Calderwood, will appear as a Russell Sage Foundation Press publication in the summer of 1973. The Committee hopes it will serve as a useful reference volume to the hundreds of women and men in academe who are devoting time and energy to efforts to improve the status of women in academe, as well as to scholars of the women's movement and researchers on higher education and career development.

4. *Monitoring Affirmative Action*

The Committee greeted with pleasure the publication in October, 1972, of the *Higher Education Guidelines* for Executive Order 11246 by the Department of Health, Education, and Welfare. Committee W arranged for copies of this important document to be distributed to all AAUP chapters and conferences across the country; has maintained close contact with local campus groups involved in complaints to the Office for Civil Rights, and has advised local chapters on the development or monitoring of affirmative action plans in their institutions.

By the February meeting of Committee W, we felt considerable concern that with cases backlogged at HEW, the budget appropriation for the Office for Civil Rights was totally insufficient for adequate implementation of the agency's own guidelines. Accordingly, the Committee drafted a letter this past month to Secretary Caspar Weinberger of HEW, urging that he assure us that progress toward the development of affirmative action program and the processing of class action complaints would not be halted for lack of funds, and that HEW would continue in the role of a fair arbiter in disputes concerning sex inequity in academe. The Committee's letter to Secretary Weinberger was also sent to a number of congressmen and women, and to officers of numerous academic women's organizations, urging that they endorse our request and supplement it with letters of their own to HEW.

Committee W has also noted with some dismay that many people in academic this year have protested that affirmative action plans represent an assault on institutional autonomy and a potential threat to standards of excellence in higher education. This appears to us an unseemly stance from members of a community that has been prominent in advocating federal insistence on goals for minority hiring in the construction industry or on racial integration of the public schools. We find ourselves in accord with Martha Peterson who argued at the Miami convention of the American Council on Education this year that academe would not now be subjected to federal pressure to depart from sex discriminatory practices had our colleges and universities done a sufficiently good job of monitoring their own affairs.

We have also urged that the AAUP Resolutions Committee present to the Annual Meeting a resolution stating the Association's endorsement of the goals of equity and justice in academic hiring, pay, and promotion through support for the development and monitoring of affirmative action plans to improve the position of women and minority group members in our colleges and universities.

5. Masculine Pronoun Usage

Committee W also considered the matter of the use of masculine pronouns and of the term "man" in the generic sense in all official documents produced by AAUP committees, conferences, and chapters. We have reviewed this issue and recommended to the Council that all future AAUP documents avoid the generic use of masculine pronouns and the term "man," on grounds that such usage reinforces the imagery of women as subordinate and ultimately invisible persons seldom in positions of power and authority. The Committee did not consider this an important issue in the first year of its re-activation, believing that our primary focus should be on important structural problems of sex discrimination and sexism. In our third year, however, with some policy revision accomplishments behind us, we believe it important to give attention to the cultural symbols which express the power relations in our social system and which through their usage reinforce and perpetuate sexist social patterns. Hence our recommendations on language usage supplement our central emphasis on policy issues, and are based on the view that one must work on both structural and symbolic levels in order to achieve significant and lasting improvement in the status of women in academe.

6. Monitoring the Repeal of Antinepotism Rulings

Since the adoption by AAUP in the spring of 1971 of a statement calling for the repeal of antinepotism rulings in higher education, on the grounds that they tend to unfairly restrict the professional opportunities of academic women, there has been virtually unanimous support from professional educational organizations for their removal. A survey undertaken by the national office under the sponsorship of Committee W shows that there is still considerable work to be done before this official position is a reality in our colleges and universities. Of the 378 responses received from AAUP chapter officers, 52 indicated their institution had a strict prohibition against two members of the same family being employed at the same institution; another 52 chapter officers reported a stated prohibition against simultaneous service in the same department; and 43 chapter officers reported no written regulation at their institution but a widespread presumption against appointing more than one member of the same family to the same department. Thus antinepotism policies and practices remain a problem, perhaps at a more subtle level than in the past, in about 38 percent of the institutions responding to our inquiry. Committee W considers it important that AAUP chapters monitor the actual practices on their campuses and bring to the attention of faculty colleagues and administrators any evidence that the old restriction against the employment of married professional couples by the same institution or department is still in force.

7. Local and State Committee W Programs

One of the developments we noted in last year's Committee W report was the proliferation of chapter and conference Committee W's across the country. We expressed optimism that the existing structure of AAUP might be activated to play an important leadership role in the movement to achieve equality of opportunity for women in the profession. Developments during this past year have reinforced this optimistic forecast.

For example, the year 1972-73 saw notable salary equity adjustments achieved by women through chapter efforts at the University of Louisville, the University of South Florida, and Rutgers University (in the latter case through the collective bargaining process). Chapter Committee W's at such institutions as the University of Cincinnati, the University of Iowa, Colby College, and Penn State have played a vigorous role in reaffirming faculty responsibility in the development of the institution's affirmative action program. Several state conferences, among them New Jersey, Ohio, California, Iowa, Massachusetts, and North Carolina, have sponsored workshops or panel sessions on the status of women and affirmative action. A number of conferences have expressed support for the passage of the Equal Rights Amendment in their state legislature and individual members have testified in its behalf.

On many campuses, chapter Committee W activity is providing a focus for the interests of all women on campus, students and staff as well as faculty members. Although the concerns of faculty women will naturally remain of primary importance to chapter committees, Committee W believes the key issues of concern to women cut across lines of professional achievement or status, and therefore considers solidary organizational ties among women students, staff, and faculty an encouraging and healthy political development.

Communication among chapters, conferences, and even among women faculty members on the same campus or in the same state continues to be a problem. The staff of the Washington Office has attempted to establish regular communications with all known conference Committee W's, and we are told this has been of help and encouragement to the committees. Conference committees have been urged to contact chapter Committee W's in their state, and to help establish chapter Committee W's where none exist. We believe such state-wide communication among women faculty members is one of the most important aspects of a conference Committee W's efforts. Joint action and shared experiences (whether of success or failure) can be valuable contributions in an efforts to improve the status of women. If more state conferences assume responsibility for coordinating and reporting on the efforts of local Committee W's in their states, they could serve as vital communication links between chapters and the Washington Office and the national Committee. This is not to suggest that chapter Committee W's should not continue to be in direct contact with the national Committee; it is to urge that for purposes of regular communication, the state conference may provide the fastest and most efficient channel through which a flow of information can link the national Committee and the hundreds of chapter Committee W's. This can only work, however, if conference Committee W's make it a first priority to get in touch with all chapter committees in their state.

There has been great variety in chapter and conference programs this past year. Workshops have been held on faculty recruiting, career options for women students, affirmative action, and women's studies. Chapters and conferences have shown ingenuity in extending invitations to their workshops to department chairmen and administrators, students and nonfaculty staff, faculty spouses (both men and women), and women members of the Board of Trustees (if they are fortunate enough to have them).

The workshop sponsored by Committee W at this meeting brought together a number of panelists with experience in local chapter and state conference Committee W work, and they discussed the problems and successes they have experienced over the past year or so. A good portion of the discussion centered on the current exploration and debate concerning retirement benefits under TIAA–CREF. The workshop participants were in agreement in expressing dismay and displeasure with the conclusions of the subcommittee established last year to study the structure and function of TIAA, which appears to accept TIAA's own reasoning on sex differentials in retirement annuity payments. I am sure this issue will be the focus of national, conference, and chapter Committee W discussions in the coming year.

8. Vacancy Announcements

The national Committee has been inundated this year with announcements of vacancies sent to us by affirmative action offices in several hundred colleges and universities. The Committee has taken the position that it is not the proper domain of AAUP to run a professional registry for academic women, and has opted instead to respond to such appeals by suggesting that affirmative action offices advertise their vacancies as equal opportunity employers in *Academe*. Records are being kept on what proportion of the notices we receive subsequently appear in AAUP publications. We note that several women's action groups have begun to devise plans for coping with this same large wave of inquiries, some out of concern that many gestures of willingness to accept applications from qualified women are empty ones, while the informal recruitment networks continue to function quietly in the background in the traditional grooves of the male buddy system. A few women's organizations are developing plans to follow up such vacancy announcements to determine what proportion of the jobs announced are finally filled by women and minority group members. Committee W plans to keep in touch with such efforts and will communicate any relevant information we find to the AAUP membership.

FUTURE ACTIVITIES OF THE NATIONAL COMMITTEE W

While some progress has been made over the course of the past three years, there still remain a number of tasks the national Committee has not yet undertaken, or has not brought to sufficient fruition to report upon. Among them are the following:

1. Retirement Benefits

As mentioned above, Committee W has a continuing interest in the issue of sex-based differentials in retirement benefits. I fully expect the Committee will lean hard on the considerable knowledge and skills of Georgina Smith on this issue.

2. Report of the Commission on Academic Tenure

This report became available a few weeks after the spring meeting of Committee W; consequently, it has not yet received careful review by more than a few members of the committee. We were pleased to note that the Commission made numerous references to the potential frustration of the legitimate aspirations of women and minority group members during the period ahead, when financial duress and reconsideration of tenure, probationary periods, early retirement, and contraction of staff may receive increasing attention in academic circles. Committee W shares the Commission's concern that holding down the proportion of faculty on tenure may frustrate efforts to increase the proportion of women in the upper academic ranks, though we think platitudinous gestures merely citing this potential problem are no longer sufficient in 1973 as they might have been three years ago. While a full-scale consideration of the Commission report will only take place at a future meeting of Committee W, we wish to record in a preliminary way at least one positive and one negative response to the Commission's recommendations.

Committee W is pleased to note that under Recommendation 18, the Commission urges that staffing plans be developed that provide *explicitly* for a substantial increase in the tenure component of women and members of minority groups; and, in Recommendation 38, that institutions consider modifying their tenure arrangements in order to permit part-time faculty service to be credited toward the award of tenure, and to permit tenure positions to be held by faculty members who cannot or do not wish to serve on a full-time basis. This is additional support for the 1971 statement by Committee W on *Senior Appointments with Reduced Loads*. It is the Committee's intention to give this issue of reduced-load appointments at senior ranks further attention during the coming year, in fulfillment of its promise in the 1971-72 report to produce a position paper on part-time and reduced-load faculty appointments.

On the other hand, Committee W notes that the Commission on Academic Tenure endorsed, in Recommendation 2, the commonly accepted principle that only tenured faculty members should play a formal role in the review process involving tenure for junior faculty, without recognizing that this necessarily means that tenure review committees heavily male in composition will be charged with the review of junior faculty which include much larger numbers of women. One may accept the traditional view that nontenured faculty are disqualified on grounds of interest from formal participation in decision-making where a member of their own ranks is concerned, but still urge a procedure that assures a fair balance of women on the tenured faculty review committee—*viz.*, by an explicit recommendation that such tenured faculty committees should have a sex composition similar to that of the nontenured faculty in a given department, so that women under consideration for tenure are assured of judgment by a sufficient number of faculty women.

3. Collective Bargaining

One last item which must be carried over to the agenda of next year's efforts by Committee W is the development of a checklist of issues of importance to women which should be considered in connection with collective bargaining elections and negotiations. We believe that the experiences of new members of the Committee in this area will be critical in fulfilling its promise of last year to develop such a checklist as a service to chapters entering the bargaining arena.

CONCLUDING COMMENTS

Since this is the last official report Committee W will submit under my chairpersonship, perhaps I may be indulged if I make a few final comments about the experience of working on a national AAUP committee and the prospects for academic women in the years ahead. In my first report I argued that AAUP was uniquely suited to contribute to the efforts of the women's movement because of its already elaborate organizational structure and the ease with which it could therefore cut across the boundaries that separate the academic disciplines and the hundreds of institutions of higher education. However, a national committee cannot be effective if it moves too far from its base in the local chapters and state conferences: nor can it serve as an effective representative of its chapter and conference base unless communication channels are open and utilized in a two-way flow of information and opinion. I do not think we have yet solved the question of adequate communication within the AAUP network of Committee W's, and this restricts the capability of the national committee to speak in the name of academic women in relation to other organizations and agencies affecting higher education.

To an individual chairperson, the vantage point of a national committee is enormously illuminating for the view one can obtain of the broad sweep of problems and the contrasts that differentiate our 2,000-plus colleges and universities. One learns to appreciate in a new way what that diversity means both intellectually and politically: we are not easily going to find "one" voice as academic women on all the issues that concern us, and must live with considerable cultural and political pluralism in our own ranks as academic women. While this is exhilarating, it can also be paralyzing where effective action is concerned. One learns more and more about the complex problems and diverse views by AAUP members, chapters, and conferences, and this can lead to undue caution and conservatism after a few years in office. Hence, I believe the time is now very ripe indeed for a new person to provide leadership as the chairperson of the national committee. Leadership turnover in committees, like caucuses at a convention, helps to assure vitality and continuing pressure for innovation and change in an organization.

On behalf of the entire Committee W, I would also like to express the very deep obligations all academic women have to Margaret Rumbarger, who has served these past three years as the Washington staff person carrying the heavy day-to-day responsibilities of Committee W activities. She has kept in balance her loyalties to AAUP as an association and her loyalties to the women's movement, meeting with grace and good cheer an almost impossible schedule of meetings, reports, trips, case inquiries, and a growing correspondence. More than any single person in AAUP, Margaret Rumbarger has been *the* vital communications link among chapter and conference Committee W's, the national office, your chairperson, and the members of the national Committee W.

When I assumed the chairperson's role in 1970, I was prepared for a long battle to rid academe of sex discrimination, but I also harbored a secret hope that we could move beyond the discrimination issue to the more basic problem of widening the aspirations of the young women who pass through our classrooms. Unfortunately, we have found no magic to rid academe of sex discrimination. Academic women are placing sharp demands on academic institutions during a difficult economic period when the best will in the world will not yield easily to them. Hence I suspect Committee W will of necessity continue to devote much of its future energies to the problems of sex discrimination. But I would also hope that the Committee will find the time and the energy to show concern for and to develop the means whereby academic women can contritbute to the enrichment of the experiences our daughters and women students have in our classrooms and laboratories and to the perspectives and plans young women develop for their own futures. There is a magic to watching the impact on one's women students, used as they are to an academic world dominated by men, of attendance at city-wide and regional conferences of academic women. For the first time they sense the power of numbers that academic women have when brought together in one place or joined in a common political effort.

I would hope that in the future all the relevant organizational units of AAUP will seek innovative ways to close the ranks between women students and women faculty. That would provide the richest assurance that the future of women in academe will be a bright one indeed.

ALICE S. ROSSI,
Sociology, Goucher College Chairperson.

REPORT OF COMMITTEE W—1971–72

Interest in and concern for the problems faced by women in the academic profession have continued to grow during the year since the publication of the first report of the reactivated Committee W. Numerous studies and reports on the status of women, as well as an increase in complaints of discrimination, have heightened an awareness of discriminatory policies and practices which have impeded women's professional careers in institutions of higher education. More and more women, individually and as members of groups, are speaking out against inequitable salaries, inadequate grievance procedures, exclusive recruiting networks usually closed to women, exploitative practices relating to part-time faculty, and unfounded and prejudicial assumptions about the needs and capabilities of women.

In general, progress for the academic woman during the academic year 1971–72 has been uneven. Many colleges and universities have moved to develop affirmative action policies, to recruit more women to their faculties, and to adjust inequities in salaries. At many other colleges and universities, 1971–72 can be better characterized as a year of awakening, accompanied by some confusion, with faculties and administrations searching for some orderly yet expeditious ways to change basic practices, and with women moving to consolidate the gains of an earlier and angrier period into lasting reform. At yet other colleges and universities "progress" has consisted of no more than lip-service toward an equality which many do not really desire. In many parts of the country discrimination against working women is still socially and professionally acceptable, and lower salaries, slower promotions, heavier teaching loads, and confinement to nontenured ranks still characterize the woman academic. Too few of our academic institutions have recognized that attainment of equality for women in the academic profession, as in other professions, calls for a reexamination of traditional assumptions about the several roles which working women have been called upon to play in our society. Too few institutions have developed policies in the areas of leave for pregnancy, of part-time appointments and of adjustment for late arrival in the academic market.

Only rarely has it been recognized that men too should be afforded an opportunity for a more flexible career pattern than has in the past characterized professional life. Too often, academic women can expect something approaching equitable treatment only so long as they conform to career patterns and conditions of service convenient to and established by and for men. Even in those institutions which have instituted reforms, old prejudices have often served to prevent their proper functioning.

Increasingly, however, women in academe are searching each other out, studying and becoming critical of their own circumstances, proposing changes to their institution and within their disciplines. Sometimes women have had the good fortune to find valuable allies among their male colleagues and within the more established groups on campus. We believe that AAUP can contribute in major fashion to securing the rights of academic women by extending this work of education and sensitization on individual campuses and on state and national levels. We believe that this function can be served most effectively on the local level, at least in the short run, by a committee W formed by the local AAUP chapter.

ACTIVITIES OF THE NATIONAL COMMITTEE W IN 1971–1972

During 1971–72, Committee W continued work on the development of policy on child-bearing and child-rearing leaves. For a number of reasons, including the need to consider recently promulgated regulations of agencies of the federal government, the preparation of an official Association statement on leaves for pregnancy and child care has been delayed. In the meantime, however, members of the Washington Office staff have advised administrations and faculty members on the development of sound policy in these areas and have assisted in the resolution of several complaints arising from inadequate institutional provisions for leaves.

In the most recent draft of its statement, Committee W's position is that leave should be granted for purposes of child-bearing, as part of the institution's general policy on temporary disability. The length of the leave should be a matter for the woman and her physician to determine, and she should not be penalized in the terms and conditions of her appointment as a result of having taken such a leave, or in her right to return to her former position after a leave of reasonable duration. Longer leaves for purposes relating to child-rearing should be available both to men and women faculty members, in the Committee's judgment, and on the same basis as administrative or military leave.

There is already a basis in AAUP policy on which to build a more detailed policy: the recently adopted *Statement of Principles on Leaves of Absence*, jointly formulated by the AAUP and the Association of American Colleges, provides that leave should be granted "for illness, recovery of health, and maternity." Child-bearing and child-rearing leave policy will be on the agenda of the Committee at its fall meeting. At that time the Committee will take into consideration guidelines issued by the Equal Employment Opportunity Commission and the Office for Civil Rights of the Department of Health, Education, and Welfare.

Committee W intends to continue its work on the development of a position paper on part-time and reduced-load faculty appointment, a subject already treated in limited fashion in the Committee's statement on *Senior Appointments with Reduced Loads*. Committee A on Academic Freedom and Tenure has expressed interest in working with Committee W to develop policy in this area. The coming year will undoubtedly bring a growing concern on campuses across the country in the status of part-time faculty members, in part because of increased financial stress. Over the past year, the staff of the Washington Office has responded to many inquiries on the subject and has generally encouraged institutions to regularize procedures and policies for part-time faculty, to make them eligible for many of the rewards as well as the responsibilities of full-time faculty members. Traditional policies and practices in this area have long been a source of insecurity and frustration for women in the academic profession, and it is encouraging to note the development of new policies governing part-time appointments at a number of institutions, including Columbia University, Princeton University, and Wesleyan University.

There has been considerable progress over the past year in implementing Association policy on antinepotism regulations.[1] A growing number of colleges and universities have rescinded or substantially modified policies governing the simultaneous appointment of spouses, in several cases upon the recommendation of the Washington Office or AAUP chapter. The Washington Office staff has assisted in the successful resolution of several cases brought to the Association's attention by women denied appointment, retention, or tenure on the basis of regulations, prohibiting or limiting faculty appointment to one member of a family, and helped to effect a change in the regulations of those institutions. AAUP chapters and state conferences are working to reform policies at those institutions which still have such restrictions, and their future efforts should gain considerable impetus from the activity of federal agencies with responsibility for enforcing laws against sex discrimination.

The Association's Washington Office staff has also assisted many inidvidual women who have submitted complaints of sex discrimination. These efforts have often taken the form of advising on the development and proper implementation of institutional grievance procedures. The delays and difficulties attending the processing of individual complaints of discrimination by such federal agencies as the Office for Civil Rights in HEW have underscored the need for women to be assured of a duly constituted academic hearing of their complaints of discrimination. Our impression is that internal mechanisms are being used increasingly for the resolution of cases where discrimination is alleged.

It is gratifying to note that several other recommendations contained in Committee W's 1970–71 Report have already been implemented or are on their way to implementation. The Council Committee on Discrimination has urged that institutions establish grievance procedures to hear and judge complaints of discrimination. Committee A on Academic Freedom and Tenure, no longer exclusively male, has accepted the principle that the same full academic due process be afforded in cases where discrimination is alleged that is available in cases where there is an allegation of violation of academic freedom.

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[1] See the Association's statement on "Faculty Appointment and Family Relationship," *AAUP Bulletin*, 57 (Summer, 1971), 22. This policy, originally formulated by Committee W, was jointly approved by both Committee W and Committee A on Academic Freedom and Tenure, and adopted by the Council and endorsed by the Fifty-sixth Annual Meeting as Association policy.

This year the ten new members elected to the Association's Council included three women (making a total of eight out of thirty members), a woman has been elected as Second Vice President of the Association, and numerous women have been appointed to standing and special committees.

We also note the appointment of an Information Officer to the Washington Office Staff, and we shall encourage this person to devote special attention to issues affecting academic women.

Over this past year, the Washington Office has expanded its work as a clearinghouse for information on women in academe for persons both inside and outside the academic community. It has kept in close touch with committees on the status of women in other professional associations and on individual campuses, sharing information on developments in the law and in government, and on events in various parts of the country. It is clear that the establishment of good communications among the many chapter and state conference committee W's must be given a high priority. Committee W will re-open the question of a national Committee W newsletter at its fall meeting, looking toward the possibility of seeking outside financial assistance for such a venture.

As interest in recruiting women for faculty and administrative positions has increased, the Association has received many requests for information on and referral of qualified women. Although the present resources of the Association do not allow for regular referral of specific individuals for vacancies which may exist, the staff and the Committee will consult with other organizations on ways to provide these much needed services.

Finally, the Committee plans to address itself to chapters which have become or are campaigning to become the exclusive bargaining representative of the faculty, urging consideration of issues of concern to women not merely in the context of an election campaign, but, more important, in the negotiation of collective bargaining agreements.

ACADEMIC WOMEN ON THE MOVE

In planning the first meeting of the reactivated Committee W in September of 1970, the Chairman composed a memorandum which sought to give an overview of the present state of research on women in the academic profession. The idea emerged from the first meeting of Committee W for a synthesis of the many studies and reports on academic women which were already numerous and which would proliferate during the next two years, to provide a historical description of academic women as part of the women's movement of the late 1960's and early 1970's. With the aid of a grant from the Russell Sage Foundation, the Chairman has undertaken to edit a volume which will describe in some twenty chapters what is known about women students in higher education, analyze the many disciplinary and institutional reports on the status of women in the academic profession, and discuss recent efforts to effect a change in that status. It is expected that this volume, entitled *Academic Women on the Move*, will be available during the coming academic year. Since its genesis lies in part in AAUP's involvement with the concerns of women in the academic profession, it is hoped that its publication will constitute an important contribution to the goals of Committee W and to the work of the many chapter and conference committee W's across the country.

CHAPTER AND CONFERENCE COMMITTEE W'S

One of the most striking developments since Committee W's reactivation in 1970 has been the widespread emergence of committees on the status of women among local chapters and state conferences. These local committee W's, of which there are now well over two hundred, have undertaken surveys and studies of the status of women, have formulated proposals for policy in areas such as maternity leave and part-time faculty appointments, have worked for the abolition of antinepotism regulations, and have assisted individual women with complaints of discrimination. They have worked with other women's groups and have enlisted the support of the AAUP chapter, and through it the entire faculty. Many are now working actively for the establishment of sound grievance procedures for dealing with cases of discrimination. They have urged that patterns of prejudicial treatment of women faculty be remedied, and they have been instrumental in directing attention to the need for faculty involvement in the development and implementation of affirmative action programs. Through state conferences of AAUP, women throughout a particular state have worked together to establish coordinating committees to encourage and to share information on the work of local committee W's. As more women assume executive roles in AAUP chapters and state conferences, the importance of Committee W activity is enhanced. On campuses where there has been little chapter activity for years, women are finding that it is possible to revitalize a chapter through their interest in the Committee W program.

A great variety of activities have been undertaken by AAUP chapter committee W's; they have communicated with women members of boards of trustees to enlist their assistance in working for the elimination of discrimination; they have urged faculty senates to become involved in the institution's affirmative action plan, recognizing perhaps better than some of their colleagues the implications of affirmative action for faculty policies and prerogatives; they have provided the statistics upon which salary adjustments have been effected; they have participated in the search for women to fill administrative offices, and they have assisted department chairmen in recruiting women faculty. Chapter committee W's have worked with women's groups on campus, and have supported coalitions of women's groups working for change. At one institution, the president approached the AAUP chapter committee W to ask its advice in developing the institution's affirmative action plan and in selecting a person to serve as equal employment-opportunity officer.

At the state level, several state conferences of AAUP chapters, as has been noted, have assumed active roles in encouraging and coordinating the work of chapter committees. In the spring of 1972, a number of highly successful conferences on the status of women were organized by state conference committee W's and by groups of chapters. For example, in March over 160 registrants attended a conference on women in higher education jointly sponsored by the New Jersey State Conference of AAUP chapters and New Jersey WEAL (Women's Equity Action League), and in April the Ohio Conference Committee W sponsored a successful state-wide conference of women. AAUP chapters at Adelphi University, Hofstra University, Nassau Community College and the New York Metropolitan Council of AAUP Chapters held a meeting of faculty in the New York metropolitan area to explore the variety of problems facing academic women in that region and to encourage communication among concerned members of the academic community. Betty Friedan and Patricia Albjerg Graham, a member of the national Committee W, were keynote speakers at this meeting.

The Minnesota Conference Committee W presented a series of wide-reaching resolutions on women in the profession at the Conference's spring meeting; the resolutions were passed enthusiastically, and forwarded to the administration and governing board of every institution in the state. The Georgia Conference has been working to effect a change in the restrictive antinepotism statute which governs employment policies in all institutions in the Georgia State System, and the Kansas Conference Committee W has undertaken a statewide salary study. The Pennsylvania Division's Committee W has been working in support of the passage of the Equal Rights Amendment by the Pennsylvania legislature. The Massachusetts Conference Committee W has formulated a set of guidelines for the Committee's operation which includes specific recommendations for assisting chapter committees and independent women's groups on campus, and for advising on individual complaints. These represent only a selection of the activities and achievements of conference committee W's.

Social and institutional change does not take place by fiat or remote control. In higher education, the locus of reform is in most cases an individual campus or state system. Hence the most significant agents of change affecting the status of academic women are the active and committed members of the institutional community itself. Conference committees can and do serve a most important function of encouraging and coordinating local groups, but it is at the level of the local chapter where the primary work must be done. AAUP chapters have been responsible for significant advances for women on their campus in the past year, and the majority of active chapters have by now established a committee W. Where a committee has not yet been established, chapters have proved increasingly willing to help women with complaints, and to urge administrative attention to patterns of inequity in salaries and promotion.

Of course, there is still a great deal to accomplish, and too often AAUP chapters, by their past inactivity or domination by unsympathetic leadership, have not earned the trust of women faculty who are looking for a vehicle for rapid change. The academic year 1971–72 has demonstrated, however, that the AAUP chapter can and does serve an important role as a catalyst in institutional reform. The zest with which many chapters have joined in the efforts to remedy patterns of sex discrimination is demonstrating the fact that the existing structure of AAUP can be activated to play an important leadership role in the movement for sex equity.

SEX DISCRIMINATION AND THE FEDERAL GOVERNMENT

As most academic women and, increasingly, entire faculties and administrations are aware, several agencies of the federal government are responsible for enforcing laws against discrimination in faculty employment on grounds of sex. These laws, which include the Civil Rights Act of 1964, Executive Order 11246 as amended, and the Equal Pay Act, have great potential for effecting a change in the status of academic women. The enforcement of these laws has been a matter of critical concern to Committee W. The Committee has worked to develop liaison with the Office for Civil Rights in the Department of Health, Education, and Welfare, and with the Equal Employment Opportunity Commission, to keep in touch with recent developments in the enforcement programs of those agencies, and to encourage their greater attention to the particular problems faced by women on college and university faculties.

During the winter and spring of 1971–72, Margaret Rumbarger, the Washington Office staff person who works most directly with Committee W, was granted a leave of absence to serve as a full-time consultant with the Office for Civil Rights and to work on the development of guidelines for colleges and universities subject to Executive Order 11246 as amended, which prohibits discrimination in employment on grounds of race, sex, color, religion, and national origin. These guidelines, awaited by academic women and by university administrators alike, were issued in draft form in late July, and it is expected that they will provide a basis for the development of affirmative action programs and for their implementation. Committee W has not yet had an opportunity as a committee to review the draft guidelines, but individual members of the Committee who received copies of the draft agree that it represents a significant step forward.

The Committee also wishes simply to note two pieces of legislation which have been passed during the last year and which should have a profound effect on academic women: these are the Equal Employment Opportunity Act of 1972, which amends Title VII of the Civil Rights Act of 1964 and extends its protections to all employees of educational institutions; and the Education Amendments of 1972, which include an amendment of the Equal Pay Act of 1963 to cover executive, administrative, and professional employees. The Equal Pay Act, a part of the Fair Labor Standards Act, requires the same pay for men and women doing substantially equal work requiring substantially equal skill, effort, and responsibility, under similar working condition in the same establishment.

The provisions of Title VII of the Civil Rights Act are enforced by the EEOC, which is now authorized to receive and process complaints of sex discrimination from faculty members; the provisions of the Equal Pay Act are enforced by the Wage and Hour Division of the Employment Standards Administration of the Department of Labor, whose investigations have in the past been successful in achieving salary equity and back pay for numerous victims of discrimination. Faculty women with complaints of salary discrimination who are unable to achieve a resolution through internal academic channels are encouraged to provide specific information of violations to the local field of the Wage and Hour Division.

PLANS FOR THE FUTURE

Clearly we have made a good beginning; just as clearly there is much yet to be done. There is need for continued work in areas of policy mentioned in an earlier section of his report, and a need to convince faculties and administrations of the wisdom of developing institutional policies which are responsive to the several roles of professional persons in our society.

During the coming year, Committee W will consider issues relating to differential retirement benefits for men and women and work to develop a "checklist" of issues of importance to women which should be considered in the context of collective bargaining elections and negotiations. It will continue to develop its relations with committees on the status of women in other professional associations, and maintain liaison with federal agencies responsible for enforcing the laws against discrimination. It will be particularly concerned to encourage institutions to eliminate patterns of discrimination and to undertake programs of internal reform as a desirable alternative to their being mandated as a consequence of investigation by a federal agency. There is also a need to provide more assistance with grievance procedures and to encourage women to make use of appropriate internal mechanisms where they are available.

Procedures and policies by themselves, however, no matter how sound, will not provide a remedy to long-entrenched patterns and cultural assumptions about what women need and want, nor will they open the eyes of those who have not suffered from discrimination to the subtle ways in which it manifests itself. This can be achieved best through a persistent and sensitive campaign to educate our faculty colleagues, administrators, and members of boards of trustees, a campaign waged with vigor and without losing our sense of ultimate purpose: the creation of an academic community in which equity for all persons, regardless of their sex, can be realized.

Alice Rossi,
Chairman.

ERRATUM

In "Coping with Adversity: Report on the Economic Status of the Profession, 1971-72" (*AAUP Bulletin*, Summer, 1972), pp. 178-243, Utah State University's category and ratings (p. 228, columns 3 and 4) were erroneous. Utah State University is a Category I institution and the ratings should have appeared as 5,5,5, and 4 for the ranks of professor, associate, assistant, and instructor respectively.

Report of Committee W—1970-71

BACKGROUND

As chairman of the most recently activated national Committee of AAUP, it is appropriate that I preface my report of this year's Committee activities with a brief sketch of the social and political context from which the Committee emerged in 1970.

To begin with, we are not a "new" but a "reactivated" Committee, resuming activity after forty-two years of dormancy. Committee W on the Status of Women in the Academic Profession was first established in 1918 and retired ten years later in 1928. Just why the Committee was first established is difficult to determine from Association or Committee records. One report of the Committee, published in a 1921 issue of the *AAUP Bulletin*, gives us a few hints. For one, World War I created a scarcity of personnel in American colleges and universities. As academic found it difficult to compete with the more remunerative work available to men outside academic, a great number of women moved in to replace men. Women faculty apparently did a good job, for the 1921 Committee report notes that the presence of women did not "bring the evils that had been feared."[1]

Secondly, colleges and universities were expanding in fields that already had large numbers of women: music, education, home economics, public health. Together with an increase in the popularity of summer sessions, this had the effect of drawing greater numbers of women to faculty ranks. Thirdly, the push for the suffrage amendment involved many academic women in its final years of political effort, and this success no doubt gave some of them courage to examine their own faculty status. Indeed, in 1921 Committee W notes that the success of the women's suffrage movement seemed to have "put the 'fear of God' into the hearts of not a few ever-watchful university executives."[2]

Many contemporary academic women are hopeful that university administrators, surely as watchful in 1971 as in 1921, will share their predecessors' fears. I think, however, that today's feminists have just a bit more humor than the suffragists of an earlier day. I had to smile in reading the 1921 phrase, "fear of God," for I found myself translating that to accord with the spirit of a recent feminist poster labelled "And God Created Woman in Her Own Image"!

The earlier Committee W, ahead of its time perhaps, conducted a survey in 1921 on the status of women in college and universities. The results of that survey underline how much unfinished business remains for the agenda of the current Committee W, for there were many findings that could just as well have been taken from any of the dozens of reports now being produced by women's caucuses in academic disciplines or by institutional committees on the status of women in colleges and universities. For example, the Committee found that although women represented 74 per cent of the faculty in women's colleges, only 22 per cent of these women were found at the full professor rank, compared with 52 per cent of the men. At men's colleges, only two women faculty members were found in a total of nearly 2,000 professors. At coeducational institutions in which women constituted 31 per cent of the students, women represented only 13 per cent of the faculty, though, again like contemporary reports, this varied markedly by rank, women being 4 per cent of full professors but 23 per cent of instructors.

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[1] A. Caswell Ellis, Chairman, "Preliminary Report of Committee W, on Status of Women in College and University Faculties," *AAUP Bulletin*, October, 1921, n. 25.
[2] *Ibid.*

There are a few hints in these older reports that academic women in the 1920's had some spark and fight to match their descendants in 1971. In one institution, the trustees voted a maximum salary of $1800 for women but a maximum for men at the same rank of $3000. The women did not take this lightly, however, for the report continues by noting that when the trustees learned the women on the faculty were going to file a protest, they promptly published a new salary schedule which made no distinction on the basis of sex.

It has been a source of gratification to note the growing number of Committee W's organized by local AAUP chapters across the country this past academic year. An analogous development followed the establishment of the Commission on the Status of Women by President Kennedy in December, 1961. By 1965, two years after the publication of the commission's report, *American Women*, almost every state in the nation had a counterpart state commission on the status of women, charged with the dual task of investigating the special circumstances facing women in their state and implementing the national report's recommendations through administrative, judicial, and legal reform. It is Committee W's hope that increasing numbers of local AAUP chapters will similarly conduct investigations on the staus of women on their campuses, or cooperate with campus groups already involved in such activity, and then move on from such data-gathering to effect whatever changes are required to assure women students and faculty not only *the right* to equal admission, appointment, and promotion, but equality *in fact.*

Activism among academic women escalated so rapidly between 1968 and 1971 that it is becoming very difficult to keep in touch with all aspects of its development. The way for this current wave of activity was paved during the preceding years, first by the establishment in 1966 of the National Organization for Women, which grew out of the frustration experienced by women in business, government, unions, and academe, who were weary of promises with little follow-through. NOW was followed in 1967 by the mushrooming of women's liberation groups, also stimulated by the frustration of women, in this case women in the civil rights and antiwar movements.

There was no formal activity among academic women, however, until the academic year 1968–69, beginning with the social sciences, quickly spreading to the humanities, and only now in 1971 stirring in the natural sciences. The first women's caucus was formed in the American Sociological Association, which it was my pleasure to serve as organizer, first by conducting a survey of graduate departments of sociology in the early spring of 1969 and then in political action at the national convention in August, 1969. By the fall, similar groups were formed in psychology, political science, history, and the modern languages.

Each discipline at first had a somewhat similar development, typically first forming a women's caucus, but showing variation in structure and focus in the past two years of growth. In some fields, there is only an independent women's caucus, in others an officially established commission or committee on the status of women in the field; in still others, there are both caucus groups and official committees.

In 1969–70, the year immediately preceding the reactivation of Committee W, pressure began to mount on some university campuses to conduct surveys on the status of women on their faculty and in research institutes. The result has been the publication of a great many reports over the past year and a half, analyzing the position of women on both a disciplinary and an institutional basis. Reports are available from the disciplines of sociology, history, psychology, political science, and the modern languages, while such institutions as Chicago, Berkeley, Harvard, Illinois, Indiana, Columbia, and Stanford have produced institutional surveys on the status of women from administration-appointed committees (e.g., the University of Chicago, or the University of California, Berkeley), from groups of women faculty and graduate students (e.g., Columbia and Stanford), or from local AAUP chapters.

During the same academic year, 1969–70, there was a sharp upturn in publication of articles in more general journals on women in the academic profession, and the beginning of a great deal of curricular activity, as courses on women began to be offered in the social sciences and the humanities. Feminist publications have developed both in and out of academe. By early 1971, there were at least forty-five major periodicals in the women's movement, four national women's newsletters, and the first of what I think will be many feminist publishing firms, ranging from Lollipop Power in North Carolina, which focuses on books for young children, to the Feminist Press in Baltimore, which will publish books and pamphlets for somewhat older children, to the Women's Free Press in Pittsburgh, specializing in inexpensive reprints, and to Source Book Press in New York which has republished forty titles from the history of the women's movement.

During the current academic year there have been at least five developments worth noting: (1) Informal women's caucuses in professional disciplines are increasingly shifting to more formal organizational structures. (2) Order organizations outside academe but relevant to women's education and career opportunities, such as the American Association of University Women, have become newly concerned and assertive on issues affecting academic women. (3) There has been new life injected into many college administrations, as pressure mounts from women students and faculty to provide gynecological services, women's studies programs and courses, child-care facilities and women's centers. (4) A most significant development is the pressure now being brought by suits under federal contract compliance procedures by women in higher education as individual and class actions, a development initiated last year by the Women's equity Action League, but now being used by individual women or groups of academic women in given institutions. Last, but not least, the reactivation of Committee W in AAUP symbolizes the need to rise above disciplinary and institutional levels to broaden national focus on the issues and policy guidelines needed in the hundreds of colleges and universities at which women study and work.

Committee W has a unique responsibility, in my judgment, precisely because the AAUP crosses the barriers of academic disciplines and of institutions. It is an enormous facilitation, unmatched by any other organization in academe, to have an existing structure at the national, state, and local levels, through which to reach and coordinate the efforts of individuals and groups sharing concern for the problems faced by women in academe. Reports that reach me form hundreds of women and countless meetings across the country all share a common characteristic: the desire for a more sustained and systematic network through which academic women can be kept informed and through which our efforts can be coordinated. The existing structure of AAUP has given Committee W a good headstart in providing at least part of that coordination.

ACTIVITY OF COMMITTEE W IN 1970–71

Committee W held two formal two-day meetings during the 1970–71 academic year, the first in September, the second in February. Between meetings there has been a lively exchange of letters and memoranda in almost constant circulation among Committee members and the Washington staff. At our first meeting, we quickly decided that our first task should be a review of existing AAUP policies and guidelines with an eye to isolating those issues on which it would be desirable to revise or supplement existing AAUP policy and guidelines to assure equal opportunities for academic women. Three policy areas were demarcated for special Committee attention: antinepotism rulings, maternity leave, and part-time appointments.

REPRESENTATION OF WOMEN IN AAUP STRUCTURE

At that first meeting, the Committee also requested that the staff provide us with a sex breakdown of AAUP committees, staff, the Council, and the officers over a number of years, in the belief that concern for broadening the opportunities for women should properly include the AAUP structure itself. For the information of AAUP members, a statistical summary is appended to this report showing the percentage women have represented among the officers, staff, Council nominations, elected Council members, and national committees in a time series sampling every five years for the period 1916 ot 1970. The data show that women have been very poorly represented at this level of AAUP structure. At most two women have appeared among the officers or the staff of the Association in any given year, and the percentage of women among elected Council members or the committees has rarely exceeded 10 per cent. Committee W urges members, chapters, and conferences to bear this poor representation in mind in nomination procedures and selection of convention delegates. We are in an embarrassing position as an Association representing faculty in higher education if we urge colleges and universities to improve the status of women while we ourselves show a far smaller proportion of women at the committee and Council level of the organization than women represent of the total membership.

ANTINEPOTISM REGULATIONS

At its February meeting, Committee W considered and revised a draft of a statement on antinepotism regulations, calling for the rescinding of laws and institutional regulations which subject faculty members to any automatic exclusion from academic employment solely on the grounds of being related to a member of the same family on the faculty of an institution. Care was taken in drafting this statement to cover reasonable restrictions against abuse by urging that faculty members should neither initiate nor participate in institutional decisions involving a direct benefit to members of their immediate families. This statement was also reviewed by Committee A, and a final joint statement agreed upon by the two committees. It is now operating AAUP policy.

PART-TIME APPOINTMENTS

On the second policy issue, part-time appointments, I can merely give a progress report rather than any announcement of Committee recommendation. The Committee discussed the part-time appointment issue at great length at its February meeting. Realizing that the issue of part-time appointments involves broad and technical problems, the Committee wished to isolate for attention at least one important category of part-time appointment of special relevance to academic women. Our focus has been on opening up the senior professional ranks for part-time appointments to qualified men and women who do not or cannot accept full-time appointments. Our general view is that both men and women should be able to move into regular part-time academic positions which are considered as full-time appointments with half- or quarter-time leave, and that these positions should be governed by the same standards for notice and tenure as regular full-time appointments. We also believe that shifting back and forth between part- and full-time should be possible, depending on personal and institutional needs.

There is already precedent in academic for such part-time appointments at senior faculty levels. In my own survey of graduate sociology departments, for example, I found that a third of the men holding part-time appointments were associate or full professors; among those holding joint appointments between two departments or between a department and a research institute, a full two thirds of the men were at the senior ranks. In our judgment, if part-time services of men faculty are considered desirable to a department, even if shared with another department or institute, it should not matter that the sharing in other cases might be with the families of women faculty members.

Numerous aspects of the part-time appointment issue require careful review, which Committee W plans to pursue at subsequent Committee meetings. In the interim, we have sent to Committee A for its consideration a first statement outlining our position on regular part-time appointments at senior ranks.

Committee W is hopeful that Committee A will find it reasonable to isolate this one type of regular part-time appointment and to join us in drafting a recommendation without waiting until the entire range of more specialized part-time appointments has been considered. In our judgment, this issue of part-time senior appointments is of very special importance to academic women, for it would enable more women to retain a continuous affiliation with academic institutions without prolonged withdrawal during the child-rearing years. We also believe that in an era in which there will be many more dual career families, both husbands and wives may increasingly desire to hold less than full-time appointments for some portion of their careers.

MATERNITY LEAVE

Committee W cannot report anything specific about the third policy issue that has concerned us, maternity leave, except to mention that it is on our agenda. We have not had a report from a Committee member on this issue as yet, nor held anything but preliminary discussion of the issue. It remains therefore as a key topic that will occupy us during the second year of the Committee's work.

CALL FOR AFFIRMATIVE ACTION

One last action by Committee W this year was the drafting of the resolution presented at this Annual Meeting, calling for support of all efforts to seek, as a minimum, full and uniform compliance with Executive Order 11246 as amended by Order 11375, which prohibits discrimination on the basis of sex by any agency holding federal contracts. We hope that all units within the structure of AAUP will initiate or support local effort to improve the status of women in thier institutions and to contribute to the leadership and the development of affirmative action programs. The long-standing permanent nature of local chapter organization makes the local AAUP chapter a natural locus to serve as monitor of any plans to effect changes in institutional procedures for however long it takes to achieve the goals of full equality for women in academe.

FUTURE WORK OF COMMITTEE W

It is no doubt clear from the above that at least some of the focus of Committee W this coming year will be on the continuation of discussion and drafting of recommendations covering part-time appointments and maternity leave.

There is one other possibility I would like to share with you in this annual report. At our February meeting, I proposed to the Committee that, in looking ahead to next year, one of the most important unmet needs in the nation where academic women are concerned is the now-scattered and uncoordinated efforts taking place in academic disciplines, individual institutions of higher education, or separate chapters of the AAUP itself. We are so submerged in the specificity of our own field or our geographic locale that it is often difficult to gain an overview of what is going on from a national perspective. So too, we have little opportunity to think beyond a given year to the larger question of how an increased respresentation of women in American higher education will affect either the structure of academe or the content of the academic disciplines themselves. I proposed therefore that one contribution Committee W could make in this regard might be a conference sponsored by AAUP which would draw together the disparate groups and individuals involved in these issues for a few days of workshops, plenary sessions, and informal discussion. Well in advance of such a conference, we would commission papers on the impact of women on various academic disciplines as well as the structure of higher education itself, with plans for a post-conference publication of the papers. A preliminary draft of a proposal seeking funds for such a conference and its publication was discussed at our February meeting. It has since been revised and submitted through the Washington Office to a foundation for funds to support such a venture. It is too early to tell whether we shall succeed in obtaining such funds in these tight-money days, but if and when we do there will be a notice to this effect in *Academe* and the *AAUP Bulletin*.

We have also been concerned, along very much the same lines, with serving a useful function as a national committee vis-a-vis the local chapter Committee W's. We know from your letters how important these local efforts are and how difficult it is for one local Committee to be informed about what is going on in other local Committees. The workshop Committee W held at this convention is only one small effort to assist communications across the local chapters. We would welcome hearing from you about other mechanisms we could adopt to assist further.

I know from other contexts how difficult it often is for women in one department of one college or university to reach out, become acquainted with, and work together with other women at their own institution or others in their city and its environs. From watching the development of such ties in women' caucuses and in NOW chapters, I think any effort a local Committee W makes to establish contacts with neighboring institutions would go a long way in building up friendship and professional and political ties among women and those of their male colleagues sympathetic to our cause.

Academic women are still a small minority in most institutions of higher education, and, as such, they are subject to some of the same problems other minority groups experience. Belonging to a group of like-minded women from several colleges and universities helps to counteract the psychological impact of minority status. We shall continue to do all we can in the national Committee, but it is the multiplication of dozens of local efforts that can stimulate the sense of shared purpose and trigger the kind of action chain that can yield significant social, economic, and political gains for women. Through our joint efforts, it may be possible to make the 1970's a breakthrough decade for American academic women.

REMARKS FROM THE ANNUAL MEETING

Up to this point I have reported in formal terms on the work of Committee W, written before coming to this convention. I would like to supplement them with a few additional remarks about events during the convention itself, most importantly concerning the workshop held last night under Committee W sponsorship.

The workshop adjourned at 11:30 p.m. but could easily have cohtinued for several more hours, so keen was the interest in and the sense of shared commitment to the issue of academic women. It was a difficult but encouraging experience to chair that meeting, for it helped, more than any experience I have had as chairman of the Committee this year, to dispel the image of AAUP that is held in the world in which I have moved in academe over the past decade—a ponderously slow-moving, tedious establishment with an early twentieth century liberalism that wears thin in the late twentieth century world we live in. It has been a complex first year trying to get accustomed to the structure and procedures of the Association, made tolerable by the conviction I brought to the chairmanship of Committee W that it was a natural springboard for action that is long overdue in behalf of American academic women.

It was a bracing experience last night to meet women and men from local chapters and conferences and to sense in them the same bitter edge of frustration and impatience I brought to the Committee last fall. While I think the Committee has made progress this year, it has been an uphill battle not always successful in resisting the pressure to be mild and bland in the AAUP style. With the encouragement provided by last night's workshop, I would like to say that I do not think my Committee has fought hard enough in saying loudly and clearly that the time is now past when we can do business as usual in the old familiar ways where the problems facing academic women are concerned.

Yesterday afternoon we spent two hours on the St. John's case, clearly an instance on which the delegates felt strongly about righting the wrongs suffered by twenty-one dismissed faculty members. It was called the most serious case of the decade; if I recall correctly, someone suggested it was the case of the century. I understand a resolution will be presented today protesting the denial of academic freedom to professors in Greece. But, my friends, far more serious denial of rights—in hiring, in salary scale, in promotion—has been a regular, persistent, and continuing experience for thousands of American women in higher education. There are many in this ballroom who could match the St. John's case a dozen times over with equally horrifying experiences that women have had on your faculties over the past hundred years, and which, if anything, are increasing as colleges and universities trim their staffs of their easiest "expendables."

It is not sufficient to say that AAUP stands ready to help in individual cases submitted to Committee A. There are growing numbers of academic women in this Association who are articulately and poignantly angry. *If* AAUP hopes to retain them as members or attract new younger women members, it will have to move at a quicker pace and with firmer commitment than has been its usual style in the past.

With the renewed sense of confidence from last night's meeting, I shall in the future urge my Committee to step up the pace of its work and sharpen its demands for action by the Association. This Association should not wait for individual women to file complaints with Committee A or write a letter to Committee W. I shall recommend to my Committee several new directions to go. Among them are the following:

1. Committee A should expand its membership by the addition of several women already conspicuous by their efforts on behalf of women's rights in chapters and conferences. I will recommend that no additional men be appointed to Committee A until it has a membership roster of at least 25 per cent women, approximately the proportion of women in academe today.

2. I shall urge the Committee to recommend that the Association broaden its conception of public relations and press releases beyond *Academe*, the *Bulletin*,

and the *Chronicle of Higher Education*, with special attention to issues affecting academic women.

3. I shall urge the Committee to recommend strongly that the Association make a firm demand that colleges and universities establish whatever grievance procedures are lacking on local campuses to facilitate the processing of complaints from women faculty members, with a strong recommendation that such grievance committees include women in proportion to their representation on the faculty, including all part-time, nontenured, and lower rank personnel where so many women have been kept.

4. I shall recommend that the Committee urge the General Secretary and appropriate persons to designate funds for the establishment of a Committee W Newsletter in which members and local Committee W's can communicate, share ideas, reports, and affirmative action plans with each other, including, if necessary, the hiring of an additional staff person to serve as Editor of such a national Newsletter. The Association should realize that it has a retroactive debt to pay to women members after the forty-two-year retirement of Committee W. Just as we have argued that the financial crisis in higher education should not lightly be resolved by holding the line on faculty salary, it is not acceptable to argue that financial exigency in the Association is grounds for rejecting the request for appropriation of funds to produce a Committee W newsletter.

5. I shall further urge that if AAUP moves into the collective bargaining arena at a greater pace in the future, it should get a better sense of what women in this Association want and need, and incorporate such needs in its platform when it seeks the bargaining agent role, including the representation of part-time and not just full-time faculty employees. If academic women were more articulate about the experiences they have in academe, I think it would be clear that they find it less easy to indulge in a fantasy of "shared authority" between faculty and administration than men can. Few academic women share authority with either department chairman or the administration on their campuses. Most academic women have been taken for granted, subjected to subtle exclusion, refused tenure or promotion, judged expendable, and let go.

Social movements come and go with regularity in American history, but I think an index of those which persist in reaching their goals are those which have a keen sense of being close to the pulse of history. Robert Coles, who has studied the black children and their families involved in the attempt to desegregate southern schools, has reported that these families had such a sense in their bones that their actions were both individual and historic, that, as Coles put it, they were "living close to history." I know from my work over the past ten years that increasing numbers of women in the feminist movement now have that sense as well. They have a right to expect that a professional association, which presumes to represent them, respect their sense that their time has come. As a nation we are painfully learning that technology and military might are no match for the aspirations of peoples with this sense of commitment. By the same token, bureaucratic procedures hallowed by a few decades of tradition are no match for the aspirations of contemporary women now on the move. As intellectuals presumably open to new ideas and able to recognize an idea whose time has come, AAUP members can legitimately be expected to apply their cognitive skills and compassionate values to the goals now being espoused by academic women and articulated in the form of guidelines, resolutions, and recommendations from your own Committee W.

It is with a keen identification with the spirit of Alice Hamilton—a great woman in the history of American public health and medicine, who President Pusey suggested at her death had benefited by the aura provided by her appointment at Harvard but who retired as an Assistant Professor—that I carry the responsibility as chairman of the reactivated Committee W.

It is in this same spirit that I submit the following motion, unanimously endorsed by the one hundred or more members at last night's workshop:

> We recommend that the AAUP move as quickly as possible toward the development of procedures by which colleges and universities can be censured for discrimination against women.[3]

ALICE S. ROSSI,
Chairman, Sociology (Goucher College).

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[3] The substitute resolution passed by the Annual Meeting read as follows:
Resolved, that the AAUP develop procedures as quickly as possible to use various measures, including censure, against colleges or universities practicing any sort of discrimination contrary to AAUP policy, including discrimination on the basis of age, sex, race, color, religion, national origin, or marital status [Ed.].

APPENDIX

REPRESENTATION OF WOMEN IN AAUP STRUCTURE, 1916-70

Year	Officers (in No.)	Staff (in No.)	Nominations for council (in percentages)	Elected council members (in percentages)	Committees (in percentages)
1916	0 [1] (4)			3 (30)	5 (262)
1920	0 (4)			13 (30)	6 (251)
1925	1 (4)			3 (30)	8 (219)
1930	0 (5)			10 (30)	7 (176)
1935	0 (4)	0 (1)		7 (30)	7 (186)
1940	2 (4)	0 (2)	7 (60)	13 (30)	5 (141)
1945	1 (4)	0 (2)	3 (60)	7 (30)	10 (21)
1950	2 (4)	0 (2)	10 (60)	17 (30)	0 (19)
1955	1 (4)	0 (3)	7 (60)	13 (30)	0 (30)
1960	0 (5)	1 (7)	3 (60)	3 (30)	[illegible] (104)
1965	1 (5)	1 (11)	7 (60)	7 (30)	7 (141)
1970	0 (5)	1 (16)	8 (60)	10 (30)	[illegible] (186)

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[1] Base N.

APPENDIX D

FACULTY APPOINTMENT AND FAMILY RELATIONSHIP

The following statement prepared initially by the Association's Committee W on the Status of Women in the Academic Profession, was approved by that Committee and by Committee A on Academic Freedom and Tenure. The statement was adopted by the Council of the American Association of University Professors in April, 1971, and endorsed by the Fifty-seventh Annual Meeting as Association policy. It was endorsed by the Board of Directors of the Association of American Colleges at its June, 1971, meeting.

In recent years, and particularly in relation to efforts to define and safeguard the rights of women in academic life, members of the profession have evidenced increasing concern over policies and practices which prohibit in blanket fashion the appointment, retention, or the holding of tenure of more than one member of the same family on the faculty of an institution of higher education or of a school or department within an institution (so-called "antinepotism regulations"). Such policies and practices subject faculty members to an automatic decision on a basis wholly unrelated to academic qualifications and limit them unfairly in their opportunity to practice their profession. In addition, they are contrary to the best interests of the institution which is deprived of qualified faculty members on the basis of an inappropriate criterion, and of the community which is denied a sufficient utilization of its resources.

The Association recognizes the propriety of institutional regulations which would set reasonable restrictions on an individual's capacity to function as judge or advocate in specific situations involving members of his or her immediate family. Faculty members should neither initiate nor participate in institutional decisions involving a direct benefit (initial appointment, retention, promotion, salary, leave of absence, etc.) to members of their immediate families.

The Association does not believe, however, that the proscription of the opportunity of members of an immediate family to serve as colleagues is a sound method of avoiding the occasional abuses resulting from nepotism. Inasmuch as they constitute a continuing abuse to a significant number of individual members of the profession and to the profession as a body, the Association urges the discontinuance of these policies and practices, and the rescinding of law and institutional regulations which perpetuate them.

APPENDIX E

Leaves of Absence for Child-bearing, Child-bearing, and Family Emergencies

The Statement which follows was prepared by the Association's Committee W on the Status of Women in the Academic Profession. It was approved by the Council of the American Association of University Professors in April, 1974, and endorsed by the Sixtieth Annual Meeting as Association policy.

INTRODUCTION

The joint *Statemen of Principles on Leaves of Absence*, adopted in 1972 by the American Association of University Professors and the Association of American Colleges, recommends that leaves of absence be granted for professional growth and intellectual achievement, for public or private service outside the institution, and for "illness, recovery of health, and maternity." The following statement on *Leaves of Absence for Child-bearing, Child-rearing, and Family Emergencies*, prepared by Committee W on the Status of Women in the Academic Profession, supplements and amplifies this last provision of the *Statement of Principles on Leaves of Absence.*

PURPOSE OF THE LEAVES

Committee W recommends that colleges and universities provide leaves of absence to faculty members for child-bearing, child-rearing, and family emergencies. Such leaves are to assist faculty members with parental responsibilities in meeting their obligations both to their professional careers and to their families, and to prevent the loss to the institution and to the academic community of substantial professional skills.

Career patterns of academic men and women vary. Academic women differ in their desire to continue or to interrupt their professional careers during the child-bearing and child-rearing years. Couples differ in the extent to which they wish to share family responsibilities. Some faculty members may wish to take a leave of absence from their professional positions to care for their children, others wish to combine parental and professional responsibilities, while still others prefer to retain their professional affiliation on a full-time basis throughout their child-bearing and child-rearing years.

An institution's policies on faculty appointments should be sufficiently flexible to permit faculty members to combine family and career responsibilities in the manner best suited to them as professionals and parents. This flexibility requires the availability of such alternatives as longer-term leaves of absence, temporary reductions in workload with no loss of professional status, and retention of full-time affiliation throughout the child-bearing and child-rearing years.

Institutional policies which require the termination of the appointment of a woman faculty member because she becomes pregnant penalize the individual unfairly. Moreover, policies which mandate the timing and duration of a leave of absence for pregnancy and childbirth do not take cognizance of particular medical needs or individual circumstances. Institutions which customarily or by policy allow paid absences for illness or temporary disability, but which deny equivalent absences for disabilities resulting from pregnancy or childbirth, discriminate against women.[1] Allowing leaves of absence for illness or temporary disability only in cases where faculty members are themselves ill or temporarily disabled disregards the need to provide short-term care for family members in serious emergencies. In addition, it may prevent fathers from assuming responsibilities in connection with the birth of children.

SHORT-TERM LEAVES OF ABSENCES FOR CHILD-BEARING AND FAMILY EMERGENCIES

Most colleges and universities provide for paid short-term leaves of absence, through formal or informal arrangements, for faculty members who are ill or temporarily disabled. The conditions and duration of compensation for short-term leaves for pregnancy, child-birth, or family emergencies involving spouse, parents, or children, should be analogous to those for leaves granted for temporary disability or personal emergencies. The timing and duration of absence in such cases should be determined by mutual agreement between the faculty member and the institution, and should be based on medical need, the requirements of the educational program, and individual circumstances. Compensation during short-term leaves of absence for child-bearing or the serious illness of a family member should be consistent with customary institutional practices in cases of illness or temporary disability.

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[1] See the 1972 Sex Discrimination Guidelines of the Equal Employment Opportunitr Commission.

LONGER-TERM LEAVES OF ABSENCE FOR CHILD-REARING

The rearing of children should be considered appropriate grounds for a leave of absence of a semester or more, and such leaves should be available to both men and women faculty members. The timing and duration of such leaves should be determined by mutual agreement between the faculty member and the institution. Faculty members on child-rearing leaves should receive the same considerations with respect to salary increments, insurance coverage, retirement annuities, and the like, as are received by faculty members on leave for public or private service outside the institution.

The alternative of a temporarily reduced workload should be available to faculty members with child-rearing responsibilities (see Committee W's statement on *Senior Appointments with Reduced Loads*).

Individual and institutional obligations in connection with such leaves, including the timing of a tenure decision, should be those set forth in the applicable provisions of the *Statement of Principles on Leaves of Absence.*

APPENDIX F

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

REPORT OF COUNCIL COMMITTEE ON DISCRIMINATION

Background

The Fifty-seventh Annual Meeting of the Association in 1971 approved a resolution which called upon us to

> "Develop procedures as quickly as possible to use various measures, including censure, against colleges and universities practicing any sort of discrimination contrary to AAUP policy, including discrimination on the basis of age, sex, race, color, religion, national origin or marital status."

In response to this resolution, the Council of the Association established a Committee on Discrimination, which it charged with looking into the implications of this resolution for Association policy and making recommendations for its implementation. This committee, chaired by Professor Beatrice Konheim of Hunter College, met twice in two-day sessions during the past year and has prepared the report that follows.

Social movements in this country in recent years have generated governmental action at the national and local level against invidious distinctions based on such non-relevant characteristics as race, with profound impact upon the academic community as well as upon other aspects of American life. An awareness of the disparate treatment of some classes of persons in our colleges and universities has given rise to demands, from external agencies such as the Federal government and from within the academic community itself, for reform of institutional policies and practices. It has seemed clear to the Committee on Discrimination that the wishes of many members of the Association, as reflected by the resolution, are that the Association should welcome these new pressures and, within the limits of its resources and the general nature of its responsibilities, work towards the abolition of unwarranted discrimination in American higher education. We interpret the 1971 Annual Meeting's resolution as asking that the Association expand its traditional concern for the freedom of academics to include explicitly concern for the opportunity *to be* an academic, and as urging that the Association, through its statements and its actions, manifest a commitment to protect faculty members from retributive action not only for what they say and do, but also for what they *are.*

In considering the background of the resolution, and the area in which the need has appeared greatest, our Committee concluded that it should direct its attention principally to questions of discrimination on the basis of race/color and sex. Discrimination on the basis of age seems to the committee to involve a variety of multifaceted and generally separate considerations, ranging from penalizing youth to prejudicial treatment of persons of middle age entering the profession for the first time to matters involving retirement, which could not satisfactorily be approached in the same manner as the other kinds of discrimination specified in the resolution. Questions of discrimination on the basis of marital status have seemed most often to be an aspect of discrimination on the basis of sex. (See, for example, the Association's policy on *Faculty Appointment and Faculty Relationship*, approved by the Fifty-seventh Annual Meeting, which states that faculty members should not be penalized in gaining or retaining academic position solely because of their marital relationship with another member of the faculty, and which first was prepared by Committee W on the Status of Women in the Profession.) The Committee does not intend to imply that the pernicious effects of religious or ethnic discrimination should be minimized. It believes that much of its report is applicable to all those classes of persons who do not yet enjoy equality of opportunity in the academic community.

Recommendations regarding Association Policy

Noting that the resolution asks for the development of procedures to be used against institutions practicing discrimination *contrary to AAUP policy*, the committee reviewed Association policy in this regard. Formal Associaton policy states that consderations unrelated to "the fitness of the faculty member in his professional capacity as a teacher or researcher" should not be taken into account in making determinations relating to his professional status. Pronouncements which specify improper discrimination have, however, been made only in the context of resolutions of Annual Meetings, which since 1956 have resolved against discrimination on the basis of race and, more recently, on the basis of sex.

The Committee has therefore come to the conclusion that explicit acknowledgement of the Association's position on discriminatory treatment of faculty members should be incorporated into the policy which governs the operation of the Association's staff and committee and provides guidance for the profession as a whole. We believe that the Association, and particularly that committee of the Association which bears central concern for the improper treatment of members of the profession, Committee A on Academic Freedom and Tenure, should make explicit what we believe is implicit in the 1940 *Statement of Principles on Academic Freedom and Tenure* and in other declarations of principle dating back to 1915: That freedom from discrimination, like academic freedom, is essential to the free search for truth and its free exposition.

In accordance with this conclusion, this committee has made two recommendations to Committee A: first, that Section 1 of the *Recommended Institutional Regulations on Academic Freedom and Tenure* which deals with faculty dismissals, be amended to include the following:

> Appointments will be made on the basis of the prospective fitness of faculty members in their professional capacities as teachers or researchers and will be without prejudice with respect to race, sex, religion or national origin.

Second, we have recommended that Section 10 of the *Recommended Institutional Regulations*, which sets forth due process for nontenured faculty members who allege that decisions not to reappoint them are based on considerations violative of their academic freedom, be amended to provide the same rights of due process to the probationary faculty member who alleges that considerations based significantly upon race, sex, religion or national origin, contributed to a decision not to offer reappointment.

Grievance Procedures

In addition, recognizing that a large number of complaints involving an allegation of discrimination relate to matters other than dismissal or non-reappointment, e.g., salary, promotion, assignment of teaching duties, and the property of conduct on the part of colleagues or administrators, we believe that the Association should offer further guidance in the matter of institutional procedures for processing grievances, an area dealt with in very general fashion in Section 15 of the *Recommended Institutional Regulations*. While the same kinds of detailed grievance procedures do not tend to be applicable for all institutions, this Committee believes that the publication of sound existing grievance procedures which meet Association standards of due process would serve as useful models to members of the profession, both at those institutions which have not yet established formal procedures and at those whose present procedures have not proven satisfactory. Our Committee has, therefore, recommended such publication to the staff and to the Editor of the *Bulletin*. We are pleased to report that comprehensive grievance procedures recently developed at a regional state university are being considered for publication in the forthcoming issue. We also wish to encourage the staff to continue its program of assisting faculties and administrations at particular institutions in the establishment of suitable grievance procedures and to consider some elaboration of the general principles laid down in Section 15 of the *Recommended Institutional Regulations*.

The Committee recognizes that sound procedures may not in and of themselves be sufficient to get to the root of the problem of discrimination, particularly these kinds of discrimination which have been allowed to exist for generations. The cultural conditioning which has permitted our profession, which in its teaching role should set the example for society in these matters, to accept without question different standards of treatment for certain groups of people, may well impede fair consideration of the elements of an individual's situation within the context of a grievance hearing. It is, therefore, highly important that the Association make concerted efforts to bring the problems of discrimination to the attention of the entire profession and to impress upon the profession the need to change the attitudes and the structures which have allowed the perpetuation of inequitable situations.

Patterns of Discrimination

The committee believes that complaints of discrimination against particular individuals generally can and should be processed adequately under existing Association policy and procedure, particularly if the Association's position on improper discrimination is clarified in the manner we have proposed. A more elusive problem, however, presents itself where *patterns* of discrimination are alleged to exist. The Committee believes that Association policy and structure do not in most instances provide a sufficient basis, and Association resources are certainly not adequate, to mount a comprehensive program of investigation and admonition regarding the problem of discrimination as a pattern, as opposed to discrimination against a specific individual.

Let us be more explicit. In a situation where the faculty has perceived and challenged conditions of discrimination, and where the administration or governing board has not been responsive to faculty efforts to remedy the existing situation, a group of faculty members might under present policy request the General Secretary to authorize an investigation of a situation which poses serious issues of adequacy of governance. In such a case, discrimination practiced by an institutional component, which has failed to respond to expressions of concern from faculty, might lead to an Association investigation and a resulting published report.

The Committee on Discrimination well realizes, however, that the Association cannot rely exclusively upon the *Statement of Government* and the *Standards for Committee T Investigations* as constituting sufficient means to meet the concerns of last year's Annual Meeting. In too many cases it is the faculty itself, or a significant portion of it, which has opposed change in such areas as appointment policies. Improperly utilizing the principle of preserving quality, faculty members responsible for recommending appointments have denied entrance to the academy to women and to persons of minority race and background. Faculties have likewise doubtless been influenced by existing patterns which lead to discrimination based on improper considerations in such matters as salary, retention, promotion, and service on decision-making bodies.

In order for the AAUP appropriately to respond to a request from its members that it censure institutions which discriminate, particularly in cases where it might justly be contended that the faculty itself has contributed to the perpetuation of discriminatory practices and patterns, it would be necessary to devise comprehensively applicable standards for such investigation, so as to measure discrimination out of the context of individual injury and of faculty judgment scorned. Such standards might speak to policies and practices whose discriminatory effect has been establihed, e.g. antinepotism policies and exclusionary systems of recruiting. These standards presumably would also require a nationally applicable measure of discrepancy in rates of salary, promotion and retention. Even assuming that genuinely useful standards could be devised, the absence of the kind of subpoena power which contributes to the operations of the Federal government in this area would make it difficult to establish that discriminatory considerations contributed to the pattern of inequality which is perceived. Equitable standards for investigation would require a showing that the discriminatory treatment persists even after it has been established as such, that it is perceived by those who might act to remedy it and can thus be interpreted as intentional, and that normal avenues for local correction have been explored without substantial success. These troublesome factors reveal the necessary limitations in what can be done by way of enforcement by a professional organization such as AAUP.

Despite these reservations, our Committee has not foreclosed the possibility that the Association would review, as a matter of national concern, cases or conditions involving patterns of discrimination. If *prima facie* conditions of discrimination exist in a given case, and *if no acceptable process is being developed within the institution through which the conditions might be remedied*, a formal Association investigation might well be appropriate, so that the given instance of unrectified conditions of discrimination can be brought to the attention of the entire profession through a published report.

Recommendations to Institutions

The Committee on Discrimination is convinced that the Association can and should take an active role in pointing to practices which foster discrimination or allow it to continue, and that it can be very effective in this role. The Association should assist the academic community in recognizing its responsibility not only to stop discriminating, but to take further steps to see that the effects of past discrimination are eliminated as rapidly as possible commensurate with the maintenance of sound academic standards. The Association should encourage institutions to develop a realistic appreciation of their record in the treatment of women and minority groups, and to develop programs of remedial action to correct inequities which may be found to exist. There are a number of effective approaches:

1. An institution should make explicit its commitment to equal opportunity for all persons and should announce this policy to all those involved in decisions on faculty appointment or advancement, and to all those with whom it consults in seeking candidates for appointment or in deciding questions of advancement.

2. Faculty vacancies should be publicized as widely as possible, and application invited from all interested and qualified persons. (Appointing officers or committees seem frequently not to have been aware of the availability of women or persons of minority race or background because customary recruitment practices have not tended to bring forth their candidacies. Word-of-mouth recruitment has worked a disservice both to candidates and to institutions to the extent that it has limited opportunity for appoinment for reasons unrelated to potential merit and has narrowed the range from which an institution can draw promising candidates.)

3. Colleges and universities would be well advised to charge a faculty committee with studying institutional practices concerning appointments, salaries, tenure and other features of professional status, to determine whether patterns of unwarranted discrimination exist. (Where such studies have been undertaken, they have been of considerable value in calling the attention of faculty members and administrative officers to potential abuses and in educating the academic community to the importance of equal opportunity.)

4. The most appropriate mechanism for arising and resolving cases of prejudicial treatment is effective institutional grievance procedures. We reiterate our concern that colleges and universities still lacking such procedures move promptly to develop them, so that grievances relating to discrimination can be heard and necessary corrective action can follow.

It is no our purpose to set forth a comprehensive model program for affirmative action; examples have been or are being formulated by learned societies, by agencies of the Federal government, and by individual colleges and universities. As in the matter of grievance procedures, the particular programs applicable to a given institution will undoubtedly differ. This Committee urges that the Association's staff remain in close touch with these developments and provide assistance to faculties and administrations which ask for it. We are pleased to report that the staff has been in close touch with the Federal government as it develops policy in this area, and we urge continued surveillance of the government's program to eliminate discrimination. In view of new legislation which extends the authority of the Federal government in matters of discrimination into a far broader area than is the case at present, the Association should be especially concerned to see that the role of the Federal government is not allowed to supersede the appropriate responsibilities of the faculty.

Affirmative Action

The Committee on Discrimination thinks it appropriate in this report to speak to the issue of affirmative efforts to redress the effects of past discrimination in college and university faculties, efforts undertaken under governmental pressure or, to be preferred, in response to concerns from within the academic community. Under the *Statement on Government of Colleges and Universities*, matters concerning faculty status are primarily a faculty responsibility. We believe that this responsibility carries with it an obligation to make decisions affecting faculty status on the basis of standards of judgment which have not on their face excluded certain groups of people, standards which have not served to limit opportunity for certain groups of people because of considerations other than academic merit. We wish to stress that the concept of affirmative action calls for rejection of standards and practices which do not allow equal opportunity for all who may be qualified. It calls for genuine and tangible efforts to bring into faculties members of those groups which have previously been denied full equality of opportunity. Under an affirmative action program, a faculty is asked to reassess its recruiting practices and, if necessary, to attempt to expand the sources from which it has traditionally drawn its new members. Affirmative action may also imply that a faculty consider providing advantage in the selection process for previously excluded groups, as a result of a faculty's desire to look to such additional factors, in evaluating an individual's potential contribution to the institution, as the values which diversity in perspective and experience may infuse into the academic program as a whole. A properly conceived affirmative effort, it must be emphasized, neither requires nor implies the placement of unqualified persons in any position, nor does it require the dilution of valid standards for appointment or promotion to any position. It does, however, make possible a broader interpretation of the criteria which have defined the parameters of academic excellence when this is deemed desirable by those responsible for decisions in this area. We do not believe that the imposition of statistical quotas for hiring by external agencies is either appropriate or necessary. We are convinced, however, that faculties which have not yet done so are likely to benefit by reexamining the procedures and the considerations which over the years have guided their decisions relating to appointment and promotion of faculty, and by moving promptly, when necessary, to insure that all are given a full opportunity to enjoy those benefits and to undertake those responsibilities which are a concomitant of faculty membership.

Finally, our Committee wishes to express its support of members who are keenly interested in drawing the Association as actively as possible into the effort to eliminate prejudice and injustice in our institutions of higher education. The Association has, we believe, a special responsibility to the profession and to the entire academic community to press for reform of discriminatory practices and conditions on the local scene and to take a firm position on the national level in favor of a responsible and positive program to eliminate discrimination.

BEATRICE G. KONHEIM,
(Biological Sciences), Hunter College, Chairman.
PAUL D. CARRINGTON,
(Law), University of Michigan.
BUTLER A. JONES,
(Sociology), Cleveland State University.
GLENN R. MORROW,
(Philosophy), University of Pennsylvania.
LAWRENCE K. PETTIT,
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MARGARET L. RUMBARGER,
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APPENDIX G

AFFIRMATIVE ACTION IN HIGHER EDUCATION

A REPORT BY THE COUNCIL COMMISSION ON DISCRIMINATION

The Report which follows was presented in April, 1973, to the Council and to the Fifty-ninth Annual Meeting.

The Council Committee on Discrimination has been directed to formulate a position on the role of affirmative action in the elimination [illegible] discriminatory practices in academic recruiting, appointment, and advancement. In doing so, we begin with the premise that discrimination against women and minorities in higher education is both reprehensible and illegal, and reaffirm the emphatic condemnation of such practices by the AAUP.

More particularly, it is to the specific meaning and implications of affirmative action that our concern is directed, and especially to the question of so-called "preferential" or "compensatory" treatment of women and minorities. Because the phrase "affirmative action" has been assigned such extraordinarily different meanings by different persons and agencies, however, we mean to set the tone for that Report at the beginning by stating our own position as to what it must mean consistent with the standards of the AAUP. It is that affirmative action in the improvement of professional opportunities for women and minorities must be (and readily can be) devised wholly consistent with the highest aspirations of universities and colleges for excellence and outstanding quality, and that affirmative action should in no way use the very instrument of racial or sexual discrimination which it deplores.

The plans which we commend are those which are entirely affirmative, *i.e.*, plans in which "preference" and "compensation" are words of positive connotation rather than words of condescension or *noblesse oblige*—preference for the more highly valued candidate and compensation for past failures to reach the actual market of intellectual resources available to higher education. The Committee believes that the further improvement of quality in higher education and the elimination of discrimination due to race or sex are not at odds with each other, but at one. What is sought in the idea of affirmative action is essentially the revision of standards and practices to assure that institutions are in fact drawing from the largest marketplace of human resources in staffing their faculties, and a critical review of appointment and advancement criteria to insure that they do not inadvertedly foreclose consideration of the best qualified persons by untested presuppositions which operate to exclude women and minorities. Further, faculties are asked to consider carefully whether they are requiring a higher standard and more conclusive evidence of accomplishment of those women and minorities who are considered for appointment and advancement. What is asked for in the development of an affirmative action plan is not a "quota" of women or blacks, but simply a forecast of what a department or college would expect to occur given the *non*discriminatory use of *proper* appointment standards and recruiting practices—with the expectation that where the forecast turns out to be wide of the mark as to what actually happens, the institution will at once make proper inquiry as to why that was so. In essence, it is measures such as these which the Committee believes to be required by the Office for Civil Rights of HEW of universities using federal funds, and we do not see that there is in such requirements anything which the AAUP should find inconsistent with its own goals. Indeed, there may be more reason for concern that affirmative action of this kind which is critical to the abatement of discrimination may fail to be pursued with vigor than that it may be pursued too zealously. At the present moment, the politics of reaction are a greater source for concern than the possibility that affirmative action might lend itself to heavy-handed bureaucratic misapplication.

1. Defining the Criteria of Merit

"Excellence" and "quality" are not shibboleths with which institutions of higher learning may turn away all inquiry. Rather, they are aspirations of higher education which are thought to be served by seeking certain attributes and skills in those to be considered for academic positions. Some of these appear almost intuitively to be clearly related to certain standards customarily used by universities, others less obviously so but nonetheless determined by experience to "work," and still others are not infrequently carried along largely by custom and presupposition. Where a long period of time has passed since any serious study has been made to review the effects and the assumptions of stated or unstated standards of appointment and advancement (or where no study was ever made, but the standards were simply adopted on the strength of common custom and plausible hypothesis), it would be reasonable in any case to expect a conscientious faculty to reconsider the matter from time to time. When the use of certain unexamined standards tends to operate to the overwhelming disadvantage of persons of a particular sex or race who have already been placed at a great disadvantage by other social forces (not exclusive of past practices within higher education itself), it is even more reasonable to expect that an institution of higher learning would especially consider its standards in light of that fact as well: to determine whether it is inadvertently depriving itself of a larger field of potential scholars and teachers than simple economy requires, even while compounding the effects of prior discrimination generally.

We cannot assume uncritically that present criteria of merit and procedures for their application have yielded the excellence intended; to the extent that the use of certain standards has resulted in the exclusion of women and minorities from professional positions in higher education, or their inclusion only in token proportions to their availability, the academy has denied itself access to the critical mass of intellectual vitality represented by these groups. We believe that such criteria must thus be considered deficient on the very grounds of excellence itself.

The rationale for professional advancement in American higher education has rested upon the theoretical assumption that there is no inherent conflict between the principles of intellectual and scholarly merit and of equality of access to the academic profession for all persons. In practice, this access has repeatedly been denied a significant number of persons on grounds related to their membership in a particular group. In part, this denial of access has resulted from unexamined presuppositions of professional fitness which have tended to exclude from consideration persons who do not fall within a particular definition of the acceptable academic person. This is in part, but only in part, a function of the procedures through which professional academics have been sought out and recognized within the academy. Insofar as few are called, the range of choice must necessarily be a narrow one, and those fewer still who are chosen tend to mirror the profession's image of what it *is*, not what it should or might be. Beyond procedural defects, however, the very criteria by which professional recognition is accorded have necessarily tended to reflect the prejudices and assumptions of those who set them, and professional recognition and advancement have generally been accorded those who most closely resemble the norm of those who have in the past succeeded in the academy.

It is therefore incumbent upon the academic community, as the first test of equal opportunity, to require something more: that the standards of competence and qualification be set independently of the actual choices made, ostensibly according to these standards; for otherwise, a fatal circulatory ensues, in which the very standards of fitness have no independent parameters other than survival itself.

Where a particular criterion of merit, even while not discriminatory on its face or in intent, nonetheless operates to the disproportionate elimination of women and minority group persons, the burden upon the institution to defend it as an appropriate criterion rises in direct proportion to its exclusionary effect. Where criteria for appointment or promotion are unstated, or so vaguely framed as to permit their arbitrary and highly subjective application in individual cases, the institution's ability to defend its actions is the less. While we do not mean to suggest that criteria for academic appointment and advancement be reduced to an easily quantifiable set of attributes or credentials, all of which might be possessed uniformly by a large number of persons otherwise wholly unsuited to the position in question, we are convinced that a reluctance or inability to explicate and substantiate the criteria and standards employed generally and in a given instance does nothing to dispel the notion that something more than chance or intuition has been at work.

2. *The Critical Review and Revision of Standards for Academic Appointment and Advancement*

The range of permissible discretion has been the norm in reaching professional judgments offers both a hazard and a valuable opportunity to the academic community. The hazard stems from the latitude for the operation of tacit and inadvertent or explicit prejudices against persons because of race or sex, and their consequent exclusion on indefensible grounds when the standards are clearly met; the opportunity stems from the posibility for broadening the Internal criteria for choice in accordance with a general notion of excellence, and hence expanding that notion.

As faculty members keenly aware from our own experience that it may not be possible to verify every consideration taken into account or to experiment wildly, we cannot, of course, urge an abandonment of common sense or common experience. Nor, frankly, have we learned of anything in the specifics of the HEW Guidelines which does so. Rather, what is called for is a review to determine whether we have taken too much for granted in ways which have been harmful, to an extent that institutions themselves may not have known, and a consideration of alternatives which would be neither unreasonable nor unduly onerous in the avoidance of inadvertent discrimination and unwarranted exclusion. Specifically, the review and revision of criteria for academic appointment and advancement should be sensitive to the following considerations:

(a) The greater the effect of a given standard in diminishing the opportunity of women and minorities for possible appointment, the greater the corresponding responsibility to determine and to defend the particular standard as necessary and proper. The disqualification of larger percentages of women and minorities by standards which are only hypothetically related to professional excellence may, understandably, invite skepticism and inquiry.

(b) Standards which may serve valid professional and institutional interests, but which are more exclusionary than alternative standards sufficient to serve those interests, should be reconsidered in light of the less exclusionary alternatives. For instance, an institution-wide antinepotism rule is doubtless connected with a legitimate interest to avoid conflicts of loyalties among faculty members, but its exclusionary effect is far broader than a rule that requires faculty members to excuse themselves from participating in particular decisions involving family members, and in practice the exclusionary effect of overly broad antinepotism rules has overwhelmingly disabled a far greater proportion of women than men from consideration for academic appointment. The AAUP has already called for the curtailment of such rules.

(c) Criteria adopted to limit the field of eligible candidates largely (if not exclusively) for reasons of administrative convenience or out of past habits especially need to be reconsidered. For example, candidates may be sought only from those few graduate programs which in the past have provided the majority of the institution's staff; or application may be limited only to those who have had prior teaching experience. To the extent that such a policy of presumed efficiency excludes persons who may be equally excellent, the interest of economy should be carefully weighed against the tendency of the standard to disqualify a disproportionate number of women and minority persons.

(d) The overall excellence of a given department may be better assured by considering its existing strengths and weaknesses and, accordingly, varying the emphasis given to different kinds of individual qualification for appointment from time to time, rather than applying a rank-order of standards of fitness identically in every case. The failure to consider appointments in terms of a balance of qualities within a department may in fact result in less overall excellence than otherwise. Exactly as excellence of a *total* department is the goal, consideration of different kinds of skills and interests in different persons becomes important in order to maintain that kind of excellence and to liberalize the emphasis given to the appointment of persons stronger in certain respects than those in which the department is already very notable.

We would go further in this observation. An institution which professes to be concerned with many things must not only indicate by its appointment practices that it means what it declares, it must act consistently with that declaration thereafter in the advancement, salary, and respect for the appointee. It is unacceptable and hypocritical to make an appointment of a candidate based on a belief that that candidate, whose strongest assets are different from those of the existing faculty, is appointed precisely because his or her strengths are valued in what they add to the quality of the department, and thereafter nonetheless treat that person as less valuable when it comes to subsequent consideration in respect to salary, tenure, and similar considerations.

(e) The consideration of diversity of characteristics among the faculty of a given department or institution may be relevant to excellence and to affirmative action in an even larger and more important sense. Ordinarily, an institution would never think to list a narrow range of "age" as a categorical criterion of eligibility for academic appointment, precisely because it is a wholly inappropriate means of categorically eliminating great numbers of people who may be as well qualified or better qualified than others. To restrict eligible candidates as a general and categorical matter to persons between, say, thirty-five and fifty years old would be thrice wrong: it unduly narrows the field of excellent people by an exclusionary standard which may work against the achievement of the highest quality of faculty obtainable; it is discriminatory and unfair to the well-qualified persons whom it categorically excludes; it may weaken the faculty in the particular sense of staffing it in a flat and homogeneous manner, depriving it of perspectives and differences among persons of more diverse ages.

It is nonetheless true that a characteristic which may be indefensible when used as a categorical standard of ineligibility is neither inappropriate nor invidious when it is taken into consideration affirmatively in choosing between two or more otherwise qualified persons, when it is related to securing a larger diversity than currently exists within the faculty. As between two otherwise well-qualified persons, a general concern for balance and the subtler values of diversity from the heterogeneity of younger and older faculty members has quite commonly found expression in resolving a preference between two candidates for a given position—never as a reflection upon, or as an "exclusionary" device against, the one, but as a relevant factor in light of the existing composition of the faculty.

The point may be generalized: meeting a felt shortage of tenured professors by preferring a more experienced and senior person; breadening the professional profile within a department, most of whose faculty secured their degrees from the same institution, by preferring in the next several appointments well-qualified persons of a different academic graduate exposure or professional background; leavening a faculty predominantly oriented toward research and publication with others more interested in exploring new teaching methods, and vice-versa. It is useless to deny that we believe such considerations are relevant, as indeed we familiarly and unselfconsciously take them into account all the time, and rightly so; never in lieu of seeking the "best qualified person," but as contributing to a sensible decision of what constitutes the best qualified person in terms of existing needs and circumstance.

As we do not think this Association would disapprove conscientious efforts by academic faculties to register an affirmative interest, as they often have, in the positive improvement of their departments in the several ways we have just illustrated, but rather that this Association would (and does) regard those efforts as wholly conducive to fairness and quality, we do not see any sufficient reason to be less approving in the affirmative consideration of race or sex. We would go further to say that special efforts to attract persons improve the overall diversity of a faculty, and to broaden it specifically from its unisex or unirace sameness, seem to us to state a variety of affirmative action which deserves encouragement. A preference in these terms, asserted affirmatively to enrich a faculty in its own experience as well as in what it projects in its example of mutually able men and women, and mutually able blacks and whites, seems to us to state a neutral, principled, and altogether precedented policy of preference.

The argument to the special relevance of race and sex as qualifying characteristics draws its strength from a recognition of the richness which a variety of intellectual perspectives and life experiences can bring to the educational program. It is more than simply a matter of providing jobs for persons from groups which have in the past been unfairly excluded from an opportunity to compete for them; it is a matter of reorganizing the academic institution to fulfill its basic commitment to those who are seriously concerned to maintain the academic enterprise as a vital social force. The law now requires the elimination of discriminatory practices and equality of access for all persons regardless of race or sex: moral justice requires an end to prejudice and an increase of opportunities for those who have been denied them in the past by prejudice; enlightened self-interest requires that an institution reexamine its priorities where standards of merit are concerned, to revitalize the intellectual life of the community through the utilization of heretofore untapped resources. Most important, insofar as the university aspires to discover, preserve, and transmit knowledge and experience not for one group or selected groups, but for all people, to that extent it must broaden its perception of who shall be responsible for this discovery, preservation, and transmission. In so doing, it broadens the base of intellectual inquiry and lays the foundation of more human social practices.

(f) It is far from clear that every qualification we may associate with excellence in teaching and research is in fact as important as we are inclined to view it, or that our predisposition to certain qualities we habitually associate with significant scholarship is as defensible as we may earnestly suppose. There is, as we have noted, a certain circularity in the verification of standards insofar as professors may discern "excellence" in others who resemble themselves, and thus, by their appointment and advancement decisions, generate the proof that merit is the function of those resemblances. It is also far from clear that some degree of frank experimentation in academic appointment would not yield significant information in terms of how a faculty decides what is to be taught, or what is an appropriate or interesting subject for research and publication. It is surely not impossible, for instance, to question whether what is not taught and what is not researched is at least as much a function of parochialism and endless circularity of education-and-teaching as it is a function of wise perspective in determining what is truly important. The point need not be labored, however, for the professional literature concerned with higher education has itself repeatedly expressed these same concerns.

Nevertheless, the point has relevance to an affirmative action plan in the following sense. An institution appropriately concerned with its own continuing development may well wish to involve a component of experimentalism in its own staff policies—deliberately reserving discretion to depart from standards and criteria it generally employs precisely as a means of determining whether there may be important scholarly and educational functions to be served by standards different from those it ordinarily applies. The selection of some faculty "out of the ordinary" is itself very much a part of an institution's continuing concern with excellence in this sense. The preference for candidates who bring to a particular position certain differences of experience and background which the university may very properly be reluctant to adopt as a general matter in advance of any oportunity to determine what kind of difference they may make, but which it needs to take into account in order to have that opportunity, is neither invidious to others nor irrelevant to a university's legitimate aspirations. This consideration, while it exists quite apart from the need for an affirmative action plan in the improvement of equal opportunity for women and minorities, may nevertheless affect and help to broaden the design of that plan.

3. The Review and Revision of Academic Recruitment Policies

It must be obvious that even the most conscientious review and revision of eligibility, appointment, and advancement standards can have little effect in the shaping of academic faculties independent of recruiting practices. Even supposing that all of the preceding concerns for excellence, diversity, and experimentalism are nominally composed in the standard of a department or institution, they may yield very little if the manner in which the department goes about the business of finding qualified persons is itself so confined that in fact only a very few qualified persons are likely to turn up, and these not necessarily the best qualified. Additionally, it is now abundantly clear that certain conventional ways of locating possible candidates may operate to the disproportionate exclusion of women and minorities from equal opportunity for consideration—not necessarily as a consequence of willful discrimination but as a practical matter nonetheless. It is natural, for instance, that members of an appointments committee would seek names of possible candidates from acquaintances at other institutions—and that the resulting suggestions may substantially understate the availability of interested, qualified women and minority persons in a number of ways. For example, the institution from which the references are sought may be one which has proportionately fewer women or minority groups among its graduates or graduate students than other institutions. Or, the acquaintances providing the reference may act on presuppositions respecting the interest, qualification, or availability of women and minorities, and thus underrepresent them in their references.

Even if we were to assume, therefore, that there is no *willful* discrimination against women and minorities in the easy custom of recruiting principally by personal inquiry and reference, still the consequence of exclusion by inadvertence is grossly unfair—and altogether inconsistent with the development of excellence in higher education.

The call for affirmative actions plans provides an occasion we believe is long overdue—to re-examine recruiting practices and patterns, and to revise them with the specific ambition of broadening the field of persons whose interest and qualifications the institution should want to know of and correspondingly providing them an opportunity to express their interest. In our view, this is an area in which we should be particularly concerned with "under-utilization" of qualified women and minority persons, *i.e.*, that customary and unexamined parochialism in recruiting practices seriously understates the availability of persons fully qualified according to an institution's own standards, and that they do so disproportionately with respect to women and minority persons.

The Committee does not think it feasible to blueprint the particular ways in which each discipline, department, or institution can best proceed consistent with reasonable economy—for the means of reaching larger numbers of qualified candidates differs considerably from discipline to discipline. In nearly all cases, however, it may be necessary to assess academic staffing needs more in advance of the time when the appointment is itself to be made, *i.e.*, to provide greater lead-time in order that new ways of locating additional qualified persons can be given a chance to work successfully. In some disciplines, moreover, it may be feasible through national professional associations to enlist the aid of a national service, readily providing a point of contact between interested candidates and available positions, vastly improving the field of available candidates with very little expense or time to a given department. For more than a decade, the Association of American Law Schools has provided a directory and registry for those interested in law teaching, for instance, and its use by a great number of law schools is now exceedingly well established. Similarly, many of the disciplinary associations in the humanities and social sciences operate professional registers and employment information bulletins, which provide a mutually satisfactory opportunity for prospective applicants and employers to make themselves known to one another. Far from being regarded as introducing an unhelpful and inefficient element in recruiting, such services should be seen as contributing to the efficiency and quality of academic staffing.

Finally, given the procedural inequity of past recruiting practices which have not only worked with discriminatory effect against women and minorities but which may well have had an additional effect of discouraging their interest in considering an academic career, we believe that a highly principled argument for preference and compensation may be made which bears on the generation of the pool of candidates to be considered. Since good evidence exists to support the claim that overwhelmingly there has been an initial skewing of the candidate pool in traditional search and recruitment procedures, it may reasonably be argued that equity itelf now requires a certain "preference" whose effects are "compensatory" in the special sense that more attention and care shall be paid where little or none was paid before; and this is not to the *special* advantage of women or blacks, for example, but for the equalization of their opportunity, in the face of prior disadvantage. Such preference and compensation does not discriminate against majority candidates, but puts them on an equal footing for the first time.

4. Statistical Forecasts under an Affirmative Action Plan, and the Monitoring of Equal Protection

Litigation and government inquiry are substantial risks in any case where the observable facts do not seem to support a claim of nondiscrimination. Historically, the relevance of statistics as a means of shifting the burden to come forward with evidence has most frequently been allowed by courts in respect to racial discrimination and the right to trial by jury. As the actual means which may have been used to compose a jury list are often not subject to public view, it proved virtually impossible for black defendants to establish that the persistent absence of blacks from grand juries and trial juries was, *in each particular case*, the result of willful discrimination. Where a comparison of census figures respecting the proportion of jury-eligible blacks in a given community would give rise to an expectation that over a substantial period of time approximately the same proportion of persons called for jury duty would similarly be black, but where in fact few or none were black, it became familiar that the federal courts would regard the fact of a continuing and significant disparity as yielding a *prima facie* inference that racial discrimination was a contributing element. The effect of the inference was to shift to the state the duty to come forward with evidence which would explain the result on grounds other than racial discrimination. Without doubt, this development in the law—which now has analogues in many other areas as well, including employment—was important to the effective detection and remedying of racial discrimination. We have thought it important to recall this fragment of civil rights history as a useful way of placing in perspective our several observations about "goals" and "targets," which have become misidentified as "quotas" in the litany of criticism of affirmative action plans.

In accordance with present requirements of the federal government, a "goal" and the timetable for its fulfillment are to be set by the institution itself. This means the arriving at the "goal" include exactly the kind of measures we have already discussed in the review and revision of criteria of eligibility and the review and revision of recruiting practices. In this framework, the "goal" is nothing more or less than an expectation of what an institution has reason to suppose will result under conditions of nondiscrimination, given its standards and recruiting practices, in light of the proportion of those within the field of eligibility and recruitment who are women or members of minority groups. Indeed, the word "goal" is itself something of a misnomer insofar as it suggests that the production of percentages is some kind of end in itself. Rather, what is contemplated is the specification of an expectation as to what the institution has reason to believe should appear in the ordinary course of events, given valid criteria of eligibility, proper recruiting practices, and the fair and equal consideration of equally qualified women and minority members in the actual course of selecting among candidates. Essentially, it is an arrangement which leaves open to public review the logic by which the expectation was determined, the general legality of standards which inform the criteria applied in personnel actions, the technical quality of the statistical analyses upon which conclusions are reached, and the degree of integrity with which an institution has adhered to a procedure which it has itself designed. The Committee on Discrimination believes that this part of an affirmative action plan is entirely proper and extremely important in several respects:

(a) Depending upon the unit for which the forecast is made, it will enable an institution to continue a policy of decentralized appointments recommended by the faculties of its respective departments and colleges, while simultaneously providing it with a means of insuring that racial and sexual discrimination is not in fact contributing to those staffing decisions;

(b) It provides the government agency responsible for making certain that institutions assisted by public funds are not in fact violating executive, statutory, and constitutional requirements of equal protection with a means of fulfilling that responsibility;

(c) It provides the institution with a means of rebutting allegations of racial or sexual discrimination, insofar as simplistic impressions of disproportionality might otherwise support an inference of discrimination where, in fact, no such inference is warranted.

Beyond this, conscientious efforts to project personnel needs and to forecast the extent to which affirmative action plans should tend to make a real difference in the employment opportunities of women and minority persons may serve a broader interest as well. As citizens as well as educators we will all have a common interest in attempting to determine how effective our separate and combined efforts are likely to be in the abatement of discrimination and the amelioration of effects from past discrimination. The knowledge these efforts can help to provide is not without significance in assessing whether or not we have done too little in this sensitive area of civil and human rights. It may help, moreover, not only to fortify the thinking of institutions of higher learning in terms of their own role, but in considering more knowledgeably what attention needs to be given to other institutions as well—institutions not involved in higher education, but whose existence and operation nonetheless profoundly affect the equal opportunity of women and minorities.

To be effective even in the three respects we have noted, however, it is obvious that additional material and records must be made and maintained by the university—information to be periodically supplied by the various departments and colleges. An institution's willingness and ability to keep a careful and accurate record of personnel actions is of paramount importance. Among these is the requirement that educational institutions collect and analyze personnel statistics by race and sex, so to determine whether there is cause for inquiry and explanation where actual staffing practices fall short of expectations under a policy of nondiscrimination. The same need to establish reliable information on actual recruiting practices under an affirmative action plan also holds.

Finally, we think it important to note again the point, purpose, and relationships of the several parts of an affirmative action plan. It is a plan which is well designed to improve both quality and equal opportunity, but it is a plan which makes an assumption. It assumes that institutions of higher education are what they claim they are—and that all of us as teachers and professors are also what we say we are; that we mean to be fair, that our concern with excellence is not a subterfuge, that we are concerned to be just in the civil rights of *all* persons in the conduct of our profession. If the assumption is a false one, then it will quickly appear that affirmative action plans can go the way of other proposals which are intellectually sound but which so frequently fail in their assumptions about the nature of people. For without doubt, the temptation will appear to the indifferent and the cynical to distinguish between the appearance and the substance of such a plan and to opt for the appearance alone: the token production of "adequate" numbers of women and blacks to avoid the likelihood of contract suspensions or HEW inquiry, even while disparaging their presence and assigning the "blame" to the government. We do not doubt in this respect that institutions of higher learning will thus reveal more about *themselves* in the manner in which they respond to the call for affirmative action, however, than what their response may reveal about the consistency of such plans with excellence and fairness in higher education. For its own part, the Committee on Discrimination believes that plans reflected in the body of this Report are entirely sound and congenial to the standards of the AAUP, and we commend them for the opportunity they provide for the further improvement of higher education as well as for their contribution to the field of civic rights.

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Prepared Statement of Mary Gray, for Committee W, of the Status of Women in the Academic Profession, American Association of University Professors

You have heard the Association's position on affirmative action. I would like to present the concerns of Committee W on the Status of Women in the Academic Profession concerning the failure of Federal agencies to move vigorously in this area.

The critics of affirmative action would have you believe that the federal agencies—in particular the Department of Health, Education and Welfare—have massively invaded the nation's university campuses and arbitrarily and unwisely forced the hiring of hundreds of underqualified women and minority group members.

None of these allegations has been supported by evidence. Indeed if there has been some "interference" in traditional hiring policies, it is precisely because these policies had led to the almost total exclusion of women and minorities from the faculties of our major universities. Finally, at least at the untenured beginning level, more women are being hired. Perhaps there have been a few cases of abuses, of the less qualified candidate being selected in attempts to satisfy affirmative action requirements, but hardly a sufficient number of such incidents to justify the elimination of Executive Order requirements from university contracts, or to stop the application of Title VII and the Equal Pay Act to faculty employment.

What is needed is not the exclusion of universities from the requirements of Revised Order 4 or other regulations, but a more intelligent and informed enforcement by HEW and a more intelligent and informed commitment to equal opportunity and affirmative action on the part of the nation's universities and colleges.

Several assumptions of those engaged in the recent spate of affirmative action criticism are unsupported by evidence. It is undoubtedly true that there is a scarcity of women available for tenured appointments at major universities in some fields. However, qualified women are not non-existent. A statement which has been repeated so much that it is taken as gospel by the affirmative action opponents is that there are, at most, one or two women qualified for tenure appointments in the top dozen mathematics departments in the country. In fact, there are more women than that already in such positions.

Moreover, there are dozens of women mathematicians in untenured positions at these schools, some of whom certainly are qualified to move into tenure slots. In the top three or four dozen universities, there are many more women in tenure positions—as many as four in one department—some of whom could be considered for positions open at the top schools. The pool of male mathematicians counts those men available in other countries. If we count in the same way for women, we see that in Paris alone there are four or five women full professors in mathematics.

Since many of the major universities have mathematics faculties approaching one hundred members, and since over 8 percent of last year's Ph. D.'s in mathematics went to women, it is not unrealistic to set hiring goals of one or two women for such departments.

There are several difficulties which I have seen when recruitment for top positions occurs in a math department. Frequently, the department, after determining the special field it needs or wants, pre-selects an individual within that area whom the department hopes to attract. Then the department specifies the exact specialty as the job description, so that not only are there no qualified women, but there may be at most one or two other qualified men. But faculties, no matter how liberal on other issues, tend to be extremely conservative when it comes to changing internal personnel practices. For example, a personal qualification which universities rarely consider important is the sensitivity and ability of the faculty member to help all students realize their potential.

At least one reason why there might be few so-called "qualified" women available for top positions is that women have been discriminated against as students in the admission policies of some of our most prestigious institutions. In addition, women have been awarded far fewer scholarships or fellowships, and some scholarships, such as the Fullbright, treated men and women on an unequal basis, even when an award was given. For example, for a long time a woman's spouse was not treated as a dependent for the purposes of additional funds as was a man's wife under the Fullbright program. Studies have also established that women have received fewer loans and in lower amounts for educational purposes. It is obvious that HEW has yet to recognize a woman's right to compete for prestigious fellowships since it has exempted the Rhodes Fellowship from Title IX coverage.

Women have sometimes dropped out at various stages of their careers. This is due to a variety of reasons, including lack of encouragement as well as overt discrimination. "Best qualified" is, of course, a subjective term—and it is sometimes used to justify a faculty's desire to reproduce itself or to applaud its own particular credentials. Women rarely fit into this network if it is dominated by men.

One hears talk of the massive hiring of women and the "reverse discrimination" against white men. Nevertheless, the unemployment rate for women with Ph.D.'s in mathematics continues to be almost double that for men, and there is no evidence that it is much different in other fields.

The Universities appear to be committed to *pro forma* affirmative action efforts. In fact, in some cases universities have hired the first woman to appear without any effort to find out whether she was the best qualified available woman, much less the best qualified candidate for the job. I have been told of situations where the lesser qualified of two women has been deliberately chosen so that she can be held up as [illegible] example of the failure of affirmative action to produce qualified faculty.

Some universities have invited women for interviews for jobs already offered to men simply in order to make their statistics look good. It is cruel to ask women to spend their time running around the country on *pro forma* interviews when they have already spent days sending out 300 to 400 job applications. It is cruel to question women about their marital status and present or future child care plans even if there is a possibility of their being offered the job, much less when the interview is only for the purpose of showing "good faith" effort. Such questions provide for "no win" answers. If the woman is married, the interviewer assumes her job is wrapped up with that of her husband. If she is not married, the interviewer wonders why not or assumes she will quit when she does marry. If she has children, the interviewer wonders how they will be cared for. If she has no children, the interviewer wonders when she will become pregnant. If she refuses to answer such questions, she is marked as a "women's libber" and a potential troublemaker.

Other universities have submitted as evidence of their affirmative action efforts, lists of women qualified for the position with the notation "won't move" after the names of women who have never even been contacted about the job. There is no evidence of the flooding of the few qualified senior women in mathematics with job offers and from my less extensive knowledge of other fields, I see very little of this elsewhere. Some women have reported receiving several offers only after it was known that they had accepted a position.

Moreover, at least in mathematics, there is no evidence of inflated salaries for women brought on by overcompetition for a few qualified candidates.

Let me describe situations at two institutions about which I am personally familiar. In the mathematics department of a large midwestern state university, there are no tenured women faculty. One of the two untenured women was notified last fall that she would receive a terminal contract for 1974–1975, and she began to search for a new position. This was, I should mention, after a two-year fight to overcome the institution's anti-nepotism rule and to be put on the tenure track so that she could even be considered for tenure and would at least be eligible for retirement and other fringe benefits as to which she had been excluded in her earlier career. She sent out several hundred applications for teaching and administrative posts for which she was well-qualified. In several interviews she was told she was too old; in others she was asked questions about children, husband's employment status, and family obligations. On several trips for interviews for mathematics teaching positions, she was not introduced to members of the mathematics faculty nor asked to give a talk on her work. On interviews for administrative posts, she was not given a chance to talk with those personnel who would obviously have an input into the hiring decision. Her references were not contacted. One school has even balked at reimbursing her for the travel expenses they originally agreed to pay. At the moment she is teaching where she was last year, on a terminal contract and still job-hunting.

In the same midwestern town there is a black woman with a Ph.D. in mathematics who, after years of trying to get a job appropriate to her qualifications, has taken a job as a programmer with a state agency. In spite of her degree from one of the very top mathematics departments in the country, she was never seriously considered for any of the many openings at the university in the town where she lives.

Recent women Ph.D. graduates of that same university's mathematics department have fared no better than the two women I have described above. One woman graduate has gone back to her native country after two years of fruitless job searching plus extensive additional study in applied areas of mathematical sciences. Another was given a temporary job at her *alma mater* and the position was renewed for a second year. Now she too is a programmer for the same government agency referred to earlier.

But at least these women have jobs. I know of many women Ph.D.'s in mathematics, some with substantial publication records, who are unable to get any employment except perhaps an occasional part-time teaching job which pays as low as $450 per semester course. At the six-hour teaching load of major universities, this would be a full-time salary of $1800 per year—*if* the women were lucky enough to get four courses to teach.

Now let us look at the institution on the West coast which granted a Ph.D. to the black woman described earlier. That institution has one of the top math departments in the country but has no tenured women faculty. They have one woman on the tenure track but she has been on leave for several years. The more cynical assert that that is why the appointment was made. There are two "faculty wives" who have occasionally taught courses, both distinguished mathematicians. One in fact has solved one of the major outstanding math problems of the century.[1] This department has recently hired a number of women in temporary lecturer positions. For the 1974–75 year the department had two tenure-track assistant professorships to fill. In January the positions were offered by the department to two men, but the dean refused to approve, citing lack of affirmative action effort. The mathematics department then sent out hundreds of letters asking for names of eligible women and minority group members. Letters inviting them to apply were then sent to those whose names were gathered or recommended. As a result 28 applications were received. All of these, together with those of the two men who had been offered the job originally, were reviewed by a committee in a brief meeting. The original offers were reconfirmed.

Many of those in the department who were involved in the futile exercise now admit that it was a *pro forma* affirmative action effort. However, lots of hopes were raised, lots of time was spent in good faith by those applying and those writing recommendations. This is not all. An eminently qualified woman who had earlier been a lecturer at the institution and was a research associate at the time of the "search" was not invited to apply. However, when it was pointed out to the committee that she should be considered (in fact they were erroneously told she had been invited to apply), she was rejected on the basis of a file several years old. No attempt had been made to update her records or to verify her so-called "application."

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[1] Known as, Hilbert's Tenth Problem.

I could continue to describe other phony "affirmative actions" efforts, other fruitless searches for employment. I could tell you of women turned down for promotion because they "didn't need the money"—because their husbands could support them; of a man told he could not be hired because the university administration demanded that a woman or black be hired. In fact the position had disappeared for completely different reasons. I could describe the incident of a search committee's rejecting a woman because they felt she was not tall enough to command the respect necessary to be dean; or the case of a department chairman taking away a teaching assistantship from a pregnant woman and giving it to a male graduate student who "needed the money" because his wife was expecting a child.

Agency enforcement of Title VII, Title IX, the Executive Order, and the Equal Pay Act will not eliminate all discrimination in higher education, but vigorous, intelligent enforcement will mean a better chance for equal opportunity for all.

Getting a first appointment at a good school may be crucial in getting papers published and in obtaining other forms of recognition. It is well known that the peer group review and referee systems are neither sex- nor institution-blind. Some progress has been made. Junior appointments at the major universities have been opened up so that at least a few more women will have the opportunity to do research in a stimulating atmosphere. This should mean that in a few years' time there will be an adequate supply of woman qualified for senior positions. However, even these advances have been made only under the threat of contract withdrawals. Universities cannot be left to their own devices.

What is desperately needed in affirmative action efforts is less attention to statistical computations and more attention to proper procedures for carrying out the sound principles of nondiscrimination. We need real commitment to expand opportunities for women and minority group members, and it is the responsibility of the Federal government to instill such commitment in universities as well as in other contractors.

This can be accomplished in several ways. First of all, intensive efforts are needed to increase the supply of qualified applicants. More women must be encouraged to study those subjects which have been traditionally male-dominated and must be given various kinds of support, both financial and moral, throughout their education and early careers. I have explained about how hiring can play a role in this. There must also be a shift in attitudes on the part of faculty and university administrators, and attention must be given to policies on leaves, antinepotism rules and other related areas where an institution's policies have been changed to reflect the requirements of federal laws and regulations.

Secondly, while faculty in general bear most of the responsibility for hiring, administrators do play a role, particularly in setting the tone. There has been practically no successful affirmative action effort in filling administrative posts, with the exception of specially created positions to deal with affirmative action itself. No major university has a woman president, very few have women vice presidents or provosts, and women deans still are for the most part found only in schools of nursing or home economics. There are few women department chairmen. Indeed, only one of the more than 100 math departments in the country with Ph. D. programs has a woman chairman.

It is often alleged that women lack administrative experience—but prior administrative experience is certainly not required of department chairmen and, in fact, many men who are hired as deans are hired on their promise, not on their experience. HEW should require university administrations in their affirmative action programs to look to themselves as well as to the filling of faculty posts.

The open listing of positions has helped both men and women job seekers. This practice should be encouraged and extended, with attention given to the proper sources within disciplines for advertising rather than encouraging a scatter-gun approach of sending notices to all women's groups whether or not they would have any contact with women qualified to fill the openings.

Finally, since there is a great deal of misinformation about the effects of affirmative action and no systematic study has been made, we would suggest that before any changes in the requirements are made, a review be undertaken by a commission with representatives of the various agencies, universities, of faculty organizations and various advocacy groups. Congressional funding of programs developed under the newly enacted Women's Educational Equity Act (H.R. 208) would be one way of implementing some of these suggestions. We look forward to support in this regard.

Respectfully submitted.

MARY GRAY,
Chairperson,
Committee W on the Status of Women in the Academic Profession.

Mr. DELLENBACK. And then in whatever order you care to present your statements, you can comment on or excerpt from or give us the benefit of what you would have to state.

Ms. POLOWY. Thank you.

I am Carolyn Polowy, and I am associate counsel and associate secretary for the American Association of University Professors and I am here today with Dr. Mary Gray, who is chairperson of the association's Committee W, on the status of women in the academic profession. Dr. Gray is also a professor of mathematics and statistics at American University here in Washington.

I would just like to briefly summarize what the association's position has been on affirmative action and the question of equal opportunities for all persons in higher education institutions.

As you probably know, from its inception, the association has been very concerned that an atmosphere of academic freedom be maintained in our higher education institutions and the association has recognized that it is impossible to have an atmosphere of academic freedom where human values are not espoused and where all persons aren't given an opportunity to participate in higher education.

To this end, the association has been very active in formulating models and standards, suggested standards, for higher education institutions, concerning aspects of academic freedom, academic tenure, and shared governance. These policy statements, many of which are attached as appendixes to my prepared statement, have had quite an impact on the establishment of procedures and regulations in our colleges and universities.

Some of the specific concerns about affirmative action came to the association's attention through the work of Committee W, our committee on women's issues, and that committee, which was reactivated in 1970, has done some very specific things to investigate policies in higher education institutions which militate against the advancement of women.

One statement that has been issued by Committee W and adopted by the association speaks to the problem of antinepotism regulations and has been incorporated in the operating procedures of many institutions.

The committee's statement on faculty appointments and family relationships recommended the discontinuance of antinepotism procedures or regulations, as they may exist, because the association concluded they had acted primarily to limit the opportunities of women in higher education institutions, although they may have been framed in neutral language.

The association also has adopted Committee W's recommended statement on leave of absence for child-bearing and family emergencies. This statement incorporated two policies. First of all, that all persons who are professors or research scholars in higher education institutions, have a right to fulfill their family obligations while fulfilling their professional obligations and that an institution should establish policies which permit these people, both men and women, to carry out their family obligations.

In terms of the particular difficulties of women, the statement supported fair maternity leave policies which are in agreement with title VII regulations and which provide for the types of benefits and the same duration as would be available under other types of leaves.

The association established in 1971 a committee to study discrimination issues and the committee took a special look at affirmative action.

In 1971, the executive orders were being enforced, well, beginning to be enforced, against higher education institutions and there was a great deal of concern in the Association about fair enforcement to improve the opportunities of women and minorities.

The association, at its annual meeting, suggested strong support for the efforts of HEW in the enforcement of affirmative action commitments and the Committee on Discrimination made several specific recommendations as to how an institution could carry out equal opportunity and affirmative action policies. Some of these recommendations included publicizing faculty vacancies. I am sure you have heard discussions about the problem that staff positions are often advertised more by word of mouth than through a system that permits wide exposure.

Another recommendation was for the establishment of a faculty committee to study, or make a systematic study of institutional policies to determine if any of those policies were working against the advancement of women and minorities.

Third, the committee recommended establishment of appropriate institutional grievance mechanisms to handle discrimination complaints, and I think the testimony of Mr. Rios established or shows the need for such grievance procedures.

The Committee on Discrimination also addressed itself to the issue of utilizing affirmative action to remedy past discrimination. At the outset, the committee expressed a desire that affirmative action, or the pressure for affirmative action begin within an institution and that faculty members in fact, initiate procedures for review of institutional standards. It would not be a situation of responding to outside forces if the institution began by policing itself.

Specifically, the committee recommended that all institutional standards be reviewed to establish whether there was discriminatory impact and that the notions of affirmative action be incorporated into hiring policies, retention policies, and promotion policies in higher education.

I think another aspect of the committee's report that was important was that the committee recognized if there was going to be a continuation of the shared governance system which the association had promoted for so long, that individual faculty members would have to be educated to their responsibilities; that is, if peer review is to work in a nondiscriminatory fashion, all of those involved in the review must understand the principle of equal opportunity.

In 1973, the Council on Discrimination reiterated these concepts and again gave its support to the implementation of affirmative action in higher education.

To summarize, I would just like to quote two paragraphs from that 1973 statement which I think express the association's position.

> The committee believes that the further improvement of quality in higher education and the elimination of discrimination due to race or sex are not at odds with each other, but at one. What is sought in the idea of affirmative action is essentially the revision of standards and practices to assure that institutions are in fact drawing from the largest marketplace of human resources in staffing their faculties, and a critical review of appointment and advancement criteria to insure that they do not inadvertently foreclose consideration of the best qualified persons by untested presuppositions which operate to exclude women and minorities.

Specifically, the report recommended the institution of standards in each institution that would incorporate the affirmative action concept.

The committee also pointed out there was more reaction to affirmative action rather than careful analysis of the purpose of affirmative action. I think that it would be inconsistent if higher education asked for a special exception from the policies and goals of the executive orders affirmative action requirement considering the role of higher education in our society to educate leaders and good citizens as well as scholars. I think that the association has given its full support to these principles and goals, although we recognize that there have been problems in enforcement and in carrying out the requirements in specific institutions.

There has been a lot of discussion about whether affirmative action is having either a financial impact on higher education institutions or whether there is a decrease in quality and I think there are more rumors than facts substantiating these assertions and I think Dr. Gray is equipped as a professor and also as chairperson of the Committee W, to discuss some of the myths and realities that are being discussed in regard to affirmative action.

Ms. GRAY. The critics of affirmative action would have you believe that the Federal agencies—in particular the Department of Health, Education, and Welfare—have massively invaded the Nation's university campuses and arbitrarily and unwisely forced the hiring of hundreds of underqualified women and minority group members.

None of these allegations has been supported by evidence. Indeed, if there has been some interference in traditional hiring policies, it is precisely because these policies had led to the almost total exclusion of women and minorities from the faculties of our major universities.

There has been some improvement lately, at least in the hiring of women at the untenured level. We would be the last to contend that there is an oversupply of women for all possible jobs. There is a scarcity of women for some of the tenured positions in the major universities in the country, but the reason for this scarcity is that the universities in the past have not lived up to their responsibilities in providing equal opportunities for all persons.

We think they need to accept this responsibility. We think they need to do a great deal more than they have done in hiring and admissions to graduate schools and in all sorts of policies to increase the supply and to do something for the already existing supply.

What we need is not the exclusion of universities from the requirements of revised order No. 4 or other regulations, but a more intelligent and informed enforcement by HEW and a more intelligent and informed commitment to equal opportunity in affirmative action on the part of the Nation's universities and colleges.

I want to give you an example which has become sort of enshrined in the discussions of affirmative action and it has been repeated so often that people are inclined to believe it. It seems that the chairman of the mathematics department in a major university once stated that there are only one or two women qualified for tenure appointment in the top dozen mathematics departments in the country. That is simply not true.

In the first place, there are more women than that already in the mathematics departments in the top dozen institutions.

Second, there are dozens of women in untenured positions, some of whom are eligible to be moved up.

Third, and most important, there are plenty of women in the group of universities that are immediately below, in some sense, the top dozen universities. The reason there is a heavier concentration of women there is because in the past it has been very, very difficult for women to get appointments in the most prestigious universities.

In other countries there are similar problems, but if you look, for example, at the University of Paris, you will find there are four or five women who are full professors in the mathematics department, which is certainly not the case in the top universities in this country.

The math departments in most universities are very large; 8 percent of Ph. D's in mathematics go to women, so there is no excuse for not having women in most math departments.

Another thing that is frequently claimed is that the faculty itself can judge who the best qualified people are for a given position. The problem of "best qualified" is at best a very subjective term and "best qualified" frequently means the existing faculties want to reproduce themselves and reproduce themselves in white males. They frequently do not take into account such things as whether the faculty members do, in fact, have the sensitivity necessary to promote needs of all students.

One reason why the pool of women applicants for jobs has been so small is that women drop out along the way. One reason that women drop out is because they don't have faculty members to encourage them or once they obtain a first position their senior colleagues don't encourage them and their senior colleagues are usually all men. We need women in positions all the way along to encourage women, to keep them from dropping out.

We cannot find any evidence of a massive reverse discrimination which many people allege exists. The unemployment rate for women with Ph. D's in mathematics still is twice that for men. When I say "unemployment rate," I mean the rate among women actually looking for jobs.

If there has been abuse of affirmative action efforts, it is mostly along the lines of conducting phony searches. Nationwide searches are announced and there is a great deal of fanfare and there is no intention whatever of hiring qualified women.

Sometimes universities will simply hire the first woman who comes along without worrying about finding somebody who is qualified, on the ground they can get rid of her very easily. Universities will invite women for pro forma interviews so they can stack their statistics and show how many women they interviewed for a job. In the interviews they ask questions like whether they are married and if she is married, the interviewer can assume the woman's job is wrapped up with that of her husband. If they are not married, the interviewer wonders why she is not married and assumes she will quit when she does marry, so she doesn't get the job.

They ask if she has children and if she has children the interviewer worries about how they are cared for and if she does not have children, when she is going to become pregnant.

Of course, the women refuse to answer the questions and then the interviewers mark her as a women's libber and potential troublemaker and she won't be hired either.

Let me describe situations at two institutions about which I am personally familiar. In the mathematics department of a large midwestern State university, there are no tenured women faculty. One of the two untenured women was notified last fall that she would receive a terminal contract for 1974–75, and she began to search for a new position. This was, I should mention, after a 2-year fight to overcome the institution's antinepotism rule and to be put on the tenure track so that she could even be considered for tenure and would at least be eligible for retirement and other fringe benefits, from which she had been excluded in her earlier career.

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On interviews for administrative posts, she was not given a chance to talk with those personnel who would obviously have an input into the hiring decision. Her references were not contacted. One school has even balked at reimbursing her for the travel expenses they originally agreed to pay.

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But at least these women have jobs. I know of many women Ph. D.'s in mathematics, some with substantial publication records, who are unable to get any employment except perhaps an occasional part-time teaching job which pays as low as $450 per semester course. At the 6-hour teaching load of major universities, this would be a full-time salary of $1,800 per year--if the woman were lucky enough to get four courses to teach.

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I could continue to describe other phony "affirmative actions" efforts, other fruitless searches for employment. I could tell you of women turned down for promotion because they "didn't need the money"—because their husbands could support them; of a man told he could not be hired because the university administration demanded that a woman or a black be hired. In fact, the position had disappeared for completely different reasons. I could describe the incident of a search committee's rejecting a woman because they felt she was not tall enough to command the respect necessary to be dean; or the case of a department chairman taking away a teaching assistantship from a pregnant woman and giving it to a male graduate student who "needed the money" because his wife was expecting a child.

Agency enforcement of title VII, title IX, the Executive order, and the Equal Pay Act will not eliminate all discrimination in higher education, but vigorous, intelligent enforcement will mean a better chance for equal opportunity for all.

What is desperately needed in affirmative action efforts is less attention to statistical computations and more attention to proper procedures for carrying out the sound principles of nodiscrimination. We need real commitment to expand opportunities for women and minority group members, and it is the responsibility of the Federal Government to instill such commitment in universities as well as in other contractors.

What little progress that has been made has only been made under severe threats. To withdraw those threats means there will be even less progress.

Thank you.

Mr. **Dellenback.** Thank you very much.

I have a couple of questions. I notice on page 8 of your testimony, Dr. Gray, talking in terms of affirmative action, you say:

> What is desperately needed in affirmative action efforts is less attention to statistical computations and more attention to proper procedures for carrying out the sound principles of nondiscrimination.

Then you helpfully proceed to outline several moves in the direction of those approved procedures.

This leads me to one of the sticky issues that some of our higher education witnesses have been testifying on, and I want to be sure I understand what it is you are saying to us in this regard. It is also tied into your testimony, Ms. Polowy.

You are talking about the most important issue in affirmative action insofar as initial hiring is concerned. It seems to me that a deliberate attempt to impose a statistical measure, a quantitative measure, a quota or a goal—call it whatever you like—to that input, is at loggerheads with trying to also insure that the group is really selected on a nondiscriminatory basis.

I am talking about the input group, you see, as a point of emphasis, rather than the mass to which the increment is being added.

Ms. **Gray.** Certainly, we would think the most important thing is that all of those people who are available for the job and qualified for it, first of all, know of the job, which in the past has just not happened.

Mr. **Dellenback.** We have numerous references to the "old boy" rule, or whatever you call it, where there is a word of mouth solicitation—male faculty members going to their friends and saying things like, "Do you know any men who are well-qualified for a position."

Ms. **Gray.** Once the people all know of a job and can apply, we feel that serious consideration needs to be given to the application. Now, in making a judgment, once you have announced a job widely and once you looked at the applications, the decision as to which person will be hired is, of course, a very difficult one.

As much as we would like to, we don't feel that six or eight things can be written down and you say that "these are the things which we must decide." You can't say that five publications are needed without saying what caliber the publications should be. That just can't be written down on paper. You can't say you need a person who is a skilled teacher and write down what makes a skilled teacher. You can't say that when you need someone who is sensitive to the special problems that women have and the special problems that minorities have and write down on paper what that sensitivity consists of.

So, you do need selective judgments in the hiring. But, what we ask in the selective judgment is that some things be considered that have not been considered in the past and in particular, less attention to this notion of reproducing one's own self-image.

We think with that sort of fair hiring practice the number of women at university faculties will increase, but we don't think that university faculties can be trusted to do it on their own because they have not in the past.

Ms. Polowy. I think you are asking us for two things, one concerns goals and timetables in general, and whether these are realistic in higher education.

Mr. Dellenback. That is correct.

Ms. Polowy. Well, if nothing else; establishing affirmative action plans with goals and timetables requires an institution to examine its hiring procedures at the outset, to see if it is in fact only going to certain schools for appointments, to see if it is only considering people within certain age groups. What happens is it filters down because each department has to participate in the process.

This process is, in a sense, a self-analysis. Many institutions go through this process for other purposes when they are changing policies or making dramatic changes. There will be a self-study of some type and that seems to me to be what an affirmative action plan is, in many respects.

If an institution has a representative body within its present faculty, then its goals and timetables will continue. I mean it will continue doing what it has done. It does not have to change any of its policies.

But, if it has, in fact, used discriminatory methods, it will have to eliminate those so that it does get to a larger group of people. At the same time, the people already in the institution should be seriously considered for promotion and tenure.

Mr. Dellenback. In those areas where a group that is already part of the faculty has had procedures which have not been equal in the past, one can change salary practices, one can change promotion practices, and one can change tenure practices and apply it immediately to the full mass of those already on the faculty. The greater difficulty, and we have gotten contrary testimony regarding this point, deals with the following issue: Let's assume we have a faculty mass of 100 people, and let's also assume that the turnover is about a 20-year turnover so that on the average, there will be five additions each year.

Let's assume initially that there are no women or minorities whatsoever in the 100. In looking at it we say, "This is a result of improper practices; it is inequitable. There is clear evidence of discrimination in this particular situation and we should be doing something affirmatively to bring about a change."

Is it sufficient to say to the university involved, "Next year's increment must have objective criteria about nondiscriminatory practices, and it will range from the initial search to the checking out of references, to the evaluation, and the final selection process; you must do this so that those five coming on next year will clearly be chosen with no discrimination whatsoever?"

Ms. **Gray**. No.

Mr. **Dellenback**. Is it necessary to go further than that and say, "Because of the mass already showing evidence of discrimination, it is necessary to set some sort of measure on that increment to be added so that maybe two or three or four or five will be women; you need to do this in order to accelerate the process of bringing about equality and nondiscrimination within the mass?"

Ms. **Gray**. I would think it is necessary to set some sort of goals depending upon what sort of situation you have.

Mr. **Dellenback**. For the mass or for the increments?

Ms. **Gray**. For both. I think you would find very few people who are willing to admit that they discriminate and therefore it is very difficult for them to believe that what they have done in the past has been discriminatory. Their belief is just that it turned out that way so if you say to them, "Don't discriminate in the future," they will continue to behave as in the past with possibly a few minor adjustments in their policies. If, on the other hand, you say to them, "In spite of your alleged good faith in the past you have not made any progress and we feel that some sort of additional motivation is required, and consequently, we will set up a goal," then at that time you will get some action and people will do something.

If you simply say, "Don't discriminate," that will not be enough.

Mr. **Dellenback**. Perhaps I phrased the question wrong because you are still not speaking to the issue. I am striving to get something in the record. I don't think I am just giving lip service to the change of policy.

Let's assume you say in this hypothetical situation I have drawn out, "Not only does the evidence of the mass show that you have discriminated—because it would just not happen that way if there were not discrimination—but we can look at the practices you have followed, and we can show with specificity there has been discrimination. You have not searched long enough; you have not advertised, evaluated, or made final selections fairly."

Is it enough to really apply nondiscrimination principles to the group that is to be added such that we are dead certain in the evaluation of those five who will be added this year there is absolutely no discrimination. We will put teeth into it, and be sure that is the way it is.

Or, in addition, must we also say, "You must, with x years bring about some rectification of the imbalance within the mass. Consequently, whatever must be done with the increments over the next 5 years, you must at the end of 5 years reach such and such a goal, or we will set such and such a goal for the mass."

Do you see the point of distinction?

Ms. **Gray**. Yes.

Mr. **Dellenback**. What troubles me is that you can't do both. You have to discriminate in some fashion with the increment in order to accelerate the resultant nondiscrimination of the mass.

Ms. **Gray**. I would not feel they are incompatible. I figure you cannot discriminate in the increments and still on the large scale not discriminate.

The reason I would hold that is that because in particular these are new hires at the assistant professor level. The fine distinction that one alleges one can make are just simply difficult to make. You can get a pool of 20 people, say, who are all qualified for this job and while someone may be able to make some subjective judgments that one is the best qualified, it is not all that realistic.

So, you can find plenty of qualified people. If, and among this plenty of qualified people you add in, you need more diversity in your faculty to serve other purposes, for example, in mathematics you frequently say of five hires we have to have one in analytical number theory, but nothing says this is called discrimination against algebraic number theorists or what have you; in other words you are serving a particular purpose in the department.

It seems to me the same thing can be done in setting hiring goals for women and minorities. You are serving a particular purpose within the department to get some diversity and people who are sensitive to all needs of students. In other words, you serve a particular purpose.

Mr. **Dellenback**. In other words, you believe it is in accordance with the law, and not violative of the concept of nondiscrimination, to write into the selection process the specific selection of women?

Ms. **Gray**. That is correct.

Mr. **Dellenback**. Deliberately or inadvertently, and you don't think it is discrimination?

Ms. **Gray**. As I say, I don't think it is any more discrimination than opting for one field of mathematics over another field of mathematics.

Mr. **Dellenback**. Do you agree with that?

Ms. **Polowy**. I would like to spend some time, not right now, but if I might, to submit some additional information. I think what we are really talking about here is what a court would require versus what the agency can require.

Mr. **Dellenback**. We are not worried, frankly, about what the court would require. We are concerned, however, about what the Congress has to establish as to policy in this area as that is our task. I am very much concerned about what kind of legislative amendment we should or should not propose in the light of part of this discussion that we are having this morning.

Ms. **Polowy**. But it would seem that it is relevant to look at what courts have required in terms of affirmative action when there has been a pattern of practice of discrimination.

Mr. **Dellenback**. I must again make the point of distinction. As a lawyer, one of the fascinating changes that takes place is that when you are first a law student and then a practicing lawyer and then a lawmaker, one shifts one's points of perspective.

As a practicing lawyer, my concern is: What is the law? I am very much concerned about what the courts are doing and very much concerned about how they interpret, or are about to interpret, something. When I became a lawmaker, my emphasis shifts to: What should the law be? At this point, I am very much concerned about writing the law as precisely as I can to bring about the result that ought to be brought about.

Ms. **Polowy**. I would think that an informed legislator would look at the policy behind the courts' particular reasoning.

Mr. **Dellenback.** Behind the policy?

Ms. **Polowy.** Yes, and I would say that I would, if I might, add some information about what has been the position of the courts in terms of supporting the implementation of actual goals and numbers.

Mr. **Dellenback.** At the moment, I am interested in what you think as a representative of a group that has real concern about this field——

Ms. **Polowy.** Yes.

Mr. **Dellenback** [continuing]. And real knowledge and capacity.

Ms. **Polowy.** Yes. The association has recognized, in the process of righting past discrimination, there would have to be an emphasis in some respects on the hiring of women and minorities.

Mr. **Dellenback.** Do you think it can be done without discrimination in selection within the increment? Would it not be discrimination if one were to say you are going to select one person this year, and that one person must be a woman?

Ms. **Polowy.** Well, what do you define as "discrimination"?

Mr. **Dellenback.** The concept that is embodied in the law where we say there should be no discrimination on the grounds of race, creed, color, sex, or national origin—or some such language. We use it differently in different statutes. Do you think there would be no discrimination?

Part of the concept of affirmative action is to eliminate discrimination. Now, do you think it would help eliminate discrimination—Dr. Gray apparently thinks it would—to write in a specific criterion wherein you say you can take into account sex in making selection?

I must confess I have difficulty with that as a legislator. The statutes are replete with language of: There shall be no undue emphasis, no consideration given to this particular qualification of sex. We have been trying to say: In evaluating relative merit for a position, those who are doing the evaluation cannot consider legally race, creed, color, sex, or something else.

Now, to turn right around and say, "We will now insist that you consider sex; you have a right and obligation to take the sex variable into account." This gives me trouble, you see, in the light of what we have been striving to do in eliminating discrimination.

Now, I may read Dr. Gray wrong, but I thought she expressly said this is a proper criterion just as in your analogy you used different fields of specialty in mathematics as a proper criterion for selection. Is that correct?

Ms. **Gray.** That is correct. What I said was: I thought you can consider what was serving the needs of the institution and, in this case, that might require that you give special consideration to hiring more women.

Mr. **Dellenback.** And it would also be possible and proper in the reverse situation, if the decisionmakers felt that the institution was better served by having a male president, to insist that it be a male even though there be an equally well-qualified, or maybe even academically superior, female.

Ms. **Gray.** What we are talking about is remedying effects of past discrimination and we are not talking about general policies as to what people think is best and what people think is not best, because for years people have thought it was best for the institutions not to hire women and what we are trying to do is write some sort, or enforce some sort of guidelines which are going to overcome the effect of this past policy, which we believe to be incorrect?

Mr. **DELLENBACK.** And in so doing to discriminate?

Ms. **GRAY.** And, in so doing, give consideration to other things that were not considered until the imbalance has been righted.

Mr. **DELLENBACK.** Including sex?

Ms. **GRAY.** Including sex.

Mr. **DELLENBACK.** In spite of the language of the statute that says, "There should be no discrimination on account of sex"?

Ms. **GRAY.** But I thought your concern was whether the language should be changed, but not what the existing character was.

Mr. **DELLENBACK.** You would have us write that language differently than traditionally, and change the phrase which is in statute after statute which says, "There should be no discrimination on the grounds of sex", and you would have us recoup it into a situation where you say, "It is proper to consider sex as a point of discrimination and a point of differentiation in selection of positions where the mass to which you are applying this has given evidence of past discrimination in the other direction," or words to that effect?

Ms. **GRAY.** Yes, I would want it very carefully qualified that you are giving consideration to this in view of the effects of past discrimination, which I would therefore view it then as only a temporary procedure.

Mr. **DELLENBACK.** OK.

Ms. Polowy, I would like to go on with it, but is there a comment of agreement or disagreement you have made on behalf of yourself?

Ms. **POLOWY.** I think it is difficult to define in a completely clear way the line between "reverse discrimination" and what it means, and changing a pattern or practice of discrimination.

I do agree with you that there are certain social policies which should be considered which a legislator might look at differently than a court, but I think we have, in the past, determined that "separate but equal," for example, was not really equal and we took certain action as a result of that.

Mr. **DELLENBACK.** On the grounds of the objective being equality?

Ms. **POLOWY.** And then righted that which we recognized as unequal.

Mr. **DELLENBACK.** But you are not talking about overemphasis to bring this about, you just say "separate but equal."

Ms. **POLOWY.** But to some people that principle interferes with their right and forms a kind of reverse discrimination.

Mr. **DELLENBACK.** That is part of the busing controversy—there has been a new thrust to say this must be equal. Anyway, I think we understand each other. However, I am not sure where you stand on the particular issue of our discussion; you just indicated it is difficult.

Dr. Gray, your answer to it has been helpful to me. I am not sure I am persuaded by it, but I am not sure that unless this is done, we can accelerate the absence of discrimination in the mass.

Ms. **GRAY.** My concern is what we do in our hiring practices now is what will determine what is going to happen in 10 or 15 years, and if we do not at the moment hire more women on university faculties there will not be more students continue and not more women graduate students and the situation will not be righted and that is so important that universities adhere to this policy.

Mr. DELLENBACK. You have both given us very helpful testimony this morning, and I want to express my appreciation. Let there be no misunderstanding of what I strive to say: I am strongly in favor of eliminating discrimination against women in the academic community as I am also strongly in favor of eliminating discrimination against minorities or against other people who have been discriminated against in the academic community. I think there are clear examples where discrimination has been practiced.

I state also on behalf of the chairman of the subcommittee and myself, having sat through most of these hearings together, we agree that we are desirous of seeing that the laws are so written that they will eliminate discrimination. We are just troubled by some aspects of how to accomplish this. That is one of the things we have been discussing back and forth a little bit in the last few minutes.

Now, I thank you both very much for coming. It has been very helpful testimony and we are very grateful.

Mr. DELLENBACK. The next witness is Dr. Martin Goldman, Reston, Va.

Mr. Goldman, we appreciate your being with us this morning. Without objection, your full statement will be made part of the record and I leave to you the best way to present your comments so as to most profitably use the limited time we have available.

STATEMENT OF MARTIN GOLDMAN, RESTON, VA.

Mr. GOLDMAN. My testimony, I think, is indicative of a nationwide policy of reverse discrimination in institutions of higher learning. The policies have been implemented to supposedly redress racial and/or sexual balance in these institutions at the direction of the Department of Health, Education, and Welfare under so-called affirmative action guidelines.

Between April 1971, the date I successfully passed my Ph. D. preliminary oral examination at Clark University—Worcester, Mass., and July 1973, I applied to approximately 150 to 200 colleges, universities, and private schools in an effort to secure academic employment. As a result of advertisements placed in academic journals, educational periodicals, magazines, and newspapers—most notably the New York Times—I knew of openings in the fields I had studied while in graduate school—the broad field of American history and the specialized fields of Afro-American and urban history. In that period of time I also attended two meetings of the American Historical Association in New York City and Boston and two meetings of the Organization of American Historians in Washington, D.C. and Chicago. At these meetings I received a number of interviews with department chairmen who had advertised teaching positions in my special fields. Most of the time, however, when it was discovered that I was white, I received no response to my applications.

The following summary represents the kinds of experiences I had in what became a futile 2-year search for employment in a discipline that I had devoted the better part of 10 years of study and teaching to master. It should be noted that these documented cases only represent the tip of the iceberg in that the circumstances were clearly pointed out as to why my candidacy would not be advanced for the positions in question.

In the vast majority of cases the individuals were far more subtle in the ways they chose to deal with my application for employment. Thus, the following cases are those where the individuals involved provided me with documentation. This documentation can be made available upon request.

Vanderbilt University advertised an opening in Afro-American history at the American Historical Association's annual meeting in New York in December 1971. Under the signature of Department Chairman Dewey Grantham, the notice stated, "Because the department believes that the responsibilities of the position can best be met by a black, we would prefer a man or woman of that race."

I applied for the position and never received a formal response or even acknowledgment of my application. On January 15, 1973, shortly after the New York Times carried a story entitled "Colleges Accused of Reverse Bias," I wrote Dr. Grantham to inform him that I was the individual who had passed the information on about his department's policy in the Times article and requested an explanation. To date, Dr. Grantham has not responded.

Pennsylvania State University advertised a position in Afro-American history at the American Historical Association in December 1971. In a letter dated January 24, 1972, I was informed that the position had been filled by a fully qualified candidate who had been in VISTA and the Peace Corps where he had been assigned to Africa.

Mr. George D. Wolf, head of humanities at the Capitol Campus went on to write, "As far as the position is concerned, it is only partially a position relating to Black Studies. What we are seeking is a candidate who can teach Black literature and aesthetics." The obvious question here is why advertise for someone in literature and aesthetics at a convention of historians. I wrote Mr. Wolf posing this question and also asking why academic credentials were considered invalid as opposed to work in VISTA and the Peace Corps which, while certainly important and invaluable, had little to do with scholarship and teaching. Mr. Wolf did not respond.

Phillips Exeter Academy—New Hampshire—advertised for an instructor of American history in the New York Times in the early spring of 1973. Responding to my application, Mr. Albert Ganley of the history department explained that the position would be offered to a woman to sexually balance the faculty. I wrote Mr. Ganley and other officials at the school to advise them that they were in violation of my rights to equal opportunity employment and then filed a complaint with the New Hampshire Commission for Human Rights. After 60 days, Mr. Everett O. Ware, of the Equal Opportunity Employment Commission, Boston, advised me that his agency had jurisdiction to proceed in the matter. I have heard nothing more on the situation since December 3, 1973.

Dartmouth College—New Hampshire—advertised for a Ph. D. or Ph. D. candidate in humanities or social science for their black studies program in the New York Times. The director of the program, Mr. S. Jay Walker, wrote that in 'History, sociology, literature, there are intangibles involved which make it probable that someone who has lived the experience will be able to give more to his students, black and white, than someone who has not."

West Virginia University, a friend in the history department advised me that there was an opening for an instructor of Afro-

American history. I applied and was informed that because of a budget cut the position was no longer available. In a letter my friend gave me the real truth when he wrote:

> I really am sorry that nothing came of the opening here, but we too were stuck by the black/white problem. They wanted a black but wouldn't/couldn't pay the price and so did nothing.

Tufts University in Massachusetts advertised for a professor of Afro-American history at the American Historical Association's New York meeting in December 1971. I applied and on January 4, 1972, Dr. Robert J. Taylor wrote acknowledging my application and said:

> I must tell you that we hope to fill the position with a minority person, but in the last analysis we hope to get the best person we can.

As a Jew, I wonder what he meant by that.

After a black colleague with lesser qualifications was invited to the Tufts campus for an interview I wrote a letter of complaint to the school's president, Mr. Burton Hallowell. He responded on July 7, 1972, saying:

> In your case, it appeared from your vita that you did not have the kind of experience and training that the department was presently looking for to fill this position.

This may have been the case but my black colleague was invited to the campus for an interview and I was not.

On June 21, 1972, Dr. Taylor wrote:

> The nub of the matter is that the position remains open. Of the several blacks available whom we interviewed none met our expectations in terms of academic criteria. It is fair to say that we are extending for another year the time period for our search.

The position was advertised again the following year.

Southern Illinois University advertised an opening in black history at the American Historical Association 1971 annual meeting in New York City. In an interview conducted by Dr. M. Browning Carroll of the history department, I was informed that the department wanted a black for the position. The suggestion was made that I go into Jewish studies. I didn't laugh at the idea and the interview was quickly terminated.

Central Michigan University, in an interview conducted in Washington, D.C., in April 1972, Dr. Richard L. Wysong informed me that he could not consider my application because of my color. Dr. Wysong said that the president of the university had directed him to come back from Washington with a black. I don't know if he was ultimately successful.

I am skipping some of the things I think are not as important.

West Chester State College, West Chester, Pa., for 2 years running this department advertised for a teacher of Afro-American history at every professional meeting under the signature of the history department's chairwoman, Dr. Patricia Johnson. Although I had been interviewed by the department in 1968 for the same position and had chosen instead to continue toward a Ph. D. in graduate school, the department never granted me an interview.

I pursued this job opening vigorously as it was nearby Philadelphia where I grew up, went to school and where my family and my wife's family still resides. I requested recommendations from numerous dividuals in Philadelphia public and private life and received them. In addition, I constantly wrote Dr. Johnson.

June 26, 1972, she wrote,

> Please believe that I am deeply distressed that this position for which I interviewed you has, at least temporarily, evaporated. I regret having taken up your time, and I regret, in view of your superb qualifications that I cannot look forward to having you with us next year.

I was informed in March 1974 by a member of the history faculty at West Chester that the department was still seeking a historian of Black America. I had still never been interviewed by Dr. Johnson for the position and wrote her a letter of complaint. The letter was dated March [illegible], 1974. She responded on April 19, 1974—though I did not receive the letter until June—and wrote that,

> In order to comply with the stringencies of the Commonwealth's budget, a member of the staff of the Office of Student Life who is a graduate student at the University of Maryland has been teaching our Afro-American history course without charge to the department. Since this individual appears to have excellent rapport with his students and to be a first-rate classroom teacher, we will probably continue to employ his services in the future. I, therefore, do not anticipate an opening in Afro-American history in the near future.

Although Dr. Johnson continued to refer to a nonexistent interview, in the 3 years that have passed since I applied to this college, Ms. Johnson and I have never met. Nor had I, unlike the mysterious, philanthropically minded Maryland graduate student, ever been offered the opportunity to teach the course without charge to the department of history.

While few colleges refuse to waive academic credentials when the case warrants such a waiver, I wondered why the discipline of Afro-American history at West Chester waived scholarly credentials in that particular field while supposedly demanding such credentials in all other fields. I asked that question of Dr. Johnson in a leter dated June 5, 1974. Dr. Johnson has not yet responded.

University of Michigan, Dearborn Campus, in April 1971, I was invited to the campus, along with my wife, to deliver a paper on teaching black history and to discuss the prospects of a position in Afro-American and urban history. After delivering the paper and meeting with members of the philosophy, English, government, and education departments, the chairman of the department of history, Dr. Donald Proctor, in consultation with Dean Papazian, offered me a half-time position for the academic year 1971–72, with the promise of a full-time position for the academic year 1972–73.

As I had not yet begun to research my doctoral thesis, I requested that the department hold the offer for a year and I accepted a position at Rutgers University on a part-time basis while I was able to complete my research in nearby Philadelphia. Dr. Proctor, of course, could not guarantee that the position would still be available, but did promise to do what he could and reiterated the fact that he was very impressed with my teaching ability and research potential.

In December of 1971, I received a letter informing me that I was still the primary candidate for the position from Dr. Procter, where he again stated how much he and the department admired my work. In a telephone conversation in April 1972, Dr. Proctor related budget difficulties and promised to reconsider me for the following academic year in the spring of 1973. The next year, Dr. Proctor informed me that a new dean had been appointed and that the word had been passed down to department heads to hire blacks or women. Proctor apologized profusely, again stated how much he admired my abilities, gave his best to my lovely wife, and wished me good luck. I never heard from the department again.

University of Oregon, a position was advertised in U.S. social history and Afro-American history through the employment information bulletin of the American Historical Association. I applied and received a response from associate dean and professor of history, Paul S. Holbo, who wrote: "The Department of Health, Education, and Welfare requires that the University secure information on all applicants. Would you kindly complete the enclosed form and return it to me?" The form, sent under the signature of the office of affirmative action's director Myra T. Willard, had spaces requiring acknowledgement of a candidate's sex, ethnic, and racial identity.

Under these headings was "American Indian," "Caucasian," "Black," "Oriental," "Spanish American," and other. A space was also provided which said, "I prefer not to provide the information requested," and a note which said "Election of this option will not be prejudicial to your application." I chose not to fill the form out, complained about its use in a letter to Dr. Holbo and never heard from the University of Oregon again.

University of Northern Colorado. For 2 years, between 1971 and 1973, the department of history advertised in the employment information bulletin published by the American Historical Association for an instructor of Afro-American history. The first year I received no response to my application. The second year I received a letter dated December 20, 1972 from acting chairman Robert W. Larson, which stated:

> As you probably know there are guidelines issued by the United States Office of Civil Rights requiring that we take positive action "to recruit, employ, and promote qualified members of minority groups." A black person, naturally, would be particularly appropriate for this position and we intend to follow the federal guidelines.

The department's motives were made apparent by an advertisement which appeared in the Black Scholar, February 1973, which read, "The University of Northern Colorado is recruiting a black faculty member to teach Black History and African History for the academic year beginning in the fall of 1973." This ad was listed under the name of Prof. Robert W. Larson.

A letter written by me to Professor Larson on January 15, 1973, complained of the department's recruitment policies and the obvious violation of white candidate's rights to equal opportunity employment. The letter was never acknowledged or answered.

In Chicago in April 1973, at the Organization of American Historians annual meeting, a professional opening was advertised by the college in black history, Id. No. 901, by Dr. Barry Rothaus. The listed requirements stated, "master's degree plus," and "some college teaching." I requested an interview from Dr. Rothaus who was present in Chicago and received no response.

On June 13, 1973, Dr. Rothaus wrote to me saying:

> The Department of History has offered a one-year contract to teach Black History to Mrs. Alice Reynolds. The choice of Mrs. Reynolds was a particularly

> difficult one considering the number of candidates applying for the position. But, in view of Mrs. Reynolds' knowledge of Black History and the Black experience, the department has selected her.

Lake Forest College, Lake Forest, Ill., in the fall of 1972, the department of history advertised an opening in black history in the employment information bulletin. I applied and received no response or acknowledgement. In February 1973, the Black Scholar advertised:

> Lake Forest College is instituting a search for black faculty. Position in Sociology Department. Two positions in History Department with preference for urban studies and Afro-American History. Applicant must be working on Ph. D.

On June 14, 1973, Dr. John G. Sproat, chairman of the department of history wrote:

> This is to inform you that the position in Afro-American History in this department has been filled for the academic year 1973–1974. The process of evaluating the many able applicants for this position has been a long and difficult one, hence the late date of this letter. Please be assured that we gave your candidacy serious consideration. I trust that you have by now found a position to take advantage of your evident qualifications.

In light of the advertisement in the Black Scholar, Sproat's assertions must be doubted.

University of Santa Clara, Calif., at the New York convention of the American Historical Association in 1971, the department of history advertised a position in black history. E. Thadeus Flood responded to my application of January 1972, 6 months later, writing, "We have in fact decided on a candidate—a Chicano specialist—for the job." To my great surprise, the following fall the department advertised the same job in the employment information bulletin published by the American Historical Association.

Once again, I applied. On January 22, 1973, I received a form letter informing me that the position was once again filled. I wrote Flood on January 25, 1973, requesting clarification of the department's activities in the hiring and search for an Afro-American historian. He did not reply to my letter.

Temple University, Philadelphia, Pa., in the spring of 1972 the Institute of Pan-African Studies advertised for a historian to teach Afro-American history in the New York Times. In response to my application, Odeyo Ayaga, chairman of the department, called me at my home in Massachusetts and invited me to Philadelphia for an interview. Ayaga informed me that my qualifications were among the best he had seen of all the applicants and also informed me that Temple would be glad to pay my travel expenses. At the end of the conversation, in order to avoid a long trip for nothing, I informed Ayaga that I was white. I was promptly disinvited.

The following September, a young woman identifying herself as a staff member of the Pan-African Institute called and inquired whether or not I was still interested in the position which had still not been filled. I said that I was and she also informed me that the position was only open to black candidates.

I wrote a letter of complaint to President-designate Marvin Wachman informing him of the two unpleasant exchanges. The Temple situation was especially painful as I had attended the university as an undergraduate and received my master of arts degree there as well. It was at Temple where my interest in black history had first been kindled.

President Wachman responded to my letter on November 20, 1972, writing:

> I received your letter sometime ago, and have pursued it at several levels. I thoroughly understand your anger and frustration; you were treated in an inexcusable fashion. All I can say at this time is that there is interim leadership in the Afro-Asian Institute, and Mr. Ayaga did not appear to be aware of the implications of the activities of his office.

Although President Wachman extended a cordial invitation to look him up when I was next in Philadelphia, he made no offer to rectify what seemed to be the clearest case of discrimination I had experienced to that date. Under the initiative of the American Jewish Committee the case was pursued through the Commission of Human Relations in Pennsylvania where I lodged my complaint against the university. In return for a monetary settlement relating to lost wages while I was unemployed during that period all charges, State and Federal, were dropped against the university. The case received national publicity and the story of the settlement was carried in most major newspapers as the first positive finding in a reverse-discrimination case in the country—actually there have been a few others.

In an editorial entitled "Costly History Lesson at Temple" the Philadelphia Inquirer reviewed the case and noted:

> Racial discrimination is equally deplorable whatever the victims's race may be. If young people today are to learn anything from the study of history, including black history, it needs to be taught to them by professors who themselves are selected on the basis of qualification, not color.

Since the story broke I have received letters from students and other applicants to the department's Pan-African studies program. Mr. Ayaga is still head of the department and has not, apparently, changed his tactics. White students are discriminated against when they try to enroll for black studies courses and when finally permitted entry have to suffer the racial harangues of ill-prepared classroom teachers who in the place of substantive analysis of their disciplines preach hatred of whites and selected ethnic groups. The position in Afro-American history was again advertised last spring in the New York Times.

In conclusion, let me say this: While my case appears to be somewhat exceptional in light of the nature of the discipline involved, I am convinced as a result of my contact with unemployed or underemployed young male scholars across the country that this is not the situation. The experiences I have outlined have hit young men in every scholarly discipline and especially in the liberal arts and humanities. Granted that there is currently a glutted academic job market and a financial crunch that is even jeopardizing those formerly comfortable tenured faculty members.

However, the combination of reverse discrimination coming on the heels of a depressed academic market makes it virtually a certainty that the vast majority of young white males who have spent years of underpaid and agonizing work in this Nation's graduate schools will see few rewards at the end of the road. It is my opinion that, far from being the exception, my experiences are the rule in the current academic job climate with affirmative action guidelines setting discriminatory quotas under the direction of the Department of Health, Education, and Welfare.

No rational individual could ever argue against the fact that Afro-Americans, and women, have suffered grievous oppression and injustice in this country's past. It is also painfully clear that blacks are still being systematically excluded from equality in many areas of American life. However, the introduction of exclusionary quotas will do precious little to reverse the twisted path of the past and the movement toward equality in the present.

What is worse, quotas will further divide the races. It is no secret to political observers that white ethnics are up in arms over the attempt of Government, by social manipulation, to regulate the lives of the great middling order in this society. This unrest can be primarily detected in the unrest resulting from the regulation of their children's educational experiences.

Discriminatory quotas which force college administrators, with one eye on Federal funds and the other on HEW affirmative action guidelines, to bring blacks and women onto their beleaguered campuses without reference to quality and qualification will only create divisiveness and hatred, and, at the same time undermine the quality of higher education in America.

A recent Carnegie Commission study has indicated that this deterioration is already well underway. It is also important to note that many of the schools that are in the forefront of this discriminatory practice are State institutions funded by the class most affected by discriminatory practice, an irony that is of dubious constitutionality.

Finally, history has always taught the lesson that it is unprofitable and unjust to visit the sins of one generation upon another. An entire generation of young scholars is currently being forced to pay for sins which they did not commit, but in some cases were actively involved in eradicating during the civil rights struggles of the early 1960's.

I myself fall into this category and can now attest from experience what it is like to have one's own civil rights constantly violated in America. Although no one can predict with any degree of accuracy where the policies of reverse-discrimination will lead, it is clear as of now that they have produced no salutary results and have altered the status of blacks and women in only a miniscule fashion. Blacks are still being excluded and shunted aside in other areas of academic life as their numbers increase in fields like black studies but remain relatively nonexistent in the more traditional disciplines of chemistry, physics, biology, classic, et cetera.

When the HEW guidelines are strictly followed, few bureaucrats pay attention to what is being taught or the quality of the individuals who do the teaching. The game simply becomes one of numbers—how many blacks, or how many women are on a given faculty. It is time for the Congress of the United States to reverse the tide of this new discrimination. Individuals in a democratic society must be judged solely on qualification and individual merit and not by what racial, ethnic, or sexual group they, by an accident of birth, belong to.

If these evils are not eradicated, I can assure you that the day will come when my children or my children's children will demand, as they inevitably will, that the scales once again be set in balance. Who will be singled out for retribution then? Would it not be so much easier for Americans, on the eve of their Bicentennial celebration, to end discrimination once and for all and to finally make the dream of the Founding Fathers a reality for this generation and every generation to come.

It is high time to stop advertisements that read, "Lake Forest College is instituting a search for black faculty," and to open all of our great institutions to all our people.

Mr. O'Hara (presiding). Thank you very much, Mr. Goldman, for a very powerful statement.

I notice that you use the term that has become fashionable, "reverse discrimination," and I am sure you would agree with me, though, that in actual logical fact it is just plain old discrimination. There is nothing reverse about it. It just happens with a different target.

Mr. Goldman. Yes, sir.

Mr. O'Hara. To my mind it partakes of all of the evils of discrimination that has caused the Congress to move slowly, but to move in eradicating the older forms of discrimination. There is no difference. It does not seem to me it matters much if an individual is being discriminated against, it hardly matters to him if the motive of the discriminator is maybe a better motive than it would have been 30 years ago, you know.

Mr. Goldman. Yes; I couldn't agree more.

Mr. O'Hara. What difference does it make? Unless we treat it that way, we are going to establish the principle that discrimination is all right as long as your motives are pure. Then, we get to the question of "What about those people."—we used to have a lot of them and we still have a few—"who really and truly believe that segregation of the races is the best public policy and that it is good for everyone involved?"

If we are going to look to their motives, maybe they will be exculpated now because their motives are good, I don't know.

But, I guess, if the individuals' motives are good, it is not if the individuals' motives are good but if the judge thinks they are good or whoever is in charge, will substitute his judgment for someone else.

I am very happy you came before the committee to let us have the benefit of your very sad experiences.

Mr. Dellenback, any questions?

Mr. Dellenback. If we were not limited by time, I would have preferred to explore not only the case you put forth in your testimony, but, as you pointed out, you had a great many other experiences beyond this and you only put down some of those which are most easily reduced to writing. For the sake of helping our thinking, I will ask you this couple of questions.

You indicated that to a large degree, the game has become one of numbers. Do you think that in this kind of consideration, numbers should play any part? Whether one is analyzing race, creed, sex, or whatever the measuring point is, can we avoid making the game solely one of numbers or even predominantly one of numbers and still validly give some consideration to statistical analysis that deal with those particular criterion?

Mr. Goldman. No. I don't think we can avoid looking at numbers because of the obvious fact of past discrimination. We have to see that the numbers and the balances somehow are redressed. The problem that you gentlemen face, and which legislators face across the country, is "How to redress the balance; how to redress the grievance, without discriminating against a whole new segment of population."

Mr. DELLENBACK. Do you think the number analysis is a valid part of what we need to do?

Mr. GOLDMAN. Very much. In fact, I would like to go on record as favoring affirmative action. I do not oppose affirmative action. If I came up before a board in opposition to a historian who was black who was equally qualified with myself, I would hope that he would get the job, in that sense.

Mr. DELLENBACK. That leads me to my second question: While not discriminating on the grounds of race in the sense of taking a less well-qualified person do, you think there are times were in determining what the criteria are that validly make up the measure of whom you are going to pick for a position, could race ever be a valid criterion as part of the total picture?

Mr. GOLDMAN. Not in the academic area. I don't think you can make race a criterion, or sex a criterion in the academic arena. There may be other areas, you know, but in the academic area I don't think you can. I think you have to make an effort to bring all peoples on to the campus, but I don't think you can search for people on the basis of race.

Mr. DELLENBACK. Perhaps this is a bizarre example, but I just thought of it as we talked, if some institution is looking for someone to coach a men's football team on a college campus, would it be valid for the selectors to say, "We want a male to coach that men's football team," or at least give consideration to that as one of the criteria in making the determination of who ought to be the coach?

Mr. GOLDMAN. In a hypothetical sense. I would say perhaps, But I don't know a damn thing about football.

Mr. DELLENBACK. This town is filled with people who—after yesterday—are inclined to think there are others around here in that same situation.

Well, would you make a distinction between the theory and the possibility of a modification in practice, the theory in this case being that there should not be consideration given to race, or creed, or sex, or anything?

Mr. GOLDMAN. Not in an equalitarian society, a society that has the standards we are supposed to have, I think, whatever we should be moving toward, who can ever reach the goal? You know, the goal is unreachable. That is perfection, but you should always be moving toward a society where quality and competence are the basic standards of evaluation.

Mr. DELLENBACK. You don't think within the field of measuring competence, there are times that sex or age or race might be a valid part of the mass of the selection?

Mr. GOLDMAN. I have heard that before, but, if we do that—what we are doing is to say to, I would say, "To know Caesar one does not have to be a Caesar".

By that, I simply mean if we did that, what we would say to a novelist, "You can't write about women, you can only write about what you feel, or a man". Or a "female", she would be limited to females. I don't think you can limit the selection of anyone on the basis of what they have been.

Now, certain experiences are valid. I don't mean to invalidate experience. But, I certainly would not want to be selected on the basis of my Jewishness for any kind of a job. Even in a Department of Hebraic Studies, I wonder how many non-Jews are doing that kind of thing. But, I think that even in that area, Jewishness is meaningless.

I made a big mistake, perhaps, to go into a field in my academic area that was precisely at the wrong time. I couldn't have been more wrong in terms of my timing, but I got into it 10 years before as a result of Civil Rights work and as a result of teaching at an all-black school and it was accidental. But, I don't see how, in a society that projects egalitarianism to the world, how selections can ever be made on any basis other than competence, quality, and those kinds of criteria.

Mr. DELLENBACK. Can experience validly be part of competence? For example, if one has been a woman for 30 years, is one able to deal with certain aspects of what you might talk about with women in a way superior to a man?

Mr. GOLDMAN. If you are going to use the analogy of a woman—you are talking primarily about women studies on a college campus which is a big field today—and my argument would be that if experience is the sole criteria, then you are invalidating every field of study there is because of this.

Mr. DELLENBACK. I am not saying, "Should it be the sole criteria", but is there any room in the selection process for that kind of thing being one of the factors that is considered?

Mr. GOLDMAN. I would say yes, there is room, but for that to be the sole criteria as it has been is ridiculous. It invalidates the study of everything.

How many Colonial Americans do we have around? We can't study Puritans because we can't find Puritans to teach us. We can't study Irish because Professor Choy is not Irish; that kind of thing.

Mr. DELLENBACK. Thank you very much. This has been very helpful, and I appreciate your answer to the last question, as well as others. This has been very moving and troublesome testimony.

Thank you very much.

Mr. O'HARA. Thank you very much on behalf of the committee, Mr. Goldman.

PREPARED STATEMENT OF MARTIN S. GOLDMAN, RESTON, VA.

This testimony is indicative of a nation-wide policy of reverse discrimination in institutions of higher learning. The policies have been implemented to supposedly redress racial and/or sexual balance in these institutions at the direction of the Department of Health, Education, and Welfare under so-called "affirmative action" guidelines. Between April 1971, the date I successfully passed my Ph.D. preliminary oral examination at Clark University (Worcester, Massachusetts) and July 1973 I applied to approximately 150–200 colleges, universities and private schools in an effort to secure academic employment. As a result of advertisements placed in academic journals, educational periodicals, magazines and newspapers (most notably *The New York Times*) I knew of openings in the fields I had studied while in graduate school—the broad field of American History and the specialized fields of Afro-American and Urban History. In that period of time I also attended two meetings of the American Historical Association in New York City and Boston and two meetings of the Organization of American Historians in Washington, D.C. and Chicago. At these meetings I receive a number of interviews with department chairmen who had advertised teaching positions in my special fields. Most of the time, however, when it was discovered that I was white, I received no response to my applications.

The following summary represents the kinds of experiences I had in what became a futile two-year search for employment in a discipline that I had devoted the better part of ten years of study and teaching to master. It should be noted that these documented cases only represent the tip of the iceberg in that the circumstances were clearly pointed out as to why my candidacy would not be advanced for the positions in question. In the vast majority of cases the individuals were far more subtle in the ways they chose to deal with my application for employment. Thus the following cases are those where the individuals involved provided me with documentation. This documentation can be made available upon request.

Vanderbilt University—advertised an opening in Afro-American History at the American Historical Association's annual meeting in New York in December 1971. Under the signature of Department Chairman Dewey Grantham the notice stated, "because the department believes that the responsibilities of the position can best be met by a black, we would prefer a man or woman of that race." I applied for the position and never received a formal response or even acknowledgment of my application. On January 15, 1973, shortly after the *New York Times* carried a story entitled "Colleges Accused of Reverse Bias," I wrote Dr. Grantham to inform him that I was the individual who had passed the information on about his department's policy in the *Times* article and requested an explanation. To date Dr. Grantham has not responded.

Pennsylvania State University—advertised a position in Afro-American History at the American Historical Association in December 1971. In a letter dated January 24, 1972 I was informed that the position had been filled by a fully qualified candidate who had been in VISTA and the Peace Corps where he had been assigned to Africa. Mr. George D. Wolf, Head of Humanities at the Capitol Campus went on to write, "As far as the position is concerned, it is only partially a position relating to Black Studies. What we are seeking is a candidate who can teach Black literature and aesthetics. . . ." The obvious question here is why advertise for someone in literature and aesthetics at a convention of historians. I wrote Mr. Wolf posing this question and also asking why academic credentials were considered invalid as opposed to work in VISTA and the Peace Corps which, while certainly important and invaluable, had little to do with scholarship and teaching. Mr. Wolf did not respond.

Phillips Exeter Academy—New Hampshire advertised for an instructor of American History in the New York Times in the spring of 1973. Responding to my application Mr. Albert Ganley of the History Department explained that the position would be offered to a woman to sexually balance the faculty. I wrote Mr. Ganley and other officials at the school to advise them that they were in violation of my rights to equal opportunity employment and then filed a complaint with the New Hampshire Commission for Human Rights. After sixty days Mr. Everett O. Ware of the Equal Opportunity Employment Commission, Boston advised me that his agency had jurisdiction to proceed in the matter, I have heard nothing more on the situation since December 3, 1973.

Dartmouth College—New Hampshire advertised for a Ph.D. or Ph.D. candidate in humanities or social science for their Black Studies program in the New York Times. The Director of the program Mr. S. Jay Walker wrote that in "History, Sociology, Literature, there are intangibles involved . . . which make it probable that someone who has lived the experience will be able to give more to his students, black and white, than someone who has not."

West Virginia University—a friend in the history department advised me that there was an opening for an instructor of Afro-American History. I applied and was informed that because of a budget cut the position was no longer available. In a letter my friend gave me the real truth when he wrote, "I really am sorry that nothing came of the opening here, but we too were stuck by the Black/White problem. They wanted a black, but wouldn't/couldn't pay the price and so did nothing."

Tufts University—Mass., advertised for a professor of Afro-American History at the American Historical Association's New York meeting in December 1971. I applied and on January 4, 1972 Dr. Robert J. Taylor wrote acknowledging my application and said, "I must tell you that we hope to fill the position with a minority person, but in the last analysis we hope to get the best person we can." (1) After a black colleague with lesser qualifications was invited to the Tufts campus for an interview I wrote a letter of complaint to the school's President, Mr. Burton Hallowell. He responded on July 7, 1972 saying, "In your case, it appeared from your vita that you did not have the kind of experience and training that the Department was presently looking for to fill this position. . . ." This may well have been the case but my black colleague was invited to the campus for an interview and I was not. On June 21, 1972 Dr. Taylor wrote, "The nub of the matter is that the position remains open. (Sic!) Of the several Blacks available whom we interviewed none met our expectations in terms of academic criteria. It is fair to say that we are extending for another year the time period for our search." The position was advertised again the following year.

Illinois State University—advertised for an Afro-American historian in the American Historical Association's *Professional Register* to which I responded. On November 27, 1972 Dr. M. Paul Holsinger wrote, "Honesty, however, compels me to note that our administration has insisted that we emphasize the policy of 'affirmative action' in our search, which in practical terms means that we must give first priority to Black candidates for the post before any others. This does not necessarily rule out others, but it clearly negates them to a considerable extent."

Southern Illinois University—advertised an opening in Black History at the American Historical Association 1971 annual meeting in New York City. In an interview conducted by Dr. M. Browning Carroll of the History Department I was informed that the department wanted a black for the position. The suggestion was made that I go into Jewish Studies. I didn't laugh at the idea and the interview was quickly terminated.

Central Michigan University—in an interview conducted in Washington, D.C. in April, 1972 Dr. Richard L. Wysong informed me that he could not consider my application because of my color. Dr. Wysong said that the President of the university had directed him to come back from Washington with a black. I don't know if he was ultimately successful.

University of Louisville—advertised for an Afro-American historian in the American Historical Association's *Professional Register*. C. W. Brockwell, Jr. of the History Department responded to my application saying, "let me say that so far as any new appointments are concerned this department is an affirmative action employer. We encourage applications from all qualified persons, including women and members of ethnic minorities." I never heard from Mr. Brockwell again.

West Chester State College, West Chester, Pennsylvania—for two years running this department advertised for a teacher of Afro-American History at every professional meeting under the signature of the History Department's Chairwoman, Dr. Patricia Johnson. Although I had been interviewed by the department in 1968 for the same position and had chosen instead to continue toward a Ph.D. in graduate school, the department never granted me an interview. I pursued this job opening vigorously as it was nearby Philadelphia where I grew up, went to school and where my family and my wife's family still resides. I requested recommendations from numerous individuals in Philadelphia public and private life and received them. In addition I constantly wrote Dr. Johnson. On June 26, 1972 she wrote, "Please believe that I am deeply distressed that this position for which I interviewed you has, at least temporarily, evaporated. I regret having taken up your time, and I regret, in view of your superb qualifications, that I cannot look forward to having you with us next year." I was informed in March, 1974 by a member of the history faculty at West Chester that the department was still seeking a historian of Black American. I had still never been interviewed by Dr. Johnson for the position and wrote her a letter of complaint. The letter was dated March 1, 1974. She responded on April 19, 1974 (though I did not receive the letter until June) and wrote that ". . . in order to comply with the stringencies of the Commonwealth's budget a member of the staff of the Office of Student Life who is a graduate student at the University of Maryland has been teaching our Afro-American History course without charge to the Department. Since this individual appears to have excellent rapport with his students and to be a first-rate classroom teacher we will probably continue to employ his services in the future. I, therefore, do not anticipate an opening in Afro-American History in the near future. . . ." Although Dr. Johnson continued to refer to a non-existent interview, in the three years that have passed since I applied to this college, Ms. Johnson and I have never met. Nor had I, unlike the mysterious, philanthropically-minded Maryland graduate student, ever been offered the opportunity to teach the course without charge to the Department of History. While few colleges refuse to waive academic credentials when the case warrants such a waiver I wondered why the discipline of Afro-American history at West Chester waived scholarly credentials in that particular field while supposedly demanding such credentials in all other fields. I asked that question of Dr. Johnson in a letter dated June 5, 1974. Dr. Johnson has not yet responded.

State University College of Arts and Science, Genesco, New York. In an advertisement placed in the *Employment Information Bulletin* published by the American Historical Association, the Department of History noted an opening in Afro-American History. In response to my application Dr. Valentin H. Rabe wrote on November 14, 1972, "I will write again whenever I have any positive information concerning the prospective position." On January 30, 1973 Dr. Rabe wrote, "I regret to inform you that the tentative position about which we have corresponded will not materialize this year. This outcome is partly the result of budgetary uncertainties, but primarily due to the decision to commit the anticipated position to the appointment of a new department chairman." However, in April 1973 at the Organization of American Historians annual meeting in Chicago a notice, identification number 907, was posted by S.U.C., Genesco, New York that read, "Seeking a historian who will continue to develop a traditional history curriculum, and who will be capable of expanding the present interdisciplinary majors in American Civilization and in Black Studies." Since my primary field was American History with a concentration in the History of Black America I applied for a second time to the department. My application was never acknowledged.

University of Michigan, Dearborn Campus—In April 1971 I was invited to the campus, along with my wife, to deliver a paper on teaching Black History and to discuss the prospects of a position in Afro-American and Urban History. After delivering the paper and meeting with members of the Philosophy, English, Government and Education Departments the chairman of the Department of History, Dr. Donald Proctor, in consultation with Dean Papazian offered me a half-time position for the academic year 1971-1972 with the promise of a full-time position for the academic year 1972–1973. As I had not yet begun to research my doctoral thesis I requested that the department hold the offer for a year and I accepted a position at Rutgers University on a part-time basis while I was able to complete my research in nearby Philadelphia. Dr. Proctor, of course, could not guarantee that the position would still be available but did promise to do what he could and reiterated the fact that he was very impressed with my teaching ability and research potential. In December of 1971 I received a letter informing me that I was still the primary candidate for the position from Dr. Proctor where he again stated how much he and the department admired my work. In a telephone conversation in April 1972 Dr. Proctor related budget difficulties and promised to reconsider me for the following academic year in the spring of 1973. The next year Dr. Proctor informed me that a new dean had been appointed and that the word had been passed down to department heads to hire blacks or women. Proctor apologized profusely, again stated how much he admired my abilities, gave his best to my "lovely wife" and wished me good luck. I never heard from the department again.

University of Michigan, Flint Campus—In response to an advertisement in the *Chronicle of Higher Education* I applied for an opening in Afro-American History. Dr. Robert W. Heywood responded, "The position in African and Afro-American history in which you have expressed interest has recently been redefined, and partially staffed for this next year. The History Department has recommended a part-time appointment. . . . A number of courses remain unstaffed, most notably in the field of Afro-American history. There is, at the moment, some uncertainty as to the precise definition of the remaining appointment, except that it will be primarily with the Black Studies program." No further communication from the department was received.

Holy Cross College, Worcester, Massachusetts—In the spring of 1970 I taught the first course in Black History offered at the college. In the fall of 1972 the Department of History advertised for a full-time teacher of African and Afro-American History. Members of the department privately informed me that the word was out that only blacks would be given consideration for the position but I decided to apply anyway. No interview was offered although Dr. Edward Wall, chairman of the department, requested my credentials. On March 1, 1973 Dr. Wall wrote to inform me that the vacancy had been filled. Upon investigation I discovered that no white candidates had been interviewed by the department.

University of Oregon—A position was advertised in United States Social History and Afro-American History through the *Employment Information Bulletin* of the American Historical Association. I applied and received a response from Associate Dean and Professor of History Paul S. Holbo who wrote, "The Department of Health, Education and Welfare requires that the University secure information on all applicants. Would you kindly complete the enclosed form and return it to me?" The form, sent under the signature of the Office of Affirmative Action's Director, Myra T. Willard, had spaces requiring acknowledgment of a candidate's sex, ethnic and racial identity. Under these headings was American Indian, Caucasian, Black, Oriental, Spanish American and other. A space was also provided which said, "I prefer not to provide the information requested," and a note which said "Election of this option will not be prejudicial to your application." I chose not to fill the form out, complained about its use in a letter to Dr. Holbo and never heard from the University of Oregon again.

Glassboro State College, New Jersey—Advertised in the *Employment Information Bulletin* for someone to teach Afro-American History. After three or four applications in May 1973 Marie G. Wanek, Chairman of the Department of History, responded in a form letter, "We are now limiting active consideration to those applicants whose qualifications most specifically fit our current needs." At the bottom of the letter was a handwritten PS that said, "We have decided upon a minority person." The following September the Department placed an advertisement in the same bulletin for the same position.

University of Northern Colorado.—For two years between 1971–1973 the Department of History advertised in the Employment Information Bulletin published by the American Historical Association for an instructor of Afro-American History. The first year I received no response to my application. The second year I received a letter dated December 20, 1972 from Acting-Chairman Robert W. Larson which stated, "As you probably know there are guidelines issued by the United States Office of Civil Rights requiring that we take positive action "to recruit, employ, and promote qualified members of minority groups. A black person, naturally, would be particularly appropriate for this position, and we intend to follow the federal guidelines." The department's motives were made apparent by an advertisement which appeared in The Black Scholar, February, 1973, which read, "The University of Northern Colorado is recruiting a black faculty member to teach Black History and African History for the academic year beginning in the fall of 1973." The ad was listed under the name of Professor Robert W. Larson. A letter written by me to Professor Larson on January 15, 1973 complained of the department's recruitment policies and the obvious violation of white candidate's rights to equal opportunity employment. The letter was never acknowledged or answered. In Chicago in April, 1973 at the Organization of American Historians annual meeting a professional opening was advertised by the college in Black History, ID number 901, Dr. Barry Rothaus. The listed requirements stated "Master's degree plus," and "Some college teaching." I requested an interview from Dr. Rothaus who was present in Chicago and received no response. On June 13, 1973 Dr. Rothaus wrote to me saying, ". . . the Department of History has offered a one year contract to teach Black History to Mrs. Alice Reynolds. The choice of Mrs. Reynolds was a particularly difficult one considering the number of candidates applying for the position. But in view of Mrs. Reynolds' knowledge of Black History and the Black experience, the department has selected her."

Lake Forest College, Lake Forest, Illinois—In the fall of 1972 the Department of History advertised an opening in Black History in the *Employment Information Bulletin*. I applied and received no response or acknowledgement. In February, 1973 *The Black Scholar* advertised, "Lake Forest College is instituting a search for black faculty. Position in Sociology Department. Two positions in History Department with preference for urban studies and Afro-American history . . . Applicant must be working on Ph.D." On June 14, 1973 Dr. John G. Sproat, Chairman of the Department of History wrote, "This is to inform you that the position in Afro-American history in this department has been filled for the academic year 1973–1974. The process of evaluating the many able applicants for this position has been a long and difficult one, hence the late date of this letter. Please be assured that we gave your candidacy serious consideration. I trust that you have by now found a position to take advantage of your evident qualifications." In light of the advertisement in *The Black Scholar* Sproat's assertions must be doubted.

Shippensburg State College—Pennsylvania—advertised in *The Black Scholar* for a teacher of Black History. In response to my application Louis M. Bouchard wrote on December 30, 1971, ". . . we do have a department of 21 people and not one of them is black. There are only two black staff members on our whole faculty of 300. We do not believe that this is a healthy situation . . . I shall keep your letter on file . . . but I am afraid I can hold out little hope."

University of Santa Clara, California—At the New York convention of the American Historical Association in 1971 the Department of History advertised a position in Black History. E. Thadeus Flood responded to my application of January, 1972 six months later writing, "We have in fact decided on a candidate—a Chicano specialist—for the job." To my great surprise the following fall the department advertised the same job in the *Employment Information Bulletin* published by the American Historical Association. Once again I applied. On January 22, 1973 I received a form letter informing me that the position was once again filled. I wrote Flood on January 25, 1973 requesting clarification of the department's activities in the hiring and search for an Afro-American historian. He did not reply to my letter.

University of Wisconsin, Green Bay—Over the signature of R. Christian Johnson my application to this department's opening in Black History was answered on January 18, 1972. I was notified, "We are unable to include your credentials among those receiving final consideration for a position at the University of Wisconsin–Green Bay." I requested clarification and asked what the department's criteria were for the position. No answer was ever received.

University of Connecticut—In response to my application for a position advertised in Black History in the *Employment Information Bulletin*, Professor Richard D. Brown wrote, "Our decision not to invite you for an interview was based on many factors, and so should not be regarded as an adverse judgment on your credentials." On February 13, 1973 I wrote Professor Brown requesting information regarding the criteria the department used in making its selections. In a response dated February 16, 1973 Brown sympathized with my distress over the job market but *did not* discuss the criteria used to hire by his department. The job was filled by a black candidate and Brown wrote, "Of those who possessed adequate credentials, only 5% were brought to the campus. As a result we were forced to eliminate many excellent candidates from our consideration."

Temple University, Philadelphia, Pennsylvania—In the spring of 1972 the Institute of Pan-African Studies advertised for an historian to teach Afro-American History in the New York Times. In response to my application Odeyo Ayaga, Chairman of the Department, called me at my home in Massachusetts and invited me to Philadelphia for an interview. Ayaga informed me that my qualifications were among the best he had seen of all the applicants and also informed me that Temple would be glad to pay my travel expenses. At the end of the conversation, in order to avoid a long trip for nothing, I informed Ayaga that I was white, I was promptly disinvited. The following September a young woman identifying herself as a staff-member of the Pan African Institute called and inquired whether or not I was still interested in the position which had still not been filled. I said that I was and she also informed me that the position was only open to black candidates. I wrote a letter of complaint to President-designate Marvin Wachman informing him of the two unpleasant exchanges. The Temple situation was especially painful as I had attended the university as an undergraduate and received my Master of Arts degree there as well. It was at Temple where my interest in Black History had first been kindled. President Wachman responded to my letter on November 20, 1972 writing, "I received your letter sometime ago, and have pursued it at several levels. I thoroughly understand your anger and frustration; you were treated in an inexcusable fashion.

All I can say at this time is that there is interim leadership in the Afro-Asian Institute, and Mr. Ayaga did not appear to be aware of the implications of the activities of his office." Although President Wachman extended a cordial invitation to look him up when I was next in Philadelphia he made no offer to rectify what seemed to be the clearest case of discrimination I had experienced to that date. Under the initiative of the American Jewish Committee the case was pursued through the Commission of Human Relations in Pennsylvania where I lodged a complaint against the university. In return for a monetary settlement relating to lost wages while I was unemployed during that period all charges, state and federal, were dropped against the university. The case received national publicity and the story of the settlement was carried in most major newspapers as the first positive finding in a reverse-discrimination case in the country—actually there have been a few others. In an editorial entitled "Costly History Lesson at Temple," the Philadelphia Inquirer reviewed the case and noted, 'Racial discrimination is equally deplorable whatever the victim's race may be. If young people today are to learn anything from the study of history, including black history, it needs to be taught to them by professors who themselves are selected on the basis of qualification, not color." Since the story broke I have received letters from students and other applicants to the department's Pan-African Studies program. Mr. Ayaga is still head of the department and has not, apparently, changed his tactics. White students are discriminated against when they try to enroll for Black Studies courses and when finally permitted entry have to suffer the racial harangues of ill-prepared classroom teachers who in the place of substantive analysis of their disciplines preach hatred of whites and selected ethnic groups. The position in Afro-American history was again advertised last spring in the New York Times.

In conclusion, let me say this: While my case appears to be somewhat exceptional in light of the nature of the discipline involved, I am convinced as a result of my contact with unemployed or under-employed young male scholars across the country that this is not the situation. The experiences I have outlined have hit young men in every scholarly discipline and especially in the Liberal Arts and Humanities. Granted that there is currently a glutted academic job market and a financial crunch that is even jeopardizing those formerly comfortable tenured faculty members. However, the combination of reverse discrimination coming on the heels of a depressed academic market makes it virtually a certainty that the vast majority of young white males who have spent years of underpaid and agonizing work in this nation's graduate schools will see few rewards at the end of the road. It is my opinion that, far from being the exception, my experiences are the rule in the current academic job climate with affirmative action guidelines setting discriminatory quotas under the direction of the Department of Health, Education, and Welfare.

No rational individual could ever argue against the fact that Afro-Americans (and women) have suffered grievous oppression and injustice in this country's past. It is also painfully clear that blacks are still being systematically excluded from equality in many areas of American life. However, the introduction of exclusionary quotas will do precious little to reverse the twisted path of the past and the movement toward equality in the present. What is worse, quotas will further divide the races. It is no secret to political observers that white ethnics are up in arms over the attempt of government, by social manipulation, to regulate the lives of the great middling order in this society. This unrest can be primarily detected in the unrest resulting from the regulation of their children's educational experiences. Discriminatory quotas which force college administrators, with one eye on federal funds and the other on H.E.W. affirmative action guidelines, to bring blacks and women onto their beleaguered campuses without reference to quality and qualification will only create greater divisiveness and hatred and, at the same time undermine the quality of higher education in America. A recent Carnegie Commission study has indicated that this deterioration is already well underway. It is also important to note that many of the schools that are in the forefront of this discriminatory practice are state institutions funded by the class most affected by discriminatory practice—an irony that is of dubious constitutionality.

Finally, history has always taught the lesson that it is unprofitable and unjust to visit the sins of one generation upon another. An entire generation of young scholars is currently being forced to pay for sins which they did not commit, but in some cases were actively involved in eradicating during the civil rights struggles of the early 1960s. I myself fall into this category and can now attest from experience what it is like to have one's own civil rights constantly violated in America. Although no one can predict with any degree of accuracy where the policies of reverse discrimination will lead, it is clear as of now that they have produced no salutary results and have altered the status of blacks and women in only a miniscule fashion. Blacks are still being excluded and shunted aside in other areas of academic life as their numbers increase in fields like Black Studies but remain relatively non-existent in the more traditional disciplines of Chemistry, Physics, Biology, Classic etc. When the H.E.W. guidelines are strictly followed, few bureaucrats pay attention to what is being taught or the quality of the individuals who do the teaching. The game simply becomes one of numbers—how many blacks, or how many women are on a given faculty. It is time for the Congress of the United States to reverse the tide of this new discrimination. Individuals in a democratic society must be judged solely on qualification and individual merit and not by what racial, ethnic or sexual group they, by an accident of birth, belong to. If these evils are not eradicated I can assure you that the day will come when my children or my children's children will demand, as they inevitably will, that the scales once again be set in balance. Who will be singled out for retribution then? Would it not be so much easier for Americans, on the eve of their Bicentennial celebration, to end discrimination once and for all and to finally make the dream of the Founding Fathers a reality for this generation and every generation to come. It is high time to stop advertisements that read, "Lake Forest College is instituting a search for black faculty," and to open all of our [illegible] institutions to all our people.

Respectfully submitted,

Martin S. Goldman.

[On September 27, George D. Wolf, dean of faculty, the Pennsylvania State University, Middletown, Pa., wrote to the subcommittee, requesting an opportunity to reply to certain allegations made by Dr. Goldman in the course of his testimony. The chairman invited Dean Wolf to submit whatever statement he felt would clarify the testimony, and the following materials were submitted by him:]

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Prepared Statement of George D. Wolf

Mr. Martin S. Goldman's testimony of 23 September 1974 cleverly combines his application for two different positions with a complete and utter distortion of the factual record of the case. In the first place, his original inquiry of 2 May 1971, which I actually received on 7 May 1971, came two days after the offer had been made to the successful candidate. At that point, I considered the case closed as my letter indicated. Mr. Goldman's abusive response to my letter of 13 May 1971, following the appropriate listing of a second position with the American Historical Association, led to my response of 24 January 1972. Most readers of Mr. Goldman's letter of 6 February 1972 would agree that it required no response. When The American Jewish Committee requested a summary of the case from me on 20 November 1972, I was happy to respond and did so on the 29th of November 1972. Unfortunately, Mr. Goldman has continued to abuse me in an article in The Social Studies, Volume LXV, No. 1, page 34, as well as his testimony before your Committee. I am happy to correct the record. I trust that the Subcommittee will not simply become a forum for disappointed candidates to vent their spleen over imaginary abuse.

Enclosures.

Auburn, Mass., *May 2, 1971.*

Dean of Faculty,
Pennsylvania State University, Capitol Campus, Middletown, Pa.

Dear Sir: Kindly allow me at this time to add my vitae to the thousands that will probably be pouring into your office as a result of your advertisement in the New York Times. I do not envy your task.

As you probably realize, there is an academic blight that has set in and the discipline of history has been among the hardest hit. Thus I am quite sure that you will have your pick among the finest doctoral candidates and Ph.D's that America has to offer. I would, however, like to throw my hat in the ring for a shot at the position in Afro-American Studies. As you will see by my vitae I have had a rather substantial background in this field.

I grew up in Philadelphia, living there for the first 25 years of my life and only left when an opportunity for work combined with a good graduate school became available in central New England in 1966. Clark University is a small school of 1500 undergraduates and 300 graduate students. The History Department has only about 30 graduate students on a full time basis. It is intimate and we work closely with our professors who become, as time passes, more than mentors and teachers to us. I must say I have enjoyed the experience. But it is now time, I think, to go out again on my own.

I know that you will have many qualified candidates for your opening. But I feel that I have one qualification that puts me heads and tails above most of my younger competitors today. And that is my sincere commitment to good teaching combined with a dedication to scholarship and professionalism. I am very much interested in the interdisciplinary approach to college teaching and have even experimented with it in my freshman classes at Clark. I know that today many schools who seek instructors in ethnic disciplines hope to obtain an ethnic for the discipline in question. I have faced up to this difficulty and decided not to give up my interest in Black History. This interest goes back to my early experiences as a high school instructor where I taught in the so-called "ghetto" in Philadelphia. I didn't know it was a ghetto because I had grown up there only 4 years earlier, attending the very same school to which I later returned as a teacher.

I don't profess to have all the answers to the problems that are confronting the teacher who ventures into ethnic studies these days. In fact I'm not sure I have any. Indeed, I too have had my difficulty with Black students as they have come to discover their long-hidden roots. But then I have also had difficulty with White students. I think teaching is the most difficult task in our society today and I am skeptical of anyone who claims to have all-purpose solutions. However, I am well-versed in my discipline, I love to teach and I would like to be considered for a position as I am now formulating my plans for the next academic year.

Sincerely,

MARTIN S. GOLDMAN.

FACULTY APPLICANT FORM

Goldman, Martin
Date of receipt of inquiry May 5, 1971.
Acknowledged by G. Wolf.
Kindly fill in the code numbers below:
Area 1 560
Area 2 ____________
Area 3 ____________
Area 4 ____________

Explanation:

This form should be attached to the front of every vita or letter of inquiry received relating to a faculty position. The date of receipt of the inquiry and the name of the person acknowledging it should be indicated. The inquiry, this form, and a copy of the acknowledgment if one is sent should be forwarded promptly to Room W-102 where the file will be recorded and retained.

It will be helpful if the code numbers of the applicant's fields of competence are indicated. They should be listed in the order of strength with a 1 preceding the code numbers of any fields of particular strength.

MAY 13, 1971.

Mr. MARTIN S. GOLDMAN,
Auburn, Mass.

DEAR MR. GOLDMAN: Thank you for your inquiry concerning the Afro-American Studies position on our campus which was referred to me by the Dean of Faculty. That position, however, has recently been filled.

With your permission, we will keep your credentials on file for future reference or in the event the present situation changes.

Sincerely,

GEORGE D. WOLF,
Head, Division of Humanities, Social Sciences and Education.

CLARK UNIVERSITY,
Worcester, Mass., January 4, 1972

Dr. GEORGE D. WOLF,
Capitol Campus,
Pennsylvania State University,
Middletown, Pa.

DEAR DR. WOLF: Last spring I applied for a position in Black History at your campus. I sent my credentials and in a few weeks received a reply that the position was filled and that my credentials were going to be kept on file for future reference. You can imagine my surprise at the recent AHA meeting in New York City when I saw an announcement for the position, once again, under your name.

This only leads me to conclude that for some reason I was not interviewed for the position. It can't be experience for I have been teaching Black History for over 5 years at the university level. It can't be my credentials as a scholar, for unlike most graduate students I have published during my graduate student life and most certainly will continue to do so as a professor. It can't be my personality because you never met me and don't know me. Thus, one can only conclude that you people will not interview me because I am White. This, of course, is a violation of the Civil Rights Act of 1964 (Equal Opportunity Employment Code).

Now I know that you will have many qualified candidates for your position. And I also know that you could easily interview me and then write me off as having complied under the law. But I wonder if you realize what you and so many administrators like you are doing to the academic profession in carrying out such discriminatory hiring policies. Such liberalism could well be catastrophic for higher education.

I am only asking that you allow me to compete with *all* candidates for the position in Black History. I have a sincere commitment to excellence in teaching combined with a well-balanced dedication to scholarship. I don't profess to have all of the answers to the problems of higher education today. Indeed, I have, in recent years, had my problems with Black students who question my right as a White scholar to teach them about their history. But isn't this to be expected as Blacks come to grips with their long-misplaced roots. It is to be less expected of college administrators who should know better and who should know what discrimination has produced in the past. At any rate my classes at Rutgers University in New Brunswick are largely Black and these students have come to accept me on my merits and abilities as a teacher. I am well-versed in a discipline that I love and which I refuse to abandon because of a temporary madness that has seized the academic profession.

If this letter seems angry, you're damn right!

Very sincerely,

MARTIN S. GOLDMAN, *Lecturer.*

JANUARY 24, 1972.

Mr. MARTIN S. GOLDMAN,
Department of History,
Clark University,
Worcester, Mass.

DEAR MR. GOLDMAN: Your letter of 4 January piqued my interest, to say the least. But time for an adequate reply has not been available until the present moment. Needless to say, your candidacy will be given the consideration it deserves in terms of the qualifications necessary for the position. Unfortunately, your letter is in error on several counts.

In the first place, the position which was advertised last year was filled by a fully qualified candidate who had been to our campus on previous occasions in conjunction with his work with VISTA. Furthermore, his Peace Corps experience in Africa, as well as his completion of graduate work in the Black Studies program at Ohio University, presented a leading candidate whom we settled upon quickly. One of the difficulties of higher educational administration is the necessity for decision and, in the case mentioned, we felt the candidate was what we were seeking and he has proven to be a good choice. This university is an equal opportunity employer and violations of anyone's civil rights, whether white or black, will not be passed over.

Incidentally, your lumping me together with "so many administrators like you" demonstrates guilt in the kind of action of which you accuse me. My hiring policies, I trust, have not been discriminatory in terms of whites, blacks, males or females. Qualified persons are still what we seek.

As far as the position is concerned, it is only partially a position relating to Black Studies. What we are seeking is a candidate who can teach Black literature and aesthetics, and perhaps participate in either our Education, Humanities or Social Science programs. On this count, I must confess that your credentials do not suggest that you are a likely candidate. However, if you feel to the contrary, we will be happy to hear from you again and will give your credentials the consideration which they merit.

Don't let your anger cloud your vision.

Sincerely,

GEORGE D. WOLF,
Head, Division of Humanities, Social Sciences and Education.

CLARK UNIVERSITY,
Worcester, Mass., February 6, 1972.

Dr. GEORGE D. WOLF,
Head, Division of Humanities, Social Sciences and Education, Pennsylvania State University, Middletown, Pa.

DEAR DR. WOLF: I would like to take this opportunity to partially apologize for jumping the gun on you in terms of the position which was advertised last spring in The New York Times and at the AHA Convention last December in

New York. It is obvious that, as a teacher of Afro-American History, I do not fit the requirements of "a candidate who can teach Black literature and aesthetics." I only wonder why such a position was advertised at the AHA where, to my limited knowledge, all candidates were trained as historians.

It is obvious, from your letter of January 24, that you are very sensitive to the qualifications of your prospective employees. Our only difference here, it would seem, is in how we evaluate academic credentials. You place, it appears from your letter, a great deal of weight upon a candidate's previous experience in terms of community-oriented services. Thus the fact that a man has been a VISTA worker, a Peace Corps volunteer, adds immeasurably to his chances of being hired. I differ with you simply in the fact that these things are in my estimation quite irrelevant in measuring an individual's academic talents in teaching and research. I would stand close to Eugene D. Genovese who wrote in his recent book In Red and Black, "What has to be resisted firmly is the insanity that claims . . . that the experience as a SNCC field organizer should be considered more important than a Ph.D. in the hiring of a professor of Afro-American History. This assertion represents a general contempt for all learning and a particular contempt for black studies as a field of study requiring disciplined, serious intellectual effort . . ." (PP. 223–224)

I hope you don't get the impression that I think that a Ph.D. entitles me to special consideration. I don't. One of the reasons that the state of American higher education is in a shambles today is because of the Ph.D. mania that has dominated our universities. However, I would hesitate to trade upon my experiences for 4 years as a teacher in black ghetto schools in order to acquire a decent academic position. As far as my academic credentials go these years mean absolutely nothing. I am, therefore, naturally skeptical of anyone who claims expertise in an area without having spent many years of teaching, reading, studying and research in the area. But I am afraid, that our differences will remain and this crazy profession will continue on its collision-course way. Again, I sincerely apologize for having misjudged what seems to be only a difference of opinion as to standards—a difference which must be allowed if academic freedom is to be maintained. I wish you luck with your search.

Sincerely,

MARTIN S. GOLDMAN.

THE AMERICAN JEWISH COMMITTEE,
Philadelphia, Pa., November 20, 1972.

Dr. GEORGE D. WOLF,
Head, Division of Humanities, Social Sciences and Education, The Pennsylvania State University, The Capitol Campus, Middletown, Pa.

DEAR DR. WOLF: This letter is with reference to your correspondence with Mr. Martin Goldman, an applicant for a position in Afro-American Studies with your faculty. I am enclosing a copy of correspondence dated January 24 from you to Mr. Goldman regarding this matter for your convenience.

The American Jewish Committee has taken a vigorous interest in problems relating to preferential treatment and quotas in hiring. It is because of this keen interest that we are asking your cooperation in developing the facts behind Mr. Goldman's application for a position with your faculty. Although Mr. Goldman has authorized us to file a complaint with the Equal Employment Opportunities Commission and the Pennsylvania Human Relations Commission, if the facts do not warrant such action on our part, we would not wish to do so.

We would, therefore, appreciate your advising us of the manner in which the position in which Mr. Goldman expressed interest was filled, and the dates and techniques surrounding the recruitment and interviewing processes.

Your prompt cooperation will be appreciated.

Sincerely,

MURRAY FRIEDMAN, *Regional Director.*

Enclosure.

NOVEMBER 29, 1972.

Mr. MURRAY FRIEDMAN,
Regional Director, The American Jewish Committee, Pennsylvania Building, Philadelphia, Pa.

DEAR MR. FRIEDMAN: I was intrigued by your letter of 20 November 1972, and certainly appreciate your "vigorous interest in problems relating to preferential treatment and quotas in hiring." However, in the case involving Martin Goldman, who authorized you to file a complaint with the Equal Employment Opportunities Commission and the Pennsylvania Human Relations Commission, I am afraid that the facts do not warrant such action on your part. Nevertheless, I am happy to supply you with whatever evidence I have relative to the case.

Enclosed are copies of Mr. Goldman's original inquiry of 2 May 1971, and my response of 13 May, indicating that the position had been filled. Also included is Mr. Goldman's letter the subsequent year, improperly dated as the content indicates—4 January 1971 (sic) 1972. My reply of 24 January 1972 is apparently in your possession since you sent me a copy of it. Finally, there is a copy of Mr. Goldman's letter of 6 February 1972 which was our final communication.

You will note that Mr. Goldman's 4 January letter takes me pretty much to task in the third paragraph, in a kind of guilt by association, which prompted my response. Furthermore, in his final communication to me, he expressed surprise that the position was advertised with the American Historical Association, when most reputable scholars know that the American Historical Association has been something of a home for American Studies people since the origin of that group. I, myself, have a degree in American Studies and teach in areas other than history, although being primarily historically trained. Incidentally, the offer was made to the successful candidate on the fifth of May in 1971, consequently, I am not even certain that Mr. Goldman's application had reached me at that point. As a matter of fact, the successful candidate was black and is still with us. In the final analysis, I can only repeat what I said to Mr. Goldman that my hiring policies have not been discriminatory in terms of whites, blacks, males, or females. We seek qualified persons.

Thank you for your inquiry and please let me know if you need any further information.

Sincerely,

GEORGE D. WOLF,
Head, Division of Humanities, Social Sciences and Educatio

Mr. O'HARA. Our last witness this morning is Lucy Sells, of the National Women's Caucus of Alameda County, Berkeley, Calif.

TESTIMONY OF LUCY SELLS, NATIONAL WOMEN'S CAUCUS OF ALAMEDA COUNTY, BERKELEY, CALIF.

Ms. SELLS. First, documentation of differential education achievement of women and minorities compared with white men.

These are the facts which document the systematic filtering of women and minorities out of the opportunity structure of higher education. While the facts are primarily about women, the processes which filter them out work even more intensely against minority students. Keep in mind the question of what happens differently to women and minority students and to white men that might account for sex and ethnic differences in educational achievement.

1. In a systematic random sample of freshmen admitted to Berkeley in fall 1972, 57 percent of the men had taken 4 years of mathematics in high school, including the trigonometry-analytic geometry sequence, compared with 8 percent of the women. This high school mathematics sequence is required for admission to the standard calculus course, which, in turn is required for an undergraduate major in every field at the university, except the traditionally female fields of humanities, social sciences, librarianship, social welfare, and education. Law is the only traditionally male field which doesn't require intensive mathematics as undergraduate preparation.

The math fact itself is changing, reflecting changing attitudes in society. By fall, 1973, 65 percent of the entering men, and 22 percent of the entering women had taken the trigonometry-analytic geometry sequence in high school. This may reflect the growing interest in the health sciences, and less sex role stereotyping on the part of high school counselors.

2. Among a class of upper division social science students at Berkeley, there was a large and statistically significant relationship between presence or absence of social support from teachers, parents, or peers, and pursuit of the fourth year of mathematics in high school.

3. Among students earning the bachelor's degree in the 21 largest letters and science departments, there is a strong and statistically significant relationship between having the standard calculus requirement in the curriculum, and having less than one-third of the degrees in the department earned by women.

4. The ethnic differences in choice of major based on the mathematics requirement are as dramatic as the sex differences. At Berkeley, 68 percent of the oriental men majored in physical sciences, life sciences, or mathematics, compared with 41 percent of the Caucasian men, and 37 percent of all other men. In contrast, 45 percent of the oriental women majored in these fields, compared with 17 percent of Caucasian and all other women—table VII, page 9 of "Strategies" paper, appendix II.

5. In the physical sciences at Berkeley 26 percent of the bachelor's degrees are earned by women. Only 11 percent of the applicants to graduate school are women. This statistically significant drop in the percentage of women from undergraduate to graduate levels is evidence of both differential aspirations among the students involved, and differential expectations on the part of faculty who might encourage them to pursue graduate careers.

6. At the same time women seem to be admitted to graduate departments in the same proportion in which they apply, and to receive financial support in the same proportion in which they apply.

7. A secondary analysis of data on Woodrow Wilson fellows who entered graduate school from 1958 to 1963 shows a 20-percent sex difference in dropouts from doctoral programs. This sex difference almost disappears among those who had second-year financial support, gets much larger among those who have children, and gets larger yet among those rated "excellent" by their faculty. There was no difference in the dropout rate of women who were rated "excellent" and that of men who were rated "average to dreadful." At a very minimum affirmative action requires that the achievements of women rated "excellent" might surpass those of men rated "average to dreadful." Fullfledged affirmative action will be achieved when the achievements of women rated "excellent" equal those of men rated "excellent"—table IV, page 74, "Strategies" paper.

8. There has been a dramatic reduction in the fourth-year doctoral dropouts among women at Berkeley. Among the entering class of 1962 25 percent of the men had dropped out of doctoral programs by the fourth year compared with 42 percent of the women. Among the entering class of 1968, 27 percent of the men had dropped out by the fourth year compared with 42 percent of the women. Among the entering class of 1968, 27 percent of the men had dropped out by the fourth year compared with 27 percent of the women. This can be attributed both to the powerful social support of the women's movement and to the fact that faculty are learning not to impose expectations and stereotypes based on the behavior of women in the 1950's and 1960's on women of the 1970's.

9. In a national survey of graduate students sponsored by the Carnegie Commission on Higher Education there are large and statisti-

cally significant sex differences in the percentage of students reporting that their primary faculty contact regards them as a colleague or apprentice. In psychology 72 percent of the men and 53 percent of the women reported such a relationship. In history it was 57 percent and 37 percent; in English it was 52 percent and 33 percent, and in mathematics, 39 percent and 22 percent. (Table VI, p. 17, Strategies.)

10. In the faculty sample of the same survey similar sex and discipline differences appear in the percentage reporting having had a faculty "sponsor" when looking for their first job out of graduate school.

Documentation is contained in the following papers in appendix II:

1. High school mathematics as the critical filter in the job market.
2. Strategies for achieving affirmative action.
3. Sex differences in graduate school survival.
4. Availability pools as the basis of affirmative action.

ANALYSIS OF 4 YEARS OF PARALYSIS BETWEEN THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE (HEW) AND INSTITUTIONS OF HIGHER EDUCATION (IHE)

This analysis is based on my 4 years of participant observation on affirmative action at Berkeley, from a variety of roles and perspectives:

1. As a researcher on filtering points in educational achievements, first of women, and subsequently on minorities.
2. As a woman graduate student struggling with the psychological, sociological, and economic implications of academic and professional success.
3. As a student member of the chancellor's advisory committee on the status of nonsenate academic women.
4. As a student member of the academic senate's committee on the status of women and minorities.
5. As a consultant on affirmative action for the University of California, on the Berkeley, Davis, San Diego, San Francisco, and Santa Barbara campuses.
6. As a consultant for HEW's Office of Civil Rights in developing guidelines for faculty recruitment, hiring, and promotion.

In my participation of discussions between and among students, faculty, and administrators I have observed 4 years of paralysis on affirmative action, which is just beginning to be resolved. The primary source of that paralysis was the conflict generated between and among three separate subcultures: the advocates, adversaries, and enforcers of affirmmative action. Discussion between and among the three groups took place in a context of mistrust, ill will, and closed communication generated by differences in perceptions of the goals and consequences of affirmative action, and in perceptions of the commitments and motivations of the other party.

The advocates of affirmative action are convinced that it is necessary to achieve the highest standards of scholarship and excellence, and that merit, rather than sex or ethnicity, should be the sole criterion for recruitment, hiring, and promotion. They are trying to develop ways of evaluating merit which don't build in the idea that being female, or belonging to an ethnic minority are demerits. Those who haven't yet tasted the rewards of the system are especially suspicious and hostile to the adversaries, whom they perceive as trying to exclude them from the system. Some are even suspicious of the enforcers, whom they perceive as not trying hard enough to include them in the system. Some even perceive the adversaries and enforcers in deliberate collusion to exclude them from the system.

The adversaries of affirmative action are convinced that their cherished values of scholarship and excellence will be destroyed by affirmative action. This comes from their misunderstanding that affirmative action means "Whenever you have a white man competing with a woman or ethnic for a job, preference must be given to the woman or ethnic, even though the white man is better qualified." In fact, Federal policy says that "In very limited instances only can preference be given to women and minorities: when there has been a history or pattern of exclusion, and/or discrimination, and if two candidates are equally qualified, only then can preference be given to the member of the minority group."

The enforcers of affirmative action are convinced that the adversaries have been recalcitrant on affirmative action because of their deliberate, conscious sexism and racism. Their paternalistic authoritarianism which assumes the worst about IHE, and about adversaries within those IHE is as fundamental to the problem as is the sexism and racism of which they accuse the adversaries.

Each group tends to think of itself as the hero or victim, and those above and below in the hierarchy of power and authority as the villains, regardless of position on the ladder.

In working with State and national organizations devoted to achieving affirmative action, I have discovered that the typology of advocates, adversaries, and enforcers of affirmative action which I had thought limited to the Berkeley situation is, in fact, applicable to all IHE affected by Federal policy. Moreover, the model of three separate subcultures talking past each other with different norms, values, styles of rhetoric, and political behavior holds up for large public universities, State colleges and universities, community colleges, and private colleges and universities.

The differential educational achievement of women and minorities is a societal problem, not one that can be solved simply by having you, the decisionmakers, crack the whip on HEW, the enforcers, to crack the whip on IHE to recruit, hire and promote women and minorities in proportion to their existence in the total population. In order to achieve those results, we must change the structure of society, so that automatic, implicit, unconscious assumptions about human beings are no longer defined in terms of sex, ethnic, and power and authority status categories.

The major themes emerging from my research on sex and ethnic differences in educational achievement are sexism, racism, and authoritarianism. They are the automatic, implicit, unconscious assumptions about human beings based on their sex, ethnic and status categories. They are so pervasive in the structure of society and personality that they are as invisible to those of us who are constrained by them as the air we breathe.

Sexism and racism are self-explanatory concepts. This thing I am labeling authoritarianism has to do with a profound sense of mistrust of people at different levels of power and authority from one's own. It consists of the automatic, unconscious, implicit expectation that persons above will behave like bad parents, either as bad fathers who will punish them, or as bad mothers who will neglect them. The second assumption is that persons below will behave as bad children, either as bad sons for compulsive rebellion or as bad daughters for compulsive docility. This phenomenon I have called misplaced familial authoritarianism is fundamental to the pathology of graduate student-faculty relations. I have observed a great deal of it in graduate school at Berkeley. I suspect that you have observed as much in your relations with the executive branch and its departments.

Sexism, racism and authoritarianism are internalized as need dispositions in the personalities of individual human beings. This calls for psychological solutions through raising people's awareness of their existence. Appendix III describes the process of consciousness-raising as it has developed among small groups in the women's movement.

Sexism, racism and authoritarianism are also institutionalized as role expectations based on stereotypes about human behavior based on sex, ethnicity and position in the power and authoritiy structure. This calls for sociological solutions, through a parallel process of organizational and institutional consciousness-raising, described in the political effectiveness paper in appendix IV. It has important implications for helping all social groups to achieve their own autonomy as responsible, creative, productive adults, independently of sex, ethnicity, or level of power and authority.

The conflict between and among the advocates, adversaries, and enforcers of affirmative action is exacerbated by the fact that you, as members of an important congressional Committee on Education are responding to conflicting demands from your own constituents. They are that you force HEW to do more on behalf of women and minorities, and that you force HEW not to commit reverse discrimination against white men. These goals need not be mutually exclusive, if we focus on the goal of freeing all persons to rise to the limits of talents and energies, independently of sex or ethnicity, as opposed to quotas, which build in exclusion, independently of talent and energy. Our efforts should be on freeing people to include themselves in the system, as well as freeing IHE to identify and rectify previous exclusionary practices.

My own work in affirmative action consists of gathering, analyzing, and disseminating whatever data I can get my hands on among the advocates, adversaries, and enforcers of affirmative action. The positive response from all three groups convinces me that sexism, racism, and even authoritarianism are veils of ignorance which can be lifted through an educational process which doesn't threaten people's sense of themselves as worthwhile human beings with accusations of blame and bad faith.

SUMMARY AND PROPOSALS FOR RESOLUTION OF THE PARALYSIS

As in all social controveries the cast of heroes, villains, and victims in the affirmative action drama depends on one's objective position in the power and authority structure and one's subjective experience of being included or excluded in that power and authority structure. Those women and minorities who experience themselves as included in the system are free to trust the good faith, intentions and will of IHE, HEW, and even of Members of Congress.

I have watched the subcommittee's hearings last week and read the transcripts from the earlier sessions. The performance of the affirmative action drama that I have seen at Berkeley has been repeated here in Washington. The actors are more articulate, the lines more cogent and precisely presented, and the overall performance more polished. However, I still see people from each perspective clinging to their own perception of the reality of affirmative action, and shutting out the perspectives of the others.

1. HEW and advocacy groups both insist that goals are not quotas.
2. HEW and advocacy groups both insist that lowering of standards is not required.
3. Adversary groups insist that goals are quotas.
4. Adversary groups insist that lowering of standards is inevitable because of their assumptions that department chairmen will take the easy way out rather than risk losing Federal funds.
5. Advocacy groups are frustrated that HEW and Congress have not done enough to improve the status of women and minorities.
6. Adversary groups are concerned that affirmative action has already produced reverse discrimination at the expense of white men.

First, I want to dispel the myth that there has been no real progress in the status of women and minorities at Berkeley, which has repeatedly been cast in the role of villain.

1. The dramatic decline in sex differences in doctoral programs reported earlier is evidence of a changing climate of expectations on the part of women students for themselves, as well as of a changing climate of faculty expectations for students.
2. The proportion of women on ladder level appointments has increased from 1969 to 1972:

	Percent
Full professor:	
1969	2
1972	3
Associate professor:	
1969	5
1972	7
Assistant professor:	
1969	5
1972	12

In academic year 1967–1968 3 percent of 124 new hires at the assistant professor level were women. In 1973–1974 27 percent of 74 new hires were women, although nationally the availability pool was around 20 percent. While the national availability pool was about 2 percent on minorities, 8 percent of the new hires were minorities. The provost assures me that affirmative action recruitment at Berkeley has increased the quality of new hires, not reduced it. I have similar data on Princeton, Stanford, and Yale with respect to percent and quality of new hires.

Second, I want to pick up on Professor Hook's theme of recruiting and hiring the best qualified person to do the job. I call your attention to the concept of differentiation of function of institutions of higher education. This has been most clearly spelled out in California's master plan for postsecondary education. Differentiation of function recognizes that major universities do something very different from State universities and colleges and community colleges.

The major function of universities is research—the creation of new knowledge—which keeps them at the cutting edge of civilization. The major function of the States universities and colleges in the California system is the transmission of existing knowledge. The major function of the community college system is to provide for smooth transition of students who might otherwise have been excluded from access to the university for a variety of reasons. A second function is the transmission of skills and technical training.

This formal recognition of the differentiation of function of IHE is not elitism, but rather, the most economical and effective division of labor and resources. It helps avoid duplication of function, as well as making it possible for institutions to meet the needs and aspirations of students.

Patterns of recruitment tend to differ among segments of postsecondary education. The qualities that make a person best qualified to do the job are quite different for a research-oriented university, a teaching college and a skill transmission and avenue for upward mobility institution.

Third, I want to dispel the myth that it is possible for department chairmen to take the easy way out by lowering standards rather than risk losing funds. If I were under consideration for an appointment at a major university the materials in appendixes I and II would be scrutinized and reviewed by (1) the departmental search committee, (2) the department chairmen and dean, (3) an ad hoc committee of five people from the faculty of the campus at large, (4) the budget committee itself comprising a dozen senior faculty members, (5) by the provost, (6) by the vice-chancellor, (7) by the chancellor.

Each review would be of the academic quality of the work, my teaching record, and my university and public service activities, and would be in competition with similar dossiers from other candidates. This gives you an idea of the care with which the search for best qualified person to do the job is conducted in major universities, with emphasis on research potential, productivity, and promise. Even if department chairmen were as spineless and irresponsible as adversaries assume them to be, there are six higher levels of review to insure that standards of quality will be upheld.

Recommendations:

1. The subcommittee is in a position to make a power contribution to the present impasse between IHE and HEW, and between advocates and adversaries of affirmative action. Whatever new legislation is adopted, it will be more effective if it is cast in positive language of facilitation instead of the negative language of enforcement. It is a subtle but profound difference, but frees all parties to look for and find the best in each other. Further, it frees them from the constraints of looking for and, hence, finding the worst in each other. Appendix V suggests a more constructive approach to helping people at all levels of IHE to recognize the need for effective affirmation action, and to come up with solutions to the difficult problems posed by civil rights obligations.

I respectfully point out that the assumption that department chairmen will take the easy way out is yet another example of not trusting people to behave as responsible, autonomous adults. I hope we can change this.

2. Make it clear that it is illegal as well as immoral to refuse to hire any person on the basis of sex or ethnicity. A graduated scale of fines would help get the point across.

3. Provide middle-range penalties short of total withdrawal of Federal funds for noncompliance.

4. Expand opportunities for remedial mathematics and remedial reading and writing skills to compensate for inequities and deficiencies in primary and secondary education, independent of sex or ethnicity.

5. In some ways the Federal Government has itself contributed to the sex differences in faculties through the GI bill of rights, which was rightfully used to reward men for years of faithful military service, although it was clearly a form of preferential treatment. I toss out for exploration the idea of a homemaker's bill of rights, to reward women for years of faithful and domestic service, to help them develop their potential contribution to solving pressing social and scientific problems once their children have left the nest.

6. We need a clear policy statement against all forms of discrimination in primary, secondary, and postsecondary education.

[Statement and appendices referred to follow:]

PREPARED STATEMENT OF LUCY W. SELLS, NATIONAL WOMEN'S CAUCUS OF ALAMEDA COUNTY, BERKELEY, CALIF.

Mr. Chairman, and members of the committee: My name is Lucy W. Sells. I'm a graduate student completing a dissertation on sex differences in educational achievement. I'm a political sociologist who specializes in problems of power and authority relationships in a variety of social systems: marriage, the family, the educational system, the economic system, and the political system. Appendix I documents my qualifications to testify, and my commitment to the goal of freeing all persons, independently of sex or ethnicity, to rise as far as their talents and energies will carry them, in educational, and hence occupational and political systems.

My testimony will consist of three major parts:

First, documentation of the differential educational achievements of women and minorities from those of white men.

Second, an analysis of the apparent four years of paralysis between the Department of Health, Education, and Welfare, and institutions of higher education.

Third, a proposal for resolving that paralysis, so that we might all work together to achieve our shared goals.

For brevity, the documentation based on my dissertation findings is presented in Appendix II.

DOCUMENTATION OF DIFFERENTIAL EDUCATIONAL ACHIEVEMENT OF WOMEN AND MINORITIES COMPARED WITH WHITE MEN

These are the facts which document the systematic filtering of women and minorities out of the opportunity structure of higher education. While the facts are primarily about women, the processes which filter them out work even more intensely against minority students. Keep in mind the question of "What happens differently to women and minority students and to white men that might account for sex and ethnic differences in educational achievement?"

1. In a systematic random sample of freshmen admitted to Berkeley in Fall, 1972, 57% of the men had taken four years of mathematics in high school, including the trigonometry-analytic geometry sequence, compared with 8% of the women. This high school mathematics sequence is required for admission to the standard calculus course, which, in turn is required for an undergraduate major in every field at the University, *except* the traditionally female fields of humanities, social sciences, librarianship, social welfare, and education. Law is the only traditionally male field which doesn't require intensive mathematics as undergraduate preparation.

The Math Fact is itself changing, reflecting changing attitudes in society. By Fall, 1973, 65% of the entering men, and 22% of the entering women had taken the trigonometry-analytic geometry sequence in high school. This may reflect the growing interest in the health sciences, and less sex role stereotyping on the part of high school counselors.

2. Among a class of upper-division social science students at Berkeley, there was a large and statistically significant relationship between presence or absence of social support from teachers, parents, or peers, and pursuit of the fourth year of mathematics in high school.

3. Among students earning the Bachelor's Degree in the twenty-one largest Letters and Science Departments, there is a strong and statistically significant relationship between having the standard calculus requirement in the curriculum, and having less than one third of the degrees in the department earned by women.

4. The ethnic differences in choice of major based on the mathematics requirement are as dramatic as the sex differences. At Berkeley, 68% of the Oriental men majored in the physical sciences, life sciences, or mathematics, compared with 41% of the Caucasian men, and 37% of All Other men. In contrast, 45% of the Oriental women majored in these fields, compared with 17% of Caucasian and All Other women. (Table VII, page 9 of *Strategies* paper, Appendix 11.)

5. In the physical sciences at Berkeley, 26% of the Bachelor degrees are earned by women. Only 11% of the applicants to graduate school are women. This statistically significant drop in the percentage of women from undergraduate to graduate levels is evidence of both differential aspirations among the students involved, and differential expectations on the part of faculty who might encourage them to pursue graduate careers.

6. At the same time, women seem to be admitted to graduate departments in the same proportion in which they apply, and to receive financial support in the same proportion in which they apply.

7. A secondary analysis of data on Woodrow Wilson Fellows who entered graduate school from 1958 to 1963 shows a twenty percent sex difference in dropouts from doctoral programs. This sex difference almost disappears among those who had second year financial support, gets much larger among those who have children, and gets larger yet among those rated "excellent" by their faculty. There was no difference in the dropout rate of women who were rated "excellent" and that of men who were rated "average to dreadful." At the very minimum, affirmative action requires that the achievements of women rated "excellent" might surpass those of men rated "average to dreadful." Full-fledged affirmative action will be achieved when the achievements of women rated "excellent" equal those of men rated "excellent." (Table IV, page 14, *Strategies* paper.)

8. There has been a dramatic reduction in the fourth year doctoral dropouts among women at Berkeley. Among the entering class of 1962, 22% of the men had dropped out of doctoral programs by the fourth year, compared with 42% of the women. Among the entering class of 1968, 27% of the men had dropped out by the fourth year, compared with 27% of the women. This can be attributed both to the powerful social support of the women's movement, *and* to the fact that faculty are learning not to impose expectations and stereoypes based on the behavior of women in the 1950's and 1960's on women of the 1970's.

9. In a national survey of graduate students sponsored by the Carnegie Commission on Higher Education, there are large and statistically significant sex differences in the percentage of students reporting that their primary faculty contact regards them as a colleague or apprentice. In Psychology, 72% of the men, and 53% of the women reported such a relationship. In History, it was 57% and 37%, in English it was 52% and 33%, and in Mathematics, 39% and 22%. (Table VI, page 17, *Strategies.*)

10. In the faculty sample of the same survey, similar sex and discipline differences appear in the percentage reporting having had a faculty "sponsor" when looking for their first job out of graduate school.

Documentation is contained in the following papers in Appendix II:

1. High School Mathematics as the Critical Filter in the Job Market.
2. Strategies for Achieving Affirmative Action.
3. Sex Differences in Graduate School Survival.
4. Availability Pools as the Basis of Affirmative Action.

ANALYSIS OF 4 YEARS OF PARALYSIS BETWEEN THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE (HEW) AND INSTITUTIONS OF HIGHER EDUCATION (IHE)

This analysis is based on my four years of participant observation on Affirmatice Action at Berkeley, from a variety of roles and perspectives:

1. As a researcher on filtering points in educational achievements, first of women, and subsequently, on minorities.
2. As a woman graduate student struggling with the psychological, sociological, and economic implications of academic and professional success.
3. As a student member of the Chancellor's Advisory Committee on the Status of Non-Senate Academic Women.
4. As a student member of the Academic Senate's Committee on the Status of Women and Minorities.
5. As a consultant on Affirmative Action for the University of California, on the Berkeley, Davis, San Diego, San Francisco, and Santa Barbara campuses.
6. As a consultant for HEW's Office of Civil Rights in developing guidelines for faculty recruitment, hiring, and promotion.

In my participation of discussions between and among students, faculty, and administrators, I have observed four years of paralysis on affirmative action, which is just beginning to be resolved. The primary source of that paralysis was the conflict generated between and among three separate sub-cultures: The *Advocates*, *Adversaries*, and *Enforcers* of Affirmative Action. Discussion between and among the three groups took place in a context of mistrust, ill will, and closed communication generated by differences in perceptions of the goals and consequences of affirmative action, and in perceptions of the commitments and motivations of the other party.

The *Advocates* of Affirmative Action are convinced that it is necessary to achieve the highest standards of scholarship and excellence, and that merit, rather than sex or ethnicity, should be the sole criterion for recruitment, hiring, and promotion. They are trying to develop ways of evaluating merit which don't build in the idea that being female, or belonging to an ethnic minority are demerits. Those who haven't yet tasted the rewards of the system are especially suspicious and hostile to the Adversaries, whom they perceive as trying to exclude them from the system. Some are even suspicious of the Enforcers, whom they perceive as not trying hard enough to include them in the system. Some even perceive the Adversaries and Enforcers in deliberate collusion to exclude them from the system.

The *Adversaries* of Affirmative Action are convinced that their cherished values of scholarship and excellence will be destroyed by Affirmative Action. This comes from their misunderstanding that Affirmative Action means "Whenever you have a white man competing with a woman or ethnic for a job, preference must be given to the woman or ethnic, even though the white man is better qualified." In fact, Federal policy says that "In very limited instances only can preference be given to women and minorities: when there has been a history or pattern of exclusion, *and* or discrimination, *and* if two candidates are equally qualified, only then can preference be given to the member of the minority group."

The *Enforcers* of Affirmative Action are convinced that the Adversaries have been recalcitrant on affirmative action because of their deliberate, conscious sexism and racism. Their paternalistic authorization which assumes the worst about IHE, and about Adversaries within those IHE is as fundamental to the problem as is the sexism and racism of which they accuse the Adversaries.

Each group tends to think of itself as the Hero, or victim and those above and below in the hierarchy of power and authority as the Villains, regardless of position on the ladder.

In working with state and national organizations devoted to achieving Affirmative Action, I have discovered that the typology of Advocates, Adversaries, and Enforcers of Affirmative Action which I had thought limited to the Berkeley situation is, in fact, applicable to all IHE affected by Federal policy. Moreover, the model of three separate sub-cultures talking past each other with different norms, values, styles of rhetoric, and political behavior holds up for large public universities, state colleges and universities, community colleges and private colleges and universities.

The differential educational achievement of women and minorities is a societal problem, not one that can be solved simply by having you, the Decision Makers crack the whip on HEW, the Enforcers, to crack the whip on IHE to recruit, hire, and promote women and minorities in proportion to their existence in the total population. In order to achieve those results, we must change the structure of society, so that automatic, implicit, unconscious assumptions about human beings are no longer defined in terms of sex, ethnic, and power and authority status categories.

The major themes emerging from my research on sex ethnic differences in educational achievement are "sexism," "racism," and "authoritarianism." They are the automatic, implicit, unconscious assumptions about human beings based on their sex, ethnic, and status categories. They are so pervasive in the structure of society and personality that they are as invisible to those of us who are constrained by them as the air we breathe.

"Sexism" and "racism" are self explanatory concepts. This thing I'm labelling "authoritarianism" has to do with a profound sense of mistrust of people at different levels of power and authority from one's own. It consists of the automatic, unconscious, implicit expectation that persons above will behave like bad parents, either as bad fathers who will punish them, or as bad mothers, who will neglect them. The second assumption is that persons below will behave as bad children, either as bad sons for compulsive rebellion, or as bad daughters for compulsive docility. This phenomenon I've called "misplaced familial authoritarianism" is fundamental to the pathology of graduate-student faculty relations. I've observed a great deal of it in graduate school at Berkeley. I suspect that you've observed as much in your relations with the Executive branch and its Departments.

"Sexism," "racism," and "authoritarianism" are internalized as need dispositions in the personalities of individual human beings. This calls for psychological solutions, through raising people's awareness of their existence. Appendix III describes the process of consciousness raising as it has developed among small groups in the women's movement.

"Sexism," "racism," and "authoritarianism" are also institutionalized as role expectations based on stereotypes about human behavior based on sex, ethnicity, and position in the power and authority structure. This calls for sociological solutions, through a parallel process of organizational and institutional consciousness raising, described in the Political Effectiveness paper in Appendix IV. It has important implications for helping all social groups to achieve their own autonomy as responsible, creative, productive adults, independently of sex, ethnicity, or level of power and authority.

The conflict between and among the Advocates, Adversaries, and Enforcers of Affirmative Action is exacerbated by the fact that you, as members of an important Congressional Committee on Education are responding to conflicting demands from your own constituents. They are that you force HEW to do more on behalf of women and minorities, and that you force HEW not to commit reverse discrimination against white men. These goals need not be mutually exclusive, if we focus on the goal of freeing all persons to rise to the limits of talents and energies, independently of sex or ethnicity, as opposed to quotas, which build in exclusion, independently or talent and energy. Our efforts should be on freeing people to include themselves in the system, as well as freeing IHE to identify, and rectify previous exclusionary practices.

My own work in Affirmative Action consists of gathering, analysing, and disseminating whatever data I can get my hands on, among the Advocates, Adversaries, and Enforcers of Affirmative Action. The positive response from all three groups convinces me that "sexism," "racism," and even "authoritarianism" are veils of ignorance which can be lifted through an educational process which doesn't threaten people's sense of themselves as worthwhile human beings with accusations of blame and bad faith.

PROPOSAL FOR RESOLVING THE PARALYSIS

(This section will be re-written in the context of observing the testimony of Advocates, Adversaries on September 17, 19, and 20, and of reading the testimony of Enforcers which occurred earlier in the summer.)

SUMMARY AND PROPOSALS FOR RESOLUTION OF THE PARALYSIS

As in all social controversies, the cast of Heroes, Villains, and Victims in the Affirmative Action Drama depends on one's objective position in the power and authority structure, and one's subjective experience of being included or excluded in that power and authority structure. Those women and minorities who experience themselves as included in the system are free to trust the good faith, intentions, and will of IHE, HEW, and even of Members of Congress.

"I've watched the Subcommittee's Hearings last week, and read the transcripts from the earlier sessions. The performance of the Affirmative Action Drama that I've seen at Berkeley has been repeated here in Washington. The actors are more articulate, the lines more cogent and precisely presented, and the overall performance more polished. However, I still see people from each perspective clinging to their own perception of the reality of affirmative action, and shutting out the perspective of the others.

1. HEW and Advocacy groups both insist that goals are not quotas.
2. HEW and Advocacy groups both insist that lowering of standards is not required.
3. Adversary groups insist that goals are quotas.
4. Adversary groups insist that lowering of standards is inevitable, because of their assumption that Department Chairmen will "take the easy way out", rather than risk losing Federal funds.
5. Advocacy groups are frustrated that HEW and Congress have not done enough to improve the status of women and minorities.
6. Adversary groups are concerned that Affirmative Action has already produced reverse discrimination at the expense of white men.

First, I want to dispel the myth that there has been no real progress in the status of women and minorities at Berkeley, which has repeatedly been cast in the role of Villain.

1. The dramatic decline in sex differences in doctoral programs reported earlier is evidence of a changing climate of expectations on the part of women students for themselves, as well as of a changing climate of faculty expectations for students.
2. The proportion of women on ladder level appointments has increased from 1969 to 1972.

	Percent
Full professor:	
1969	2
1972	3
Associate professor:	
1969	5
1972	7
Assistant professor:	
1969	5
1972	12

In Academic year 1967–1968 3% of 124 new hires at the Assistant Professor level were women. In 1973–1974, 27% of 74 new hires were women, although nationally, the Availability Pool was around 20%. While the national Availability Pool was about 2% on minorities, 8% of the new hires were minorities. The Provost assures me that Affirmative Action recruitment at Berkeley has increased the quality of new hires, not reduced it. I have similar data on Princeton, Stanford, and Yale, with respect to percent and quality of new hires.

Second, I want to pick up on Professor Hook's theme of recruiting and hiring the best qualified person to do the job. I call your attention to the concept of differentiation of function of institutions of higher education. This has been most clearly spelled out in California's Master Plan for Postsecondary Education. Differentiation of function recognizes that major universities do something very different from state universities and colleges and community colleges. The major function of universities is research—the creation of new knowledge—which keeps them at the "cutting edge of civilization." The major function of the State Universities and Colleges in the California system is the transmission of existing knowledge. The major function of the Community College system is to provide for smooth transition of students who might otherwise have been excluded from access to the University for a variety of reasons. A second function is the transmission of skills and technical training.

This formal recognition of the differentiation of function of IHE is not elitism, but rather, the most economical and effective division of labor and resources. It helps avoid duplication of function, as well as making it possible for institutions to meet the needs and aspirations of students.

Patterns of recruitment tend to differ among segments of Postsecondary Education. The qualities that make a person "Best qualified to do the job" are quite different for a research oriented university, a teaching college, and a skill transmission and avenue for upward mobility institution.

Third, I want to dispel the myth that it is possible for Department Chairmen to "take the easy way out" by lowering standards rather than risk losing Federal funds.

If I were under consideration for an appointment at a major university the materials in Appendices I and II would be scrutinized and reviewed by:

First, the departmental search committee.

Second, the department Chairman and Dean.

Third, an ad hoc committee of five people from the faculty of the campus at large.

Fourth, the Budget Committee, itself comprising a dozen senior faculty members.

Fifth, by the Provost.

Sixth, by the Vice-Chancellor.

Seventh, by the Chancellor.

Each review would be of the academic quality of the work, my teaching record, and my university and public service activities, and would be in competition with similar dossiers from other candidates. This gives you an idea of the care with which the search for 'Best qualified person to do the job' is conducted in major universities, with emphasis on research potential, productivity, and promise. Even if department chairmen were as spineless and irresponsible as adversaries assume them to be, there are six higher levels of review to ensure that standards of quality be upheld.

1. The subcommittee is in a position to make a powerful contribution to the present impasse between IHE and HEW, and between Advocates and Adversaries of Affirmative Action. Whatever new legislation is adopted, it will be more effective if it is cast in positive language of "Facilities" instead of the negative language of "Enforcement." It is a subtle, but profound difference, but frees all parties to look for, and find the best in each other. Further, it frees them from the constraints of looking for, and hence finding, the worst in each other.* I respectfully point out that the assumption that department chairmen will 'take the easy way out' is yet another example of not trusting people to behave as responsible, autonomous adults. I hope we can change this.

2. Make it clear that it is illegal as well as immoral to refuse to hire any person on the basis of sex or ethnicity. A graduated scale of fines would help get the point across.

3. Provide middle-range penalties short of total withdrawal of Federal funds for non-compliance.

4. Expand opportunities for remedial mathematics, and remedial reading and writing skills to compensate for inequities and deficiencies in primary and secondary education, independently of sex or ethnicity.

5. In some ways the Federal Government has itself contributed to the sex differences in faculties, through the GI Bill of Rights, which was rightfully used to reward men for years of faithful military service, although it was clearly a form of preferential treatment. I toss out for exploration the idea of a Homemaker's Bill of Rights, to reward women for years of faithful domestic service, to help them develop their potential contribution to solving pressing social and scientific problems once their children have left the nest.

6. We need a clear policy statement against all forms of discrimination in primary, secondary, and postsecondary education.

APPENDIX I

Lucy Watson Sells, Berkeley, Calif., Social Security No. 569–40–5460

EDUCATION, ALL AT UNIVERSITY OF CALIFORNIA, BERKELEY

B.A., June 1962, with honors, in Communication and Public Policy.

M.A., December, 1967, in Sociology.

Fields of specialization for the Oral Examination, May 25, 1971 were: Research Methodology, with Charles Y. Glock, Chairman; Political Sociology, with Jeffery

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*Appendix V suggests a more constructive approach to helping people at all levels of IHE to recognize the need for *effective* affirmative action, and to come up with solutions to the difficult problems posed by civil rights obligations.

M. Paige; Sociology of Education, with Martin A. Trow; and Systematic Sociological Theory, with Neil J. Smelser.

Filed for doctoral candidacy March 1, 1973. Dissertation on Sex and Discipline Differences in Doctoral Attrition near completion, with Neil J. Smelser as Chairman.

RESEARCH EXPERIENCE, ALL AT UNIVERSITY OF CALIFORNIA, BERKELEY

Assistant Specialist, Institute of Governmental Studies, Multi-campus Universities Project. 4–74—6–74

Coordinator, Project to evaluate and improve undergraduate education, for the Academic Affairs Council of the ASUC. 1–74—6–74

Senior Administrative Analyst, Affirmative Action Planning Group. 4–73—6–73

Research Assistant, Academic Senate Sub-Committee on the Status of Women. 5–69—12–69

Postgraduate Research Sociologist, III, Survey Research Center, Librarian for International Data Library and Reference Service. 5–69—9–69

Research Assistant for National Science Foundation survey of the behavioral and social sciences. February, 1969

Project Director for Associated Students of the University of California. Pilot study of student-faculty relations among undergraduates. 5–67—9–67

Postgraduate Research Sociologist, I, Center for Research and Development in Higher Education. Wrote manual on questionnaire design and analysis; designed questionnaire for study of higher education in Wisconsin. 1–67—9–67

Research Assistant, Center for Research and Development in Higher Education. Study of the aftermath of the Free Speech Movement at Berkeley. 7–66—9–66

Research Assistant, Institute of Business and Economic Research. Survey of Panel Studies in Market Research. 6–65—9–65

Research Assistant, Survey Research Center. Cleaning data for loading to computer tapes. 6–64—9–64

Interviewer, Survey Research Center. Conducted 99 intensive hour long interviews on drivers' attitudes toward use of seat belts. 6–63—9–63

TEACHING EXPERIENCE, ALL AT UNIVERSITY OF CALIFORNIA, BERKELEY

Associate, Social Science 100ABC, teaching one seminar on Changing Roles of Women, and one on Education and Society. 9–69—6–70

Teaching Assistant, Sociology 105, Introductory Research Methods. 6–65—8–65

Teaching Assistant, Sociology 201, Graduate Methodology requirement. 9–64—6–65

Teaching Assistant, Sociology 40, Introductory Statistics, and Sociology 105, Introductory Research Methods. 9–63—6–64

AWARDS AND FELLOWSHIPS

American Association of University Women Fellowship. 7–71—6–72

Soroptimist Fellowship to study for the Orals Examination. 1–71—6–72

PAPERS AND PUBLICATIONS

"Beyond Programs and Policies: Changing Attitudes," paper presented at the regional conference of the American Association of Higher Education, The Learning Society: Including the Excluded, Stanford Center for Research and Development in Teaching, Stanford University, May 11, 1974.

"Strategies for Achieving Affirmative Action," paper presented at the 45th Annual Meeting of the Pacific Sociological Association, Hyatt House, San Jose, March 28, 1974.

"Psychological and Sociological Barriers to the Scientific Achievement of Women and Minorities," paper presented at the annual meeting of the American Association for the Advancement of Science, February 27, 1974, Sheraton Palace Hotel, San Francisco.

"Mathematics as the Critical Filter in Education and Employment," paper presented at a joint colloquium of the Mathematics and Sociology Departments, University of California, Santa Barbara, November 29, 1973.

"Women Dropouts in Higher Education," with Michelle Patterson, in Alice S. Rossi and Ann Calderwood, Academic Women on the Move, New York, Russell Sage, 1973.

"On Increasing Political Effectiveness," paper presented at the First Statewide Convention of the National Women's Political Caucus of California, Berkeley, September 28, 1973.

"Sex Differences in Graduate School Survival," paper presented at the American Sociological Association Meetings, New York, Hilton Hotel, August 28, 1973.

"Availability Pools as the Basis for Affirmative Action," paper presented at the 44th Annual Meeting of the Pacific Sociological Association, Scottsdale, Arizona, May 5, 1973.

"Preliminary report on the Status of Graduate Women at Berkeley," March 30, 1973.

"Survival in Graduate School," paper presented at Sociologists for Women in Society's session at the Annual Meeting of the American Sociological Association, New Orleans, August 31, 1972.

"Current Research on Sex Roles," second edition, September, 1972. An annotated bibliography of research in progress, or recently completed.

"Women Graduate Students in the Sixties and Seventies," paper presented at the Pacific Division, American Association for the Advancement of Science, Eugene, Oregon, June 15, 1972.

"Current Research on Sex Roles," first edition, August, 1971.

Review of Helen S. Astin, "The Woman Doctorate in America: Origins, Career, and Family," in *Journal of Marriage and the Family*, Volume 33, No. 3, August, 1971.

PROFESSIONAL SOCIETIES

American Association for Higher Education, American Sociological Association, American Association for the Advancement of Science, California Women in Higher Education, Comparative and International Education Society, Sociologists for Women in Society, Women's Equity Action League.

OTHER ORGANIZATIONS

National Women's Political Caucus of Almeda County, Berkeley Women's Democratic Forum.

APPOINTMENTS INVOLVING PROFESSIONAL SOCIETIES

Chair, Research Committee, Sociologists for Women in Society, 1971–72, 1972–73, 1974–75.

Chair, Education Committee, Sociologists for Women in Society, 1973–74.

Institutional Representative to Affirmative Goals and Actions Committee of the Association of Women in Science, 1973–74, 1974–75.

Coordinator, California Women in Higher Education, January 1974, to present.

Steering Committee, Women's Caucus, American Association for the Advancement of Science, February, 1974 to present.

APPOINTMENTS AT THE UNIVERSITY OF CALIFORNIA

Appointed to Sub-Committee on Student Needs, Fall 1973.

Appointed to Demography Review Committee, Spring 1973.

Appointed to Search Committee for Affirmative Action Coordinator, Spring, 1973.

Appointed to Academic Senate Committee on Academic Planning, 1972–73, 1973–74, 1974–75.

Appointed to ASUC Academic Affairs Council, 1972–73, 1973–74, 1974–75.

Chair, Graduate Assembly Committee on the Status of Women, 1972–73, 1974–75.

Appointed to Academic Senate Committee on the Status of women, 1971–72, 1972–73, 1973–74.

Appointed to Chancellor's Advisory Committee on the Status of Women, 1971–72, 1972–73.

Elected Secretary-Treasurer, Graduate Assembly, 1971–72.

CONSULTANTSHIPS, COORDINATORSHIPS, AND FACILITATORSHIPS

Affirmative Action Consultation, for University of California, San Francisco, two hours, June 11, 1974.

Affirmative Action Consultation, for University of California, Davis, two days, May 21, 22, 1974.

Affirmative Action Consultation for University of California, San Diego, three hours, May 18, 1974.

Affirmative Action Consultation, for University of California, Santa Barbara, Women's Assembly, two days, March 15, 16, 1974.

Affirmative Action Consultation for U.S. Department of Health, Education, and Welfare, six days, March 4–9, 1974.

Statistical Consultation for Chancellor's Advisory Committee on the Status of Women, University of California, San Francisco, three hours, February 12, 1974.

Statistical Consultation for Management Analysis Group, University of California, Berkeley, six hours, January, 1974.

Facilitator, Workshop on Techniques on Data Collection for Institutional Research on the Status of Women, at Conference on Women in California Higher Education, University of California, Irvine, December 1, 1973.

Co-facilitator of Graduate Women's Project, Spring 1973, sponsored by the Women's Center and the Affirmative Action Office.

Coordinator of Workshops, Conference, Women: Breaking the Shackles, University of California, Berkeley, Boalt Hall, January 31, 1970.

APPENDIX II

HIGH SCHOOL MATHEMATICS AS THE CRITICAL FILTER IN THE JOB MARKET

We know that the job market is dismal for untrained people. We know that it is somewhat better for people with high school and college degrees. We know that the fields which are opening up in the next ten or fifteen years are based on mathematics training. We know that certain groups of students are less likely to take any more mathematics in high school than is required for admission to the University. These include girls and non-Asian minority students.

A study of admission applications of Berkeley Freshmen shows that while 57% of the boys had taken four years of high school math (first year algebra, geometry, second year algebra, trigonometry and solid geometry), only 8% of the girls had done so.

The four year mathematics sequence is required for admission to Mathematics 1A at Berkeley, which in turn is required for majoring in every field at the University of California *except* the traditionally female, and hence lower paying, fields of humanities, social sciences, education, and social welfare.

We do not know what causes these large differences in mathematics preparation. The following hypotheses need to be tested:

1. Sex and ethnic differences in ability;
2. Sex and ethnic differences in motivation;
3. Sex and ethnic differences in career aspirations;
4. Sex and ethnic differences in parental encouragement;
5. Sex and ethnic differences in peer support; and
6. Differences in counselor encouragement and advice, depending on sex or ethnicity of student.

Two small pilot projects conducted at Berkeley are summarized on the next few pages. The first examines applications for admission for sex differences in high school mathematics preparation. The second provides evidence for the effect of social support among members of an upper division social science class.

PILOT TEST OF SEX DIFFERENCES IN HIGH SCHOOL MATHEMATICS PREPARATION

This pilot study was conducted to test the investigator's long standing contention that inadequate preparation in mathematics presents a serious constraint in choice of undergraduate major in college. It was hypothesized that girls applying for admission at Berkeley would be less likely to have taken advanced mathematics than boys.

A systematic random sample of names was drawn from the applicants for admission as Freshmen at Berkeley for the Fall of 1972. The folders were pulled from the files, and coded by sex and number of years of high school mathematics taken by the applicant. Some students take only the minimum entrance requirement of two years, some take three years, and some take four years. The distribution is presented below:

YEARS OF HIGH SCHOOL MATH BY SEX, 1972

	Berkeley applicants for admission as freshmen		
	Boys	Girls	Total
Mathematics (percent):			
2 years	7	36	21
3 years	36	56	46
4 years	57	8	33
Total	100	100	100
Number	42	39	81

Source: Berkeley admissions office.

The difference of forty-nine percentage points between boys and girls among those who took four years of mathematics is striking, and statistically significant at the .001 level. $X^2=19.942$ with two degrees of freedom.

Pilot Study of Attitudes toward Mathematics

This is a summary of an exploratory pilot project on attitudes towards mathematics. A questionnaire was distributed to the members of an upper-division social science class. It contained questions about performance in elementary school, high school; expectations and encouragement by teachers, parents and peers; whether or not respondents had taken mathematics beyond the geometry requirement in high school; and an open ended question on "What do you consider to be the most important factors which influence your interest and aptitude for doing mathematics?"

There were 34 women and 4 men, with no sex differences in the responses.

The first table shows the relationship between encouragement by parents, teachers, or peers, and whether or not students took mathematics beyond the admissions requirements for the University of California.

ADVANCED HIGH SCHOOL MATHEMATICS BY SOCIAL SUPPORT

	Some social support	No social support	Total
Took advanced math	13	7	28
Did not take any advanced math	1	17	10
Total	14	24	38

There is a strong (Q=.94) and statistically significant ($X^2=13.87$, ——.001 with 1 degree of freedom) relationship between social support from teachers, parents, and peers, and the pursuit of advanced mathematics courses in high school.

The second table shows the relationship between encouragement by parents, teachers, or peers, and performance in the advanced mathematics courses.

	Some social support	No social support	Total
A's and B's	13	3	16
C's and D's		4	4
Total	13	7	20

Again, the relationship between social support and performance in advanced high school mathematics is strong (Q=1.00) and statistically significant.

While it is not possible to generalize beyond the small sample of social science undergraduates, the relationships between social support, taking advanced high school mathematics, and performing well in it are striking. They suggest the need for an experimental project designed to increase the level of social support for those undertaking high school mathematics.

OPEN-ENDED RESPONSES TO "IN SUMMARY, WHAT DO YOU CONSIDER TO BE THE MOST IMPORTANT FACTORS WHICH INFLUENCED YOUR INTEREST AND APTITUDE FOR DOING MATHEMATICS?

1. From those who took advanced math, and did well in it

"Good grades and encouragement of teachers. Also I simply enjoyed it. I do know that if kids were not especially interested in taking more math, high school counsellors did not push them to."

"I did well in math in my pre-high school year & had confidence in my ability to handle it in high school. I was encouraged by my teachers in high school but was not encouraged (in fact discouraged) to consider a college major in math."

"Self-motivation and parental support. Also competition between all of the kids (over 200) in the advanced classes in my high school. We all took the same courses. It never occured to me that I couldn't do well in math—only that more effort might be required than say in English."

"Mainly, my ability to do well in math. Also my counselor and my parents encouraged me to take higher levels of math as preparation for college."

"I had planned to discontinue math after the minimum university requirement of two years, however because of a good math department I continued 'just in case' my interest headed in that direction—also peers decided to continue. However, by senior year I was only female in class."

"I did well in Jr. High, my parents were pleased. I took 3 years of math partly because I knew I did fairly well in the field & I wished to have a good background for college. There was encouragement to take math & science, and *all* the college-prep courses."

"I did well in math because I have an organized mind. I have received an 'A' in almost every math class I have taken, including college logic. But my major is English, in which I did consistently well, but not with a straight 'A'. The dichtomy must mean something in my socialization which I cannot put my finger on."

"I feel I have an inborn feel for numbers. I enjoy calculations and although many male classmates felt competition, this never bothered me. I don't ever remember any discouragement toward mathematics. I was constantly encouraged from all sides. I must add that I was almost a math major, but decided to use it practically instead." (!)

"My father and male math teachers were most encouraging and then most discouraging as I did not want to continue in a field which seemed to stress abstract thought without concern with its relationship to personal experience. They saw my interests in other fields as impractical, silly, sentimental. I rebelled and discontinued my math program."

"The enthusiasm of the teacher for his subject & his or her ability to communicate it to me and my fellow students. Also helps to have fellow students excited about their work."

2. From those who took advanced math, and did poorly in it

"I felt less intelligent than males and some females in the class, but this gave me incentive. I still feel this way, but no longer get incentive from this inferior position. A math teacher called me stupid in front of the class once and this had a great negative effect on my opinion of my intelligence."

"My first and half of my second year of High School was in a very large co-ed school. Classes in math were mainly boys. Few girls planned college careers. In Soph year I went to a small convent HS for girls. My teachers were nuns. I did very well that year in my math classes, compared to the previous experience. I then transfered to a co-ed religious school. All classes were segregated *except* for math and science, where the school felt they would not have enough women enrolled to warrant an all-women's class. We had a man teacher, it was predominantly a men's class. That year I failed Algebra III & IV. So did many of the other women in the class."

"General feeling from parents that all the members of the family did well in the humanities, poorly in math. This was not a sexist orientation, but very influential. Have since found out that I have a very strong natural bent for math. I grew up feeling that I was not inclined toward math—feeling that other academic areas were more interesting—that I wouldn't have much use for a lot of math—all this even though I did very well in Arithmetic in early school years. My interest in math consistently declined—feelings from peers and from parent were anti-math—not overtly sexist—nevertheless I never considered getting a degree in a field that was predominantly a male field—probably because of a mostly covert sense of the feminine role—*absolutely no encouragement* from teachers, parents, peers or anyone."

"My math teachers in high school were mostly men. I remember them as being very cold, impersonal, apathetic of my existence as anything other than a math student. And in the fifth grade when math didn't sink in right away I became very discouraged. According to the tests I've taken I'm supposed to be getting A's in math."

In first grade my teacher told me I was stupid because I didn't understand arithmetic, but offered me no help with it. I know I hated the teacher from that point on and possibly I also hated math."

3. *From those who did not take advanced math in high school*

"My good aptitude for math was not encouraged. It was generally ignored and not stressed. I was pushed into fields of social science. If I had been encouraged to continue in math, I would have continued. But my straight 'A's in math were noticed by no one. My social science 'A's were heartily encouraged."

"My parents and teachers never encouraged and in some cases, discouraged my interest in any profession. (They assumed I would marry and have children.) I never saw any need for math beyond the beginning levels because I did not intend to go into any profession requiring it. I was, at one time in high school actively interested in chemistry and university work in pharmacy, but my chemistry teacher ignored it and did not respond to my stated interests. (I got A's in Chemistry.) and my parents felt my ambitions were foolish, so I gave up my first interest in chemistry, and the second interest in business administration, and chose education!"

"None. Everyone discouraged me."

"Everyone told me it was hard and complicated. Although I got good grades in it I didn't really apply myself and very early believed that I didn't understand it and it was over my head."

"I had very poor, apathetic math teachers who never gave technical or psychological help. There was no inspiration to learn and no help when I didn't understand something."

"Parochial school 1–8 gave excessive drill and emphasis on efficiency and skill rather than math for fun and creativity."

"My teachers were usually women—then suddenly in 7th and 8th grade there were men teachers and they all taught math or science. Something was going on here and it scared me, so I avoided science and math. The message wasn't verbal but it was clear. (Influences:) Socialization factors. And fear. It's difficult to step confidently into what is obviously male territory if you're confused about the necessity of taking the course at all, you're unsure about how well you'll do, (if obviously intelligent women refuse math then there must be something magical and terrible about it that only men can handle), you're not even sure you like math. "What a bother," you think, and you take drama."

"Inability to ask questions, fear of looking stupid, considering the unimportance of math in the future for me. Since it was unimportant for me (for various reasons) to pursue math and I had average performance in math most attitudes were neutral but as for myself I was (and am) fearful of math, science (almost mystically) I discourage myself thinking I could not do well."

"My neutrality turned to dislike of mathematics when I began Algebra. Also my interests became focused upon my social life, so the subjects that I felt to be difficult I avoided as much as possible. Math, especially the higher maths, gave me some difficulty. Probably the only high school subject I had to apply much effort at—so I steered away from math and took subjects that afforded me no difficulty."

"I was the top student in my 8th grade class, and even won prizes. I thought I would continue in mathematics. Boring, disinterested teachers led to my disenchantment with mathematics, combined with a growing interest in social sciences and humanities. I could have passed any math class offered, but it was my choice, and I chose not to continue in math."

"Poor instruction, uninterested, uninspired by teachers; lack of encouragement from home (except sister tried to help but she could not help enough); my attitude was completely defeatist."

"In the 4th grade I was a slow learner and was placed in remedial math from which I never escaped. There were more boys than girls in my class and we remained together through 12th grade. (Once you get behind in arithmetic, it is difficult for the teacher you get later to catch you up.) I took math every year in Jr. High and High School, and ended up a senior in geometry with 9th graders."

"When in the third grade I missed two weeks of school during which multiplication and division were introduced. Since then I have never regained any confidence in the field. The interest has always been lagging and the aptitude, if any, unfound."

"Too frustrating. Could not see any relevance in working with figures."

"There was a kind of (basically unspoken) pressure from peers, parents, faculty, etc. for males at my school to continue, but a smaller amount of pressure for females. (Females were never discouraged, though, and frequently encouraged.)"

STRATEGIES FOR ACHIEVING AFFIRMATIVE ACTION*

(By Lucy W. Sells)

This paper is an attempt to clarify the goals, specify the means, and delineate some of the resources available for effective achievement of affirmative action on behalf of women and minorities in postsecondary education.

It consists of a presentation of the facts which document the need for affirmative action; a sociological analysis of the current state of paralysis in efforts to achieve it; and strategies for changing the climate of social opinions, expectations, and aspirations so profoundly, that by 1980, the concept of affirmative action will no longer be necessary.

My goal for affirmative action is that we might achieve a society in which the educational and occupational opportunities and achievements of women and minorities might equal those of WAMP's and JIM's. WAMP's are the class of White Anglo Male Protestants, and JIM's are the class of Jewish Intellectual Males. It is these two groups, rather than WASP's who have been most favored in levels of educational, and hence, occupational achievement.

1. THE FACTS WHICH DOCUMENT THE NEED FOR AFFIRMATIVE ACTION

These are the facts which document the social climate of different attitudes, beliefs, and expectations about the performance and aspirations of women and minority students. Effective affirmative action at faculty hiring levels rests ultimately on increasing availability pools at each critical hiring point implicit in the facts.

The first filtering point is adequate high school mathematics preparation, so people can keep their options open as long as possible. The University of California requires one year of high school algebra, and one year of plane geometry for admission as entering freshman. In a systematic random sample of Freshmen admitted to Berkeley in the Fall of 1972, 57% of the men had taken four full years of math in high school, including the trigonometry and solid geometry sequence, compared with 8% of the girls. The four year math sequence is required for admission to Mathematics 1A, the beginning calculus sequence. It, in turn is required for majors in every field at the University *except* the traditionally female, and hence lower paying, fields of humanities, social sciences, librarianship, social welfare, and education.

Tables I through IV show the percentage of women in each school and college at Berkeley for the Fall Quarter, 1972, more detailed breakdowns for the College of Letters and Science, and for the Professional Schools. They appear on pages 2 through 6, and show that every field or major with the calculus requirement has thirty percent or less women as undergraduates. They also show a consistent and statistically significant pattern of dropoff in the proportion of women from the undergraduate to the graduate level. The decision to apply for graduate school is the second filtering point in educational achievement for women and minority groups. Table V, on page 6, shows the ethnic distribution of Berkeley students, for the Fall Quarter, 1972. The pattern is similar to that for women.

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*Paper presented at the Pacific Association Meetings, Hyatt House, San Jose, March 28, 1974.

TABLE I.—UNIVERSITY OF CALIFORNIA, BERKELEY: PERCENTAGE WOMEN AT UNDERGRADUATE AND GRADUATE LEVELS BY SCHOOLS AND COLLEGES

School or college	Undergraduates	Graduates	Dropoff	Dropoff rate[1]
Agricultural sciences (percent)	48 (314/651)	30 (73/242)	−18	−0.38
Chemistry (percent)	14 (50/358)	9 (36/394)	−5	−.36
Engineering (percent)	3 (37/1, 361)	2 (28/1, 336)	−1	−.33
Environmental design (percent)	17 (130/748)	25 (108/424)	+8	+.47
Business administration (percent)	17 (117/693)	9 (51/565)	−8	−.47
Criminology (percent)	46 (93/201)	38 (21/57)	−8	−.17
Forestry and conservation (percent)	7 (9/132)	6 (5/89)	−1	−.14
Optometry (percent)	17 (20/121)	12 (13/112)	−5	−.29
Ethnic studies (percent)	55 (18/33)			
Letters and science (details in table II) (percent)	46 (6, 859/14, 909)	31 (1, 053/3, 353)	−15	−.33
Graduate professional schools (details in table IV) (percent)		44 (1, 164/2, 624)		
Total	40 (7, 647/19, 290)	28 (2, 552/9, 196)	−12	−.30

[1] Dropoff rate is calculated by the formula: Percent undergraduates minus percent graduates over percent undergraduates.

Source: Calculated from "Campus Statistics, Fall Quarter 1972" and year 1971-72, Office of Institutional Research March 1973, table 6, pp. 22-25.

TABLE II.—UNIVERSITY OF CALIFORNIA, BERKELEY: PERCENTAGE WOMEN AT UNDERGRADUATE AND GRADUATE LEVELS IN LETTERS AND SCIENCES

Field	Undergraduates	Graduates	Dropoff	Dropoff rate
Humanities (percent)	58 (1, 159/2, 001)	48 (465/965)	[1]−10	−0.17
Social sciences (percent)	46 (1, 727/3, 754)	33 (352/1, 082)	[1]−13	−.28
Biological sciences (percent)	33 (362/1, 085)	29 (135/465)	[2]−4	−.12
Physical sciences (percent)	22 (148/664)	11 (89/817)	[1]−11	−.50
Total	45 (3, 396/7, 504)	31 (1, 041/3, 329)	[1]−14	−.31
Field difference in percentage of women	[1]36	[1]37		

Source: Calculated from "Campus Statistics, Fall Quarter 197 and Year 1971-72," Office of Institutional Research March 1973, table 6, pp. 23, 24, and 25.

[1] Dropoffs and field differences are statistically significant at the 0.05 level, using a conservative estimate of a 2-tailed test.

[2] NS.

Note: Dropoffs and field differences are statistically significant at the 0.05 level, using a conservative estimate of a 2-tailed test. I am indebted to Arthur L. Stinchcombe, who provided the rule of thumb, which has both prevented embarrassment for getting excited about possibly random differences, and saved hours of calculations to prevent that embarrassment. The rule is: In comparing percentage differences in any context, let $(\%_1-\%_2)=E$, or Epsilon, the percentage difference. If E_2 is greater than $\left(\frac{1}{N_1}+\frac{1}{N_2}\right)$, then E is significant at the 0.05 level on a 2-tailed test. N_1 and N_2 are the numbers on which $\%_1$ and $\%_2$ are based.

It should be pointed out that aggregation of departments within fields conceals sharp variation among departments within fields. Table II, below, illustrates this problem by showing the departments within field with the highest and lowest percentage of women among undergraduates.

TABLE III.—UNIVERSITY OF CALIFORNIA, BERKELEY—PERCENTAGE WOMEN IN HIGHEST AND LOWEST DEPARTMENTS WITHIN FIELDS

Field	Undergraduates		Graduates		Dropoff	Dropoff rate
	Percent	Number	Percent	Number		
Humanities:						
History of Art	83	87/105	67	34/51	[1] −16	−0.19
Philosophy	24	31/130	25	13/51	[1] +1	+.04
Department difference		[2] 59		[2] 42		
Social sciences:						
Anthropology	61	205/336	55	78/143	[1] −6	−.10
Economics	14	41/295	8	11/138	[1] −6	−.43
Department difference		[2] 47		[2] 47		
Biological sciences:						
Bacteriology	53	74/140	48	22/45	[1] −5	−.09
Biochemistry	20	41/201	21	17/82	+1	−.05
Department difference		[2] 33		[2] 27		
Physical sciences:						
Mathematics	30	101/332	13	48/380	[2] −17	−.57
Physics	5	5/105	4	9/245	[1] −1	−.20
Department difference		[2] 25		[2] 9		

[1] NS.

[2] Difference is statistically significant at the 0.05 level, using a conservative estimate of a 2 tailed test.

Source: Calculated from "Campus Statistics, Fall Quarter 1972 and Year 1971-72," Office of Institutional Research, March 1973, table 6, pp. 23, 24, and 25.

Note that the magnitude of the department difference within fields gets smaller as we move from Humanities, with a difference of fifty-nine percentage points, through the Social Sciences with a difference of forty-seven percentage points, through the Biological Sciences, with a difference of thirty-three percentage points, and the Physical Sciences, with a difference of twenty-five percentage points.

Note also that Philosophy has a requirement in Logic, and that admission to the Economics undergraduate major requires completion of Math 1A or Math 16A, both of which require the high school Trigonometry sequence.

TABLE IV.—UNIVERSITY OF CALIFORNIA, BERKELEY—PERCENTAGE WOMEN IN GRADUATE PROFESSIONAL SCHOOLS

School	Percentage women	Number of women/total
Education	54	516/ 953
Journalism	50	24/ 42
Law	25	216/ 851
Librarianship	66	135/ 205
Public Health	43	120/ 282
Public Policy	17	8/ 46
Social Welfare	59	145/ 245
Total	44	1,164/2,624

Source: Calculated from "Campus Statistics, Fall Quarter 1972 and Year 1971-72," Office of Institutional Research, March 1973, table 6, pp. 22-25.

TABLE V.—ETHNIC DISTRIBUTION OF FULL-TIME STUDENTS BY COLLEGE AND LEVEL

College or school	Undergraduate				Graduate				Professional			
	Percentage				Percentage				Percentage			
	Negro	Oriental	All other	Total	Negro	Oriental	All other	Total	Negro	Oriental	All other	Total
Letters and science	4	11	82	14, 031	3	2	94	3, 169	8	33	42	12
Agriculture	3	11	84	605	2	4	93	227				
Chemistry	2	18	79	333	1	3	96	383				
Engineering	3	12	83	1, 266	1	5	94	1, 309				
Environmental design	4	10	82	695	7	6	85	406				
Business administration	4	15	78	644	5	6	87	530				
Criminology	9	12	72	184	12	14	67	51				
Education					15	5	73	428	9	8	79	319
Forestry and conservation	2	2	97	122		2	98	84				
Journalism					10	3	85	39				
Law						3	1	32	8	6	79	816
Librarianship						3	97	35	4	8	83	163
Optometry	5	29	62	112		8	92	13	1	29	68	92
Public health					13	7	73	270				
Public policy					7		91	43				
Social welfare					11	2	78	54	12	5	71	183
Total	4	11	82	17, 992	4	4	90	7, 073	8	8	77	1, 585

Source: Dec. 12, 1972 compliance report to HEW by University of California, Berkeley.

The ethnic categories used in the compliance report on which Table V is based were American Indian, Negro, Oriental, Spanish Surnamed American, and all Other Students, whom I presume to be Caucasian. Table V shows the percentage of students who are Negro, Oriental, and All Other, by college, for undergraduates, graduates, and professional schools. American Indians and Spanish Surnamed Americans were excluded from the table, because their percentages were so small, and to simplify presentation of the data.

In every college and school except Criminology, there is an increase in the percentage of All Other (Caucasian) students from the undergraduate to graduate levels, and a corresponding drop in the percentage of Negro and Oriental students. In order to rule out the possibility of discrimination against Orientals implicit in the drop from 18% undergraduates in the College of Chemistry, to 3% of the graduate, I made discrete inquiries with a friend on the faculty. It turns out that the Department of Chemistry has a policy of not admitting its own undergraduate students to graduate programs. The high proportion of Orientals among undergraduates in Chemistry is an artifact of Berkeley's proximity to San Francisco's Chinatown. Apparently, a high proportion of Orientals from Berkeley's Chemistry Department do go on to graduate school, but at MIT, Harvard, Cal. Tech, or Stanford.

This demonstrates the importance of ruling out alternative explanations for data before jumping to conclusions of discrimination, and of having friends with whom one can make discrete inquiries, before making grotesque errors in public.

On the second filter in educational achievement for women and non-Oriental students, it is clear from the data provided by the Berkeley Graduate Division that they are being admitted to graduate departments in the same proportion in which they are applying. They also receive financial support in the proportion in which they are applying. The problem is that they are not applying to graduate school in the same proportion as they earn undergraduate degrees.

If we assume that talent and willingness to work are randomly distributed between the sexes, and across ethnic groups, the data suggest a differential climate of encouragement and support for application to graduate school.

In most social systems based on meritocracy and achievement, the aspiration to move up the ladder is very much shaped by those who have already demonstrated their achievement. In a University system, this means that faculty have both the power and the responsibility of encouraging potential talent, regardless of the sex or ethnicity of the person who displays that talent. The primary goal of affirmative action should be to help faculties and administrations of institutions of higher education recognize that their cherished values of scholarship and excellence will be upheld only when all persons are free to develop their talents and energies to highest potential, regardless of sex or ethnicity.

Recent data from Berkeley show large and statistically significant sex and ethnic differences in percentage of students reporting the doctorate as the highest level of education they plan to complete. Among the men, 63% gave the doctoral response, compared with 36% of the women. Table VI, on page 8, gives the percentage of doctoral aspirants by sex, ethnicity, and field.

While 67% of the students in Physical Sciences, Life Sciences, and Mathematics plan to get the doctorate, only 44% of those in the Humanities do so.

TABLE VI.—PERCENTAGE OF DOCTORAL ASPIRANTS BY SEX AND ETHNICITY, CONTROLLING FOR FIELD

	Men		Women		Sex Difference	Total	
	Percent	Number	Percent	Number		Percent	Number
Humanities and social sciences:							
Oriental	44	195	21	295	[1] 23	30	490
Caucasian	57	2,419	33	2,511	[1] 24	44	4,930
All other	59	438	34	343	[1] 25	48	781
Total	56	3,052	32	3,149	[1] 24	44	6,201
Ethnic difference	[1] 15		[1] 13				[1] 8
Physical sciences, life sciences, and mathematics:							
Oriental	65	420	32	243	[1] 33	53	663
Caucasian	75	1,675	58	529	[1] 17	71	2,204
All other	72	259	62	69	[2] 10	70	328
Total	73	2,354	51	841	[1] 22	67	3,195
Ethnic difference	[1] 10		[1] 30				[1] 17
Field difference:							
Oriental		[1] 21		[1] 11			[1] 23
Caucasian		[1] 18		[1] 25			[1] 27
All other		[1] 13		[1] 28			[1] 22
Total		[1] 17		[1] 19			[1] 2

[1] Difference is statistically significant at the 0.05 level, using a conservative estimate of a 2-tailed test.

[2] NS.

Source: University of California, Berkeley, Student Resource Survey, spring, 1972.

Table VII below, shows sex and ethnic differences in the percentage of Letters and Science students majoring in the physical sciences, life sciences, and mathematics. These differences reflect sex and ethnic differences in high school mathematics preparation.

ETHNICITY

	Men		Women		Sex difference	Total	
	Percent	Number	Percent	Number		Percent	Number
Oriental	68	615	45	538	[1] 23	58	1,153
Caucasian	41	4,094	17	412	[1] 24	31	7,134
All other	37	697	17	412	[1] 20	30	1,109
Total	44	5,406	21	3,990	[1] 23	34	9,396
Ethnic difference		31		[1] 28			[1] 28

[1] Difference is statistically significant at the 0.05 level, using a conservative estimate of a 2-tailed test.

Source: University of California, Berkeley, Student Resource Survey, spring, 1972.

There is a strong interaction effect between sex and ethnicity in choice of field, with a difference of fifty-one percentage points between Oriental Men in the physical sciences, life sciences, and mathematics, and Caucasian and All Other Women. The percentage of Oriental Women in these fields even exceeds that of Caucasian Men. As a sociologist, I attribute these very large sex and ethnic differences in choice of field to cultural, rather than to biological factors.

The third filter in educational achievement for women and minorities has to do with survival in doctoral programs, so that they might become members of the pool of qualified persons eligible for hiring at institutions of higher education. The remainder of this paper is based on data about women. However, it is clear that some of the casual mechanisms whch operate to filter women out of the doctoral pool operate more intensely against minorities. These include a social climate which systematically lowers aspirations and expectations, sense of competence, and self esteem. Both actively by discouragement, and passively, by absence of social support and encouragement.

SEX AND DISCIPLINE DIFFERENCES IN DOCTORAL ATTRITION

The data in this section come from a secondary analysis of Mooney's 1966 study of the Woodrow Wilson Fellows who entered graduate school from 1958 through 1963. The Fellows were selected by professors while still seniors in college, for their special promise in a career of college teaching. Because of the method of their selection, they represent a biased sample of some of the best graduate students in their entering class. Other things being equal, attrition rates should be lower among Woodrow Wilson Fellows than in the total population of graduate students. At the time of the study, 49% of the Fellows had not yet earned the doctorate, *and* were no longer in school. Among the men, 44% were thus defined as dropouts, compared with 64% of the women. The sex difference in dropouts of Woodrow Wilson Fellows was twenty percentage points.

Table I, on page 12 shows both sex differences and discipline differences in the percentage of dropouts among the Woodrow Wilson Fellows. The sex differences can be read across the rows, and the discipline differences down the columns. Within the Humanities, there is a small, but statistically significant difference in the percentage of dropouts in English and Philosophy, with 58% of the English Fellows dropping out, compared with 52% of the Philosophy Fellows. Within the Social Sciences, History, Political Science each had 53% dropouts, compared with 39% in Psychology, a difference of fourteen percentage points. Within the Physicial Sciences there is a difference of twelve percentage points between Mathematics and Chemistry.

In the Humanities, the sex difference is fourteen percentage points. In the Social Sciences, it is eighteen percentage points, and in the Physical Sciences it is twenty-eight percentage points. While the dropout rate is lower for women in the Physical Sciences, the magnitude of the sex difference increases as we look from Humanities to Social Sciences, to Physical Sciences.

Table II, on page 13, shows the effect of second year financial support on the sex and discipline differences in dropouts. Among those with no financial support during the second year of graduate school, the original sex difference of twenty percentage points holds up. Among those with any second year financial support, the sex difference is reduced to nine percentage points. For men, the effect of second year support is to reduce dropouts by fourteen percentage points. For women, the effect is to reduce dropouts by twenty-six percentage points. The effect of second year support is even more dramatic when field is controlled. It makes a difference of twenty-nine percentage points for women in the Humanities, and forty percentage points among women in the Physical Sciences.

This may reflect the special kind of self-esteem and assertiveness that it takes for a woman to think her work is good enough to justify her applying for support. If she thinks that well of her own work, she's free to communicate her worth to others. Traditional female socialization has taught young girls that assertiveness is unfeminine, just as traditional ethnic socialization had taught Blacks that the Uncle Tom role was the key to their survival.

Table III, on page 13 shows the effect of parenthood on dropout rates for men and women, by field. For men, regardless of field, having children makes no statistically significant difference. For women, having children makes a difference of thirteen percentage points in the Humanities, eleven in the Social Sciences, and thirty-one in the Physical Sciences. Unfortunately, it is not possible to infer from the data whether women dropped out of graduate school because they have babies, or whether they have babies as a face-saving alternative to trying to succeed in an unhospitable social climate.

Table IV, on page 14 shows the effect on sex and discipline differences in attrition when faculty rating of Woodrow Wilson Fellows was controlled. The assumption was that in a pure meritocracy, where talent and willingness to work are the primary determinants of "success", dropout rates would be very low among those who were rated 'Excellent,' and very high among those who were rated 'Average to Dreadful.'

In fact, the zero-order difference of twenty percentage points is specified, rather than being interpreted in the Lazarsfeld sense. When faculty rating of graduate performance is controlled, the sex difference increases to twenty-six points among the "Excellent" students. When field is also controlled, it increases to *thirty-eight* percentage points among those rated "Excellent" in the Physical Sciences. Table IV in this series shows no statistically significant difference in the dropout rates of women who were rated "Excellent," and of men who were rated "Average to Dreadful" by their faculty.

A second goal of affirmative action is that we make it possible for the achievements of women and minorities who are rated "excellent" to surpass those of white men who are rated "average" or "dreadful."

There has been a dramatic reduction in the fourth year dropout rates among women Doctoral students at Berkeley. Among the entering class of 1962, 22% of the men had dropped out of doctoral programs by the fourth year, compared with 42% of the women. Among the entering class of 1968, 27% of the men had dropped out by the fourth year, compared with 27% of the women. This can be attributed both to the powerful social support of the women's movement, and that faculty at Berkeley are beginning to learn not to impose expectations and stereotypes based on the behavior of women in the 1960's on the behavior of women in the 1970's. (Sells, August, 1973.)

Table V, on page 15, shows the systematic reduction in fourth year dropout rates for women at Berkeley from entering classes of 1962 through 1968.

The fourth filter in educational achevement for women and minorities is the traditional academic recruiting system, known as the "old boy" or "buddy" system. Job openings at first rate doctoral institutions have, until recently, been closed or kept secret, except among long-time friends and colleagues of those in a position to do the recruiting and hiring. In 1968, the Carnegie Commission on Higher Education sponsored a National Survey of Higher Education. Analysis of the data on faculty members of Universities rated "high quality" shows very large sex and field differences in percentage of "yes" responses to item "As a graduate student, was there a faculty member who acted as your 'sponsor' when you were looking for your first job?" With the exception of the Social Sciences, in which there were no differences, the pattern is consistent with the pattern of dropout rates observed in the Woodrow Wilson dropout data. Table VI, on page 16, shows the percentage of faculty who reported having had a faculty sponsor themselves, by sex and field.

There has been a striking reduction in the sex differences in dropout rates at Berkeley, starting with the entering classes of 1963. Table V, on page 16, shows what's happened to the entering cohorts of 1962 through 1968 by their fourth year of graduate school. Almost 80% of the doctoral dropouts occur by the fourth year.

The pattern of sex and discipline differences in dropouts is repeated in the pattern of sex and discipline differences in a national survey of students, in which students were asked whether their primary faculty contact regarded them as a colleague or apprentice. Table VI, on page 17, shows the percent responding yes, by sex and discipline. The discipline differences are larger than the sex differences, with 72% of the men in Psychology reporting collegial or apprentice relations, compared with 39% of the Mathematics students.

Among the faculty sample in the same national survey, similar patterns appear in the percentage of faculty who reported having a faculty sponsor when they were looking for their first job. Table VII, on page 18 shows the faculty response.

TABLE 1.—WOODROW WILSON FELLOWS, 1958–63, PERCENT DROPOUTS BY SEX AND DISCIPLINE

	Men	Women	Sex difference	Total
Humanities:				
English:				
Percent	51	68	E=17	58
Number	886	633		1,519
Modern languages:				
Percent	51	59	E=8 [1]	55
Number	345	308		653
Classics:				
Percent	51	57	E=6 [1]	53
Number	124	56		180
Philosophy:				
Percent	50	63	E=13 [1]	52
Number	381	63		444
Other humanities:				
Percent	64	79	E=15	70
Number	230	132		362
Total humanities:				
Percent	52	66	E=14	58
Number	1,966	1,192		3,158
Social sciences:				
History:				
Percent	48	69	E=21	53
Number	726	251		977
Political science:				
Percent	48	73	E=25	53
Number	413	115		528
Economics:				
Percent	52	59	E=7 [1]	53
Number	324	49		373
Anthropology:				
Percent	46	60	E=14 [1]	50
Number	92	45		137
Sociology:				
Percent	44	55	E=11 [1]	49
Number	90	56		146
Psychology:				
Percent	32	51	E=19	39
Number	159	85		244
Other social sciences:				
Percent	42	67	E=25	46
Number	319	66		375
Total social sciences:				
Percent	46	64	E=18	51
Number	2,123	667		2,790
Physical sciences:				
Mathematics:				
Percent	31	54	E=23	34
Number	479	56		535
Physics:				
Percent	26	70	E=44	31
Number	428	47		475
Biological sciences:				
Percent	20	36	E=16	26
Number	112	69		181
Chemistry:				
Percent	14	58	E=44	22
Number	208	50		258
Other physical sciences:				
Percent	31	70	E=31	41
Number	67	19		86
Total physical sciences:				
Percent	26	54	E=28	30
Number	1,294	241		1,535
Total, Woodrow Wilson Fellows:				
Percent	44	64	E=20	49
Number	5,383	2,100		7,483
Field difference	E=26	E=12		E=28

---

[1] NS.

TABLE II.—WOODROW WILSON FELLOWS, 1958-63, PERCENT DROPOUTS BY SEX, FIELD, AND SECOND YEAR SUPPORT

	No support			Any support			Support effect	
	Men	Women	Sex effect	Men	Women	Sex effect	Men	Women
Humanities:								
Percent	57	72	E=15	43	43	E=0[1]	E=14	E=29
Number	1,357	947		609	245			
Social sciences:								
Percent	51	69	E=18	38	52	E=14	E=13	E=17
Number	1,331	484		792	183			
Physical Sciences:								
Percent	33	66	E=33	16	26	E=10[1]	E=17	E=40
Number	758	169		536	72			
Field effect	E=24	[1] E=6		E=27	E=17			
Total Woodrow Wilson Fellows:								
Percent	49	70	E=21	35	44	E=9	E=14	E=26
Number	3,428	1,599		1,887	500			

TABLE III.—WOODROW WILSON FELLOWS: 1958-63, PERCENT DROPOUTS BY SEX, FIELD, AND PARENTHOOD

	No children			Any children			Parenthood effect	
	Men	Women	Sex effect	Men	Women	Sex-effect	Men	Women
Humanities:								
Percent	52	64	E=12	54	77	E=23	[1] E=2	E=13
Number	1,677	1,042		289	150			
Social sciences:								
Percent	46	63	E=17	49	74	E=27	[1] E=3	E=11
Number	1,776	571		347	96			
Physicial sciences:								
Percent	26	49	E=23	27	80	E=53	[1] E=1	E=31
Number	1,117	197		177	44			
Field effect	E=26	E=15		E=27	[1] E=6			
Total, Woodrow Wilson Fellows								
Percent	43	62	E=19	46	77	E=31	[1] E=3	E=15
Number	4,570	1,810		813	290			

[1] NS.

Note: The original Mooney data were obtained for secondary analysis by permission of Mrs. Janet Mitchell, Director of the Woodrow Wilson dissertation fellowship program. The number in parenthesis is the total number of cases on which the percentage is based. Underlined values of epsilon (E) are statistically significant at the .05 level, using a conservative estimate and a two-tailed test.

TABLE IV.—PERCENT DROPOUTS AMONG WOODROW WILSON FELLOWS, BY FIELD, SEX, AND GRADUATE RATING

	Humanities			Social sciences			Physical sciences			Total		
	Men	Women	Total	Men	Women	Total	Men	Women	Total	Men	Women	Total
Excellent:												
Percent	42	63	49	39	54	42	12	50	18	32	58	38
Number	265	144	409	341	78	419	254	48	302	860	270	1,130
	E=21			E=15			E=38			E=26		
Very good:												
Percent	54	65	58	47	75	55	23	50	28	44	67	50
Number	227	130	357	286	107	393	164	34	198	677	271	948
	E=15			E=28			E=27			E=23		
Average to dreadful:												
Percent	67	85	74	61	77	65	51	67	54	61	80	66
Number	168	99	267	182	52	234	105	24	129	455	175	630
	E=18			E=16			[1] E=16			E=19		
Total of those with graduate ratings:												
Percent	52	69	58	47	68	52	23	54	28	42	67	49
Number	660	373	1,033	809	237	1,046	523	106	629	1,992	716	2,708
	E=17			E=21			E=31			E=25		
Graduate rating effect within field: ε=	−25	−22	−25	−22	−23	−23	−39	−17	−36	−29	−22	−28

[1] NS.

Note: Field effects within graduate ratings are not statistically significant among the women because there are so few women in each cell in the physical sciences. Field effect within graduate ratings:

	Among the men	Among the women	Among total
Excellent	E=30	E=13	E=31
Very good	E=31	E=15	E=30
Average to dreadful	E=16	E=18	E=20
Total	E=29	E=15	E=38

The fifth filter in educational achievement for women, but probably not minorities, is the underutilization of women who have pulled themselves into the availability pool of qualified persons for faculty hiring by virtue of having earned the doctorate. Table I, below, shows the juxtaposition of availability pools and utilization for selected academic disciplines. The availability pools are here defined as the percentage of women earning the doctorate in the decade of the 1960's for each field. Utilization is here defined as the percentage of women among those persons with a doctorate on the faculties of the "High Quality Universities" in the Carnegie survey.

TABLE I.—PERCENT WOMEN IN AVAILABILITY POOLS AND PERCENT WOMEN PH. D.'S ON FACULTIES OF HIGH QUALITY UNIVERSITIES FOR ACADEMIC DISCIPLINES

Discipline	Availability pool		Utilization		Under utilization
	Percent	Number	Percent	Number	
Humanities	18	22, 392	8	1, 525	[1] 10
Social sciences	15	22, 854	8	1, 319	[1] 7
Biological sciences	14	17, 708	8	957	[1] 6
Physical sciences	5	31, 902	3	1, 388	[2] 2
Total academic	12	94, 856	7	5, 189	[1] 5

[1] The percentage difference as a measure of underutilization is statistically significant at the 0.05 level, using a conservative estimate of a 2-tailed test. The number column is the basis of the percentage. Read "18 percent of the 22,392 doctorates in the humanities were women. 8 percent of the doctorates on the faculties of high-quality universities were women, giving an underutilization of 10 percentage points."

[2] NS.

Source: Availability pools: Women's Equity Action League, "Proportion of Doctorates Earned by Women, by Area and Field, 1960–69," June 1971. Distributed by the Project on the Status and Education of Women, Association of American Colleges, 1818 R. St., NW., Washington, D.C. 20009. Utilization: Secondary analysis of the National Survey of Higher Education, sponsored by the Carnegie Commission on Higher Education.

TABLE V.—PERCENTAGE DROPOUTS FROM DOCTORAL PROGRAMS BY THE 4TH YEAR OF GRADUATE SCHOOL UNIVERSITY OF CALIFORNIA, BERKELEY

Year of entrance	Men	Women	Total	Sex difference
1962:				
Percent	22	42	25	20
Number	1, 093	194	1, 287	
1963:				
Percent	20	36	23	16
Number	1, 185	213	1, 398	
1964:				
Percent	21	36	23	15
Number	1, 233	264	1, 497	
1965:				
Percent	20	34	22	14
Number	1, 185	238	1, 423	
1966:				
Percent	22	33	24	11
Number	1, 214	287	1, 501	
1967:				
Percent	26	31	27	5
Number	1, 176	279	1, 455	
1968:				
Percent	27	27	27	
Number	1, 136	323	1, 459	
Total:				
Percent	22	34	24	12
Number	8, 222	1, 798	10, 020	
Difference by year of entrance	+5	[1] −15	+2	

Source: Graduate Division, University of California, Berkeley. In the entering cohort of 1962, 22 percent of the 1,093 men had dropped out of the doctoral program by the 4th year. In that same cohort, 42 percent of the women had dropped out by the 4th year. By the entering cohort of 1968, the sex differences in 4th year doctoral dropouts had disappeared There was a reduction of 15 percentage points in 4th year dropout rate for women from 1962 through 1968.

TABLE VI.—PERCENTAGE OF DOCTORAL STUDENTS WHOSE PRIMARY FACULTY CONTACT REGARDS THEM AS A COLLEAGUE OR APPRENTICE, BY SEX AND DISCIPLINE

Discipline	Men	Women	Percentage difference	Total
Psychology:				
Percent	72	53	[1] 19	65
Number	176	95		271
Anthropology:				
Percent	72	50	[1] 22	61
Number	51	50		101
Chemistry:				
Percent	58	54	[2] 4	57
Number	235	35		270
Physics:				
Percent	57	36	[2] 21	56
Number	265	14		279
Biological sciences:				
Percent	56	45	[1] 11	53
Number	393	150		543
Sociology:				
Percent	61	38	[1] 23	52
Number	101	44		145
History:				
Percent	57	37	[1] 20	52
Number	252	90		342
English:				
Percent	52	33	[1] 19	44
Number	197	149		346
Mathematics:				
Percent	39	22	[1] 17	36
Number	268	50		318
Discipline percentage difference	[1] 33	[1] 31		[1] 29

[1] Statistically significant at the 0.05 level, using a conservative estimate of a 2-tailed test.

[2] NS.

Source: Secondary analysis of data gathered by the National Survey of Higher Education, sponsored by the Carnegie Commission on Higher Education.

All of the tables based on the Carnegie data were based only on the institutions designated "High Quality University" in the codebook. They do not include medium or low quality Universities, four year colleges, or junior colleges.

Question. "As a graduate student, was there a faculty member who acted as your 'sponsor' when you were looking for your first job?"

Response. 1=yes; 2=no.

TABLE VIII.—PERCENT OF FACULTY WHO REPORTED HAVING HAD A FACULTY SPONSOR, BY SEX AND FIELD

Field	Men	Women	Sex difference	Total
Humanities:				
Percent	56	41	[1] 15	54
Number	1,719	235		1,954
Physical sciences:				
Percent	66	45	[1] 21	65
Number	1,526	65		1,591
Social sciences:				
Percent	71	68	[2] 3	71
Number	1,445	146		1,591
Biological sciences:				
Percent	64	46	[1] 18	62
Number	1,069	110		1,579
Total:				
Percent	64	50	[1] 14	63
Number	5,759	556		6,315
Field difference: Humanities-social	[1] 15	[1] 27		[1] 17

[1] Statistically significant at the 0.05 level, using a conservative estimate.

[2] NS.

While 56% of the male faculty in the Humanities reported having a faculty 'sponsor' when looking for the first job, only 41% of the female faculty members did so. The field difference is almost twice as large for women as for men.

Underutilization is largest in the field of English, which has an availability pool of 24% women, and only 6% women among the faculty members with doctorates, giving an underutilization of eighteen percentage points. Not only is the available pool of qualified women being underutilized in this national sample of faculty at high quality universities, but also, it is disproportionately distributed at the lower end of the faculty ranks.

Table II, below, shows the percentage of women among faculty with doctorates, by rank and field. For each field, the percentage of women gets larger, from Full Professor down to Instructor or Lecturer. There are large, and statistically significant differences in the percentage of women among Full Professors and Instructors and Lecturers in all but the Physical Sciences, where the small size of the availability pool places an artificial ceiling on underutilization.

TABLE II.—PERCENT WOMEN AMONG FACULTY MEMBERS WITH DOCTORATES, BY RANK AND FIELD

	Full professor	Associate professor	Assistant professor	Instructors Lecturers	Rank difference	Total
Humanities:						
Recent	3	7	12	30	[1] 27	8
Number	588	332	529	76		1,525
Social sciences:						
Percent	2	6	11	27	[1] 25	8
Number	490	298	441	90		1,319
Biological sciences:						
Percent	2	8	13	33	[1] 31	8
Number	393	235	287	42		957
Physical:						
Percent	1	3	5	4	[2] 3	3
Number	587	292	390	119		1,388
Total academic fields:						
Percent	2	6	10	20	[1] 18	7
Number	2,058	1,157	1,647	327		5,189

[1] Statistically significant at the 0.05 level.

[2] NS.

Source: Secondary analysis of Carnegie data.

This section has demonstrated both the underutilization of those who already belong to the pool of qualified persons in a national sample of faculty at high quality universities, and the differential distribution of women at the lower faculty ranks. At Berkeley, the ranks of Instructor and Lecturer are separate, non-ladder ranks, from which, by definition, it is impossible to transfer horizontally to the ladder positions of Assistant Associate, and Full Professor. The 1970 Report of the Subcommittee on the Status of Academic Women (*Blue Book*) shows a similar pattern, but with only 5% women among the Assistant Professors, and 27% women among the Instructors and Lecturers.

Berkeley has made tremendous progress in new appointments at the Assistant Professor level. In 1967–68, 4 of the 124 new hires were women, or 3%. In 1973–74, 16 of the 64 new hires were women, or 25%. These kinds of results indicate that traditional recruitment patterns are changing.

The difference in the percentage of women from Full Professor to Instructor-Lecturer grows *larger* with each increase in length of time at the institution, as shown in Table III, below.

TABLE III.—PERCENT WOMEN AMONG FACULTY WITH DOCTORATES BY RANK AND NUMBER OF YEARS AT INSTITUTION

	Full professor	Associate professor	Assistant professor	Instructors lecturers	Rank difference	Total
Less than, or up to 3 years:						
Percent	2	5	7	16	[1] 14	7
Number	326	423	1,513	291		2,5[illegible]3
4 to 6 years:						
Percent	4	4	13	23	[1] 19	8
Number	296	533	633	71		[illegible],533
7 or more years:						
Percent	2	8	25	30	[1] 28	5
Number	2,391	833	142	76		3,442
Total all fields:						
Percent	2	6	10	19	[1] 17	6
Number	3,013	1,789	2,288	438		7,528

[1] Statistically significant at the 0.05 level.

Source: Secondary analysis of Carnegie data.

These are the facts which document the need for affirmative action on behalf of women and minorities, first to increase their numbers in the availability pools at each filtering point, and second, to utilize more adequately those already qualified. The whole point of affrmative action is that every person be free to achieve to the limits of talents and energies, independently of sex or ethnicity.

The next section provides a sociological analysis of the current state of paralysis on efforts to achieve affirmative action on both counts.

2. THE CURRENT STATE OF PARALYSIS IN EFFORTS TO ACHIEVE EFFECTIVE AFFIRMATIVE ACTION ON BEHALF OF WOMEN AND MINORITIES

The letter and spirit of Executive Order 11246 as amended, Title VII of the Civil Rights Act of 1964 as amended, the Equal Pay Act of 1963 as amended, and Title IX of the Education Amendments Act of 1972 are clear. From the perspective of those trying to get some of the rewards of the system for themselves, progress has been agonizingly slow. By Fall, 1972, the percentage of women among Full Professors at Berkeley was up to 3% from the Blue Book of 2% in 1969. The percentage of women among Associate Professors is up to 7% from 5%, and among Assistant Professors, up to 12% from 5%.

The primary source of paralysis with respect to affirmative action for women and minorities at Berkeley has been the amount of conflict generated between supporters and opponents of affirmative action within the University, and between the University and HEW. At both levels, discussions about the merits and demerits of various aspects of the Affirmative Action Plan to be filed with HEW had become adversary proceedings in which neither side was willing or able to trust the other to act in good faith.

Within the University, and between the University and HEW, people at every level of power and authority have been responding to people or groups above and below in terms of their fantasies about what people and groups at higher levels expect, instead of taking responsibility and initiative in clarifying those expectations.

The major fantasy among those resistant to the idea is that affirmative action means that "Whenever you have a white male competing with a female or black for a job, preference must be given to the women or black, even though the white male is better qualified."

In fact, the letter and spirit of the Federal requirements cited in the first paragraph of this section require the opposite interpretation.

The institution sets the criteria, not HEW. The criteria must be applied equally to men and women, whites and blacks, and must not itself be discriminatory, i.e., criteria which give preference to people who did their undergraduate work at Ivy League Schools would be discriminatory in that women have been denied, until very recently, the opportunity to attend such institutions.

In very limited instances only can preference be given to women and minorities: when there has been a history or pattern of exclusion, *and* or discrimination, *and* if two candidates are equally qualified, only then can preference be given to the member of the Minority Group. (*Summary of Federal Policy Concerning Twenty-Five Affirmative Action Issues in Employment*, published by the Project on the Status and Education of Women, Association of American Colleges, reproduced in Sells, March 30, 1973, page 40.)

Paralysis and lack of productivity come from conflict about the goals to be achieved, the means of achieving them, and the standards of evaluation of achievement at a number of levels:

1. Internal conflicts within individuals paralyzes individual performance and achievement.
2. External conflict between individuals or groups at the same level of power and authority paralyzes performance and achievement.
3. Internal conflict within groups paralyzes group performance and achievement.
4. Within institutions, such as Universities and Federal bureaucracies, conflict paralyzes performance and achievement.

The first step in the healing process is to clarify the nature and extent of the conflict by articulating and identifying the goals to be achieved, the means of achieving them, and the standards of evaluation of achievement as experienced by people and groups at each level of power and authority, within the University, and within the Department of Health, Education and Welfare.

For over two years, three sides have been talking past each other, with differing perceptions of the goals and consequences of affirmative action. Those of us who have been working for it do so from the position that it is necessary in order to maintain the highest standards of scholarship and excellence. We firmly believe that merit rather than sex or ethnicity should be the sole criterion for recruitment and hiring. We need to establish ways of evaluating merit which don't contain implicit assumptions that make being female, or a member of a minority group a demerit.

Those members of the faculty and administration who have up til now opposed affirmative action did so from a genuine conviction that it might destroy their cherished values of scholarship and excellence. They are feeling coerced and constrained both by external pressure from HEW, and internal pressure from us within the system.

In the meantime, HEW has been harboring the fantasy that faculty and University administrations have been recalcitrant on affirmative action because of deliberate, malevolent, hostile sexism and racism. My own perception is of a more benign conception of what sexism and racism are, and I use the word "benign" because of my conviction that they are both curable. Sexism and racism are the unconscious, implicit assumptions which are so pervasive in the structure of society that they are as invisible to those constrained as the very air we breathe. They are internalized as needed dispositions in the personalities of individuals, which calls for psychological cures, through consciousness raising. They are also institutionalized as role expectations based on sex-role and ethnic-role stereotypes, which calls for sociological cures, through institutional consciousness raising.

One amusing example of sexism occurred to me in my role as member of the Board of Trustees of the Berkeley Public Library. The librarian recognized the last name on my library card, and her face lit up as she said "Oh, your husband is on the Board of Trustees, isn't he." There was nothing hostile or malicious intended. She was operating with the unconscious, implicit assumption that only men get appointed to public office.

As an unemployed graduate student conducting research, I've been free to travel up and down the ladder of power and authority within the University, between the University and members of the State legislature, and between the University and Members of Congress and HEW. When I was in Washington, D.C., I was free, as a consultant rather than permanent employee, to travel up and down the five floors of the HEW building. The symbolism of the power and authority structure was even more oppressive than in University Hall. It was felt most acutely by those on the ground floor, who carried the weight of the other four floors, while being responsible for the effective performance of nine regional offices with considerable variation in competence of directors. My fantasy for improving the level of political appointments is that the standards of merit and excellence aimed for in facility recruitment and hiring be carried over to political appointments.

The week in Washington has crystallized my thinking about the phenomenon of paranoid authoritarianism, which I see as a profound mistrust of people and groups above and below one's own in the hierarchy of power and authority. Like sexism and racism, this authoritarianism cripples and constrains trust, good will, and openness of communication. It is fundamental to the pathology of bureaucracies, whether educational or political. Fortunately, like sexism and racism, it too can be cured, by calling people's attention to its existence, by rendering it visible.

This section has analyzed some of the factors underlying past paralysis in efforts to achieve effective affirmative action. The last section will specify means of achieving it, delineate some resources which can be mobilized, and suggests strategies for achieving it.

3. STRATEGIES FOR ACHIEVING AFFIRMATIVE ACTION

The first section of this paper has clarified two major goals of affirmative action on behalf of women and minorities:

1. The first is to help faculties and administrations of institutions of higher education recognize that their cherished values of scholarship and excellence will be upheld *only* when all persons, including women and minority members are free to develop their talents and energies to highest potential.

2. The second is to make it possible that the achievements of women and minority students who are rated "excellent" might surpass those of white men who are rated "average."

The second section of this paper suggests internalized and institutionalized sexism, racism, and authoritarianism as the major factors contributing to the paralysis on affirmative action discussions between proponents and opponents, and between the University and the Department of Health, Education, and Welfare.

This last section will focus on means, resources, and strategies.

I. Means for Achieving Affimative Action

My approach to achieving effective affirmative action on behalf of women and minorities involves a five pronged educational campaign aimed at presenting the facts about the differential distribution of women and minorities at five levels of power and authority within and outside the University system. The purpose of this campaign is to bring every group's fantasies about those above and below into closer contact with reality.

This approach is an extension of my philosophy of education, which defines the highest form of learning as that which is discovered by freeing people to draw their own conclusions from the data, rather than trying to force my own conclusions onto them. My experience has been that discovered knowledge is more likely to be retained, and to be made relevant to problems at hand more effectively than force-fed regurgitated knowledge.

I have found people at all levels within and outside the University to be very open and receptive when I present the facts outlined in the first section on the paper, and solicit feedback from them about the causes and consequences of the data. A frequent response to the high school mathematics differential is "But why do you take this to be a problem? Maybe girls don't take any more math in high school because they don't *want* to. Shouldn't they have freedom of choice?"

My response is to ask what happens differently to boys and girls, that makes boys want to continue, and girls not want to continue in math. Contrary to the experiences of some proponents of affirmative action, and of some people in HEW, I have found academic men to be reasonable. The brighter the group I'm working with, the more quickly their faces light up with comprehension of the powerful effects of their unconscious, implicit assumptions about human behavior based on sex-role stereotyping. When I see their faces light up, I know that their consciousness has been raised to new levels of awareness. Then I point out that freedom of choice depends on keeping options open, and that the math filter closes options more intensely for minorities than women.

This approach frees them to contribute solutions to the problem, partly by not threatening their sense of themselves as worthwhile people. My brief experience on the Board of Library Trustees confirms my hypothesis that decision makers are more likely to listen to offers of help to solve problems, and to expressions of support, interest, and concern than they are to listen to protest and outrage which implicitly accuse them of acting out of hostility, bad faith, and of being bad human beings.

It is both vulgarized and intellectualized Dale Carnegie, but it gets results.

Major targets for my educational progress include:

1. Students, starting in junior high school, to raise their aspirations and motivations consistent with ability levels, and to develop their sense of autonomy, initiative, and responsibility for their own lives, with respect to faculty.

2. Faculty, to change their expectations and assumptions about sex and ethnic stereotypes of students, and to develop their sense of autonomy, initiative, and responsibility for their own lives with respect to the campus administration, and the state legislature, and the federal congress and administrative bureaucracies.

3. Administrators, to change their expectations and assumptions about students and faculty, and to develop their sense of autonomy, initiative, and responsibility for their own lives with respect to the Regents and Legislature, Congress, and HEW.

4. Legislatures, to change their expectations and assumptions about students, faculty, administrations, and to develop their acceptance of grass-roots upward development of autonomy, initiative, and responsibility for control for people's own lives at each level, both as individuals, and as groups. (There's an implicit, but not thought through message to Legislatures, which feels like a vulgar plagiarism of Edmund Burke. Elected officials need to develop their sense of autonomy, initiative, and responsibility for their own lives, as well.)

5. U. S. Department of Health, Education, and Welfare, to clarify the similarities and distinctions between the goals, needs, and standards of evaluation in University systems and Industrial systems.

I am convinced that the paralysis of the past two years is not part of some evil Machiavellian plot to keep women and minorities in their place, nor to destroy institutions of higher education. Rather, it is because people are oblivious to their own unconscious, implicit assumptions about human behavior based on sex-role and ethnic stereotyping. We can eliminate internalized and institutionalized sexism, racism, and authoritarianism by giving people enough facts to see the light for themselves.

II. Resources for Achieving Affirmative Action

The most important resource for achieving affirmative action is our own personal talents and energies, working together on our own behalves to pull ourselves into the availability pools. We need to stop wasting our time and energies fighting with faculty and administrations, and with H. E. W. over words on pieces of paper, in order to produce the kinds of results in our respective fields that qualify us for jobs and salaries consistent with our abilities and ambitions.

A second powerful resource is the growing number of academic and professional organizations devoted to achieving affirmative action on behalf of women and/or minorities. These include:

1. The Women's and Minority Caucuses of the various professional societies.
2. The Association of Women in Science (AWIS). Membership is $5.00 for students and unemployed, $18.00 for Faculty, and $25.00 for Libraries. Send Check to: Dr. Ellen C. Weaver, Membership Chair, AWIS, Office of Research Development, California State University, San Jose, 125 South Seventh St., San Jose, CA 95192.
3. The Project on the Status of Women and Education, The Association of American Colleges, 1818 R Street N.W., Washington, D.C. 20009. (202) 265-3137. Bernice Sandler, Executive Associate, puts out a fantastic array of affirmative action materials and information.
4. California Women in Higher Education (CWHE). This statewide organization is devoted to maximizing opportunities for women in California higher education. Membership is open to all persons from all segments of higher education in California, and to persons at all levels within each segment:

	Levels
The University of California System	Undergraduate students. Graduate Students.
The State University and College System	Non-Academic Staff.
The Community College System	Academic Staff. Faculty.
The Private Colleges and Universities	Administration.

The appendix contains a membership application for this organization, which provides social and political support for women to organize to act affirmatively on their own behalves.

A third resource is the good will of persons at all levels who are already on our side. My most difficult job is to persuade people who have not yet tasted the rewards of success in their own field that there are such people. I see this most clearly among graduate students who are still agonizing over whether they want to make the commitment necessary for academic success. People who are still experiencing the pain of their oppression as women or minorities, or as those at any level of power and authority feeling oppressed by those above, and disappointed by those below, are as oblivious to the existence of good will on the part of persons or groups they feel are oppressing them as most human beings are to their own sexism, racism, and authoritarianism.

III. Strategies for Achieving Affirmative Action

The emerging theme from my research on graduate student and faculty relationships extends to all power and authority relationships, including faculty and administration, administration and State and Federal legislative and administrative bodies, and even Congress and outraged citizens and pressure groups. When individuals and groups at any level of power and authority are feeling pressured and harassed by those above and below them, it paralyzes constructive solutions to problems.

Autonomy, initiative, and responsible adulthood are not characteristics which can be conferred upon human beings by other persons, groups, or social institutions. Instead, they come from individuals acting affirmatively to produce the kinds of results that will persuade the decision makers in their particular social system that their autonomy, initiative, and results earn the same rewards in that system that others who succeed are earning. For those who have not yet succeeded in the system, this is perceived as selling out to the system. For those who have already succeeded, this is perceived as using the rules of the system to work for their success, rather than against it.

I don't have the data, but it's conceivable that WAMP's and JIM's traditionally have been more in touch with the rules for succeeding in educational systems, because of the heretofore closed nature of communication within such systems. One of the cherished values of Universities as social systems is that of academic freedom in the context of the free market place of ideas. One strategy for achieving affirmative action is to use that value to achieve a free market place of information about the rules for succeeding within the system, at every level: Adequate mathematics preparation to keep options open as an undergraduate, survival and flourishing as an undergraduate and graduate student, getting hired, promoted, and getting tenure at the highest possible levels consistent with abilities, energies, and ambitions, independently of sex or ethnicity.

A second strategy is to change society so profoundly that sex and ethnic differences in psychological variables no longer exist, and that societal expectations based on sex-role and ethnic-role stereotyping no longer exist. We can't accomplish either alone, but must work on both together.

My own strategy is to work at both levels presenting the data wherever I get the chance, even to the point of leaving the fact sheet with tips when I attend professional meetings. At every level, I have assumed good will until I have direct evidence to the contrary, and have assumed openness to the data until I have direct evidence to the contrary. So far, I've not been disappointed. An alternative strategy has been to assume ill will and closed mindedness until there is direct evidence to the contrary. My own experience suggests that both strategies tend to become self-fulfilling prophecies, and that human beings tend to live up to the expectations placed on them by others. We each have the potential for eliciting both the best and the worst in other human beings. Let's concentrate on the best!

SEX DIFFERENCES IN GRADUATE SCHOOL SURVIVAL*

(By Lucy W. Sells)

This is a report on recent trends in graduate school survival. It is based on national survey data, a recent pilot project in attrition reduction conducted at the University of California, Berkeley, and on trend data in doctoral attrition provided by the Graduate Division at Berkeley.[1]

A national study of 1950–1953 Post-Master's students in the traditional arts and sciences shows a sex difference of twenty percentage points in completion of the doctorate by December, 1962. (Tucker, Gottlieb, and Pease, 1964.) While 65% of the men in the sample had earned the degree nine to twelve years later, only 45% of the women had done so. A similar pattern was found among Woodrow Wilson Fellows who entered graduate school from 1958 through 1963. (Sells, 1973.) In the national sample, the mean time to completion of the doctorate was 8.5 years, so the Money data gathered on Woodrow Wilson Fellows six to eight years after entrance to graduate school were analyzed in terms of dropouts rather than completions. At the time of the study, 44% of the men and 64% of the women were no longer in graduate school, and had not earned the doctorate. Data on the entering cohort of 1962 doctoral students at Berkeley show that by the fourth year of graduate school, 22% of the men had dropped out, compared with 42% of the women.

The pilot project at Berkeley grew out of concern with understanding the psychological and sociological factors contributing to the twenty per cent sex difference. We were particularly concerned with isolating those factors which might be different for women graduate students in the 1970's, so that expectations based on the behavior of women in the 1950's and 1960's would no longer be imposed on contemporary women. The project consisted of an eight week series of two hour sessions in which groups of women from a variety of disciplines attempted to define and articulate problems faced by women in graduate school, and to generate solutions to these problems.

Because of the comparatively short duration of the project, the discussions were somewhat more structured than under the usual Consciousness Raising procedures of women's groups in the past few years. A number of recurring themes emerged from the discussions. They were echoed and amplified independently in a questionnaire survey of non-participants from the mailed announcement of the project. The major themes emerging from the group explorations and the questionnaire responses can be grouped into three categories:

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*Paper presented at the annual meetings of the American Sociological Association, New York, August 28, 1973.

[1] The Graduate Women's Project was co-sponsored by the Women's Center and the Affirmative Action Office at Berkeley. It was conducted by the author, and Nancy Isaac Kuriloff, a doctoral candidate in the Division of Higher Education. It was supervised by two consultants in group dynamics, Paul Baum and Vivian Gold.

1. Factors beyond the control of students or faculty.
2. Factors within the control of faculty.
3. Factors potentially within the control of students.

Each group will be outlined below, with the greatest emphasis on those factors potentially within the control of students themselves.

1. FACTORS BEYOND THE CONTROL OF STUDENTS OR FACULTY

Decline in Federal and private courses of graduate student financial support, which makes students increasingly dependent on departmental good will for support.

Rising tuition costs, and costs of living in general.

Declining job market for Ph. D.'s, combined with the proliferation of doctoral production from lower quality institutions.

2. FACTORS WITHIN THE CONTROL OF FACULTY

Lack of women as role-models on the faculty, which affects the socialization process of the women graduate student.

Poor formal advising procedures, which are the source of much unnecessary confusion and bitterness.

Exclusion of women from the informal communications network by both faculty and graduate students, which contributes to an increasing sense of invisibility as time passes.

Exclusion of women from the traditional apprentice relationships with faculty.

Indifference of professors Many women feel that the remoteness and unapproachability of professors makes it difficult to seek advice and help.

Mystery, characterized by the lack of easy availability of information. Many women cited the absence of well-defined, *public* criteria for evaluation, requirements, or procedures.

Secrecy. Many complained about the absence of information about attrition, flunking, and success rates within the department; about the length of time it takes to get the degree; about the employment situation once they earn the degree. There were also complaints about the absence of due process for students who felt they were wrongfully being dropped from doctoral programs.

3. FACTORS POTENTIALLY WITHIN THE CONTROL OF STUDENTS

These factors were repeatedly recurring themes in the group discussions and the non-participant questionnaire. Each woman in the group had initially perceived them as unique, personal problems. The major insight arising from the group process was the recognition by the women involved that their feelings were in fact not individual, and even more importantly, that they were not limited to students in their own departments. Recognition of these feelings as pervasive characteristics of graduate student life seems to have made it possible to deal with them more effectively.

Problem areas were raised at two different levels, psychological and sociological.

The psychological level

Students mentioned the following kinds of feelings which interfere with performance and inhibit the kind of sustained effort needed for intellectual achievement, and which seem to become more intense as length of time in graduate school increases:

1. Lowering of self-confidence.
2. Lowering of self-esteem.
3. Ambivalence about professional and career norms which seem to exclude the legitimacy of personal life.
4. Ambivalence about professional norms which put research ahead of teaching.
5. Ambivalence about success and failure, arising from fears of professional success as inherently defeminizing.
6. At least three different forms of alienation:

A. Alienation arising from ambiguity about the norms governing academic and professional success. This ambiguity could be resolved by explicit clarification of what it takes to succeed in a field, so that students could decide early in their graduate careers whether or not they want to play the game.

B. Alienation arising from the student's sense of powerlessness. To the extent that she perceives her academic life outside of her own control, she will be hindered in degree progress. This sense of powerlessness could be resolved by providing greater opportunity for student participation in the decision making processes which affect doctoral progress.

C. Alienation arising from a sense of the meaninglessness of hurdles to be passed. This could be resolved by clarifying the relationship between curriculum hurdles and their contribution to professional growth and development.

The sociological level

Graduate students frequently complain about the infantalization imposed on them by graduate school. The women in the pilot project also mentioned this. A faculty advisor told one of our women scientists that "the trouble with students is they want to take too much charge of their own lives." Of course it is not always clear which way the casual arrow operates. Do faculty behave in a paternalistic manner because students behave in a dependent, childlike manner? Or do students behave in a dependent, childlike manner because faculty expectations elicit and reward such behavior? Is the question of paternalism versus autonomy related to the sex of the student, or does it affect the progress of male students as well?

Women enter graduate school with stronger records than men. They have to be better to survive the initial screening process. All of the women in the exploratory group, and most of the women in the questionnaire survey reported a sense of progressive demoralization, of skidding downhill in their sense of competence, self-esteem, and self-confidence. They see the male graduate students with whom they entered accepted as apprentices and junior colleagues, but feel shut out from such relationships themselves.

The evidence from the pilot project at Berkeley is corroborated by findings in a national survey of graduate students, conducted by the Carnegie Commission on Higher Education. One of the questionnaire items was "Does the Professor with whom you have the most academic contact regard you primarily as: a colleague, an apprentice, an employee, or a student?" Table I on page 5 shows the percentage of doctoral students who responded that their primary faculty contact regarded them as "colleague" or "apprentice", broken down by sex and discipline.

TABLE I.—PERCENTAGE OF DOCTORAL STUDENTS WHOSE PRIMARY FACULTY CONTACT REGARDS THEM AS A COLLEAGUE OR APPRENTICE, BY SEX AND DISCIPLINE

Discipline	Men	Women	Percentage difference	Total
Psychology:				
Percent	72	53	[1] 19	65
Number	176	95		271
Antropology:				
Percent	72	50	[1] 22	61
Number	51	50		101
Chemistry:				
Percent	58	54	[2] 4	57
Number	235	35		270
Physics:				
Percent	57	36	[1] 21	56
Number	265	14		279
Biological sciences:				
Percent	56	45	[1] 11	53
Number	393	150		543
Sociology:				
Percent	61	38	[1] 23	52
Number	101	44		145
History:				
Percent	57	37	[1] 20	52
Number	252	90		342
English:				
Percent	52	33	[1] 19	44
Number	197	149		346
Mathematics:				
Percent	39	22	[1] 17	36
Number	268	50		318
Discipline percentage difference	[1] 33	[1] 31		[1] 29

[1] Statistically significant at the 0.05 level, using a conservative estimate of a 2-tailed test.

[2] NS.

Source: Secondary analysis of data gathered by the National Survey of Higher Education, sponsored by the Carnegie Commission on Higher Education.

In the national sample, the sex differences in being treated as an apprentice or colleague are large and statistically significant among students in Psychology, Anthropology, the Biological Sciences, Sociology, History, English, and Mathematics. The mean sex difference in these seven disciplines is nineteen percentage points. The discipline differences are even larger.

All of the tables based on the Carnegie data were based only on the institutions designated "High Quality University" in the codebook. They do not include medium or low quality universities, four year colleges, or junior colleges.

Students in the pilot project at Berkeley reported an increasing sense of not being taken seriously, by faculty, or by their fellow students. This sense of not being taken seriously contributes to their sense of demoralization, and of futility in pursuit of the doctorate. Again, the evidence from a self-selected sample of women concerned about their anxieties about graduate school is corroborated by data from the Carnegie national survey of graduate students. Table II. below, shows the distribution of responses to the Carnegie item that "Professors in my department don't really take female graduate students seriously, by sex and year in school. While 26% of the first year women agreed strongly or agreed with reservations to the item, 36% of the fourth year women did so.

TABLE 11.—PERCENTAGE OF GRADUATE STUDENTS WHO AGREE THAT PROFESSORS IN MY DEPARTMENT DON'T REALLY TAKE FEMALE GRADUATE STUDENTS SERIOUSLY, BY SEX AND YEAR OF GRADUATE SCHOOL

Year of graduate school	Men	Women	Total	Sex difference
1:				
Percent	22	26	23	4
Number	2,195	1,004	3,239	
2:				
Percent	25	28	25	3
Number	1,520	465	1,985	
3:				
Percent	28	33	29	5
Number	1,077	244	1,321	
4:				
Percent	27	36	29	[1] 9
Number	720	137	857	
5 or more:				
Percent	23	30	25	[1] 7
Number	979	279	1,258	
Total:				
Percent	24	28	25	4
Number	6,491	2,169	8,660	
Year difference 1 to 4	+5	[1] +10	+6	

[1] Percentage difference is statistically significant at the 0.05 level.

If we assume that faculty beliefs about the seriousness and dedication of female graduate students are based on their previous experience with having women graduate students drop out, we would predict large differences in agreement to the item across the ranks of faculty appointments, with Full Professors showing higher percentage agreement than Associate Professors or Instructors and Lecturers. In fact, the differences are modest.

TABLE III.—FACULTY: PERCENT AGREEMENT THAT FEMALE GRADUATE STUDENTS ARE NOT AS DEDICATED BY RANK AND SEX

	Full professor	Associate professor	Assistant professor	Instructors	Lecturer	Rank difference
Men:						
Percent	30	28	29	25	23	[1] 7
Number	2,118	1,180	1,539	274	223	
Women:						
Percent	20	14	8	19	20	
Number	45	76	165	64	94	
Total:						
Percent	30	27	29	25	23	
Number	2,163	1,256	1,704	338	317	
Sex difference within ranks	[2] 10	[1] 14	[1] 21	[2] 6	[2] 3	

The twelve point difference between agreement by women Lecturers and Full Professors compared with women Assistant Professors is not significant because of the small number of cases involved.

It appears that faculty perceptions of the seriousness of women graduate students have no relation to their number of years experience with students succeeding or dropping out. Among those who have been teaching for one year or less, 23% agreed that women are less dedicated, compared with 22% among those who have been teaching for thirty or more years. The N's are large enough to preclude random fluctuation, with 1119 and 787 respectively.

Table IV, on page 9 shows the distribution of faculty responses to the item "The women graduate students in this department are not as dedicated as the males," and the distribution of female student responses to the item "The professors in my department don't take female graduate students seriously." There are large and statistically significant differences in faculty attitudes toward women, across disciplines, in student perceptions of faculty attitudes, across disciplines, and most importantly, between faculty attitudes and student perceptions in History, English, Political Science, and Sociology.

Again, it is not clear whether students pick up and reflect faculty expectations with respect to their seriousness, or whether students behave in a manner which elicits expectations of lack of seriousness.

One of the themes emerging from the pilot project and the national survey data was the sense of exclusion from the informal colleague or apprenticeship relationship with faculty. It was particularly strong for women in the national sample, but obviously also a problem for men. While 72% of the men in Psychology and Anthropology felt that they were regarded as colleagues or apprentices by their major faculty contact, only 39% of the men in Mathematics did so. At least 40% of the men in the major doctoral disciplines indicated that they did not feel like colleagues or apprentices to their major faculty contact.

Graduate student organizations can provide an ideal mechanism for students to develop the interpersonal and professional skills which contribute to their sense of colleagueship and apprenticeship. The paradox is that many students are so involved in their individual progress or paralysis that they fail to see the possibility of organizational solutions. This is particularly true for students who see problems in graduate school as evidence of personal failure and ineptitude, rather than evidence of problems shared by most students. Until quite recently, women have tended to internationaliz blame for these problems, while men have tended to project it on faculty, and on the system.

TABLE IV [1]

Discipline	Faculty	Female students	Percentage difference
History:			
Percent	19	48	[2] 27
Number	395	91	
English:			
Percent	22	42	[1] 20
Number	495	149	
Clinical psychology:			
Percent	22	28	[3] 6
Number	114	18	
Political science:			
Percent	23	55	[2] 33
Number	307	67	
Sociology:			
Percent	23	40	[2] 17
Number	212	45	
Biological and physical sciences:			
Percent	35	30	[3] −5
Number	2,403	252	
Experimental psychology (percent)	49	42	[3] −7

[1] Distribution of responses on items tapping faculty attitudes toward women graduate students, and student perceptions of faculty attitudes: Percent agree strongly, or agree with reservations. Facúlty item is "the women graduate student in this department are not as dedicated as the males. The student item is "the professors in my department don't take female graduate students seriously."

[2] Statistically significant at the 0.05 level, using a conservative estimate of a 2-tailed test.

[3] NS.

Source: Secondary analysis of data gathered by the National Survey of Higher Education, sponsored by the Carnegie Commission on Higher Education.

Trend data on doctoral dropouts provided by the Graduate Division at Berkeley suggest the powerful impact of students organizing themselves on their own behalf. Table V, on page 11, reflects the growth of Women's Caucus Activities at Berkeley. The longstanding sex difference of twenty percentage points in dropouts was gradually reduced to zero in the wake of women's increasing efforts to seize their own autonomy.

Some of the processes which operate to drive women out of doctoral programs also work against men. Solutions derived from working with women students might also be used to reduce attrition among talented men. The problem is to help students recognize that it is to their advantage to become involved in departmental student organizations, in order to take responsibility for their own professional growth and development. There appears to be considerable student resistance to the idea of "professional socialization," in which students are rewarded for becoming more and more like faculty, and penalized for serious deviation from the faculty model of appropriate professional academic behavior. This resistance comes from men as well as women, and needs to be explored. Part of it may stem from rejection of the passivity and denial of autonomy implied by the process of being socialized by authority figures who are solely responsible for determining standards of evaluation. Part of it may stem from rejection of these standards of evaluation. Part may stem from a rejection of the faculty models of appropriate professional attitudes and behavior.

Students should be encouraged to organize on their own behalf to improve communications among each other, and with faculty; to find out, and make explicit the standards of evaluation governing performance and professional behavior; to explore and make explicit alternatives to accepted models of appropriate professional attitudes and behavior; to find out, and make explicit the opportunities and limitations for employment imposed by the rapidly changing supply and demand for doctorates in each field.

Some might argue that such activities are the primary responsibility of the faculty. However, for faculty to continue to spoon-feed students with the rules for success becomes the worst form of paternalism and denial of student autonomy. The paradox is that students have to act like colleagues and apprentices in order to be so treated, and they have to feel like colleagues and apprentices in order to act accordingly.

TABLE V.—PERCENTAGE DROPOUTS FROM DOCTORAL PROGRAMS BY THE 4TH YEAR OF GRADUATE SCHOOL UNIVERSITY OF CALIFORNIA, BERKELEY

Year of entrance	Men	Women	Total	Sex difference
1962:				
Percent	22	42	25	20
Number	1,093	194	1,287	
1963:				
Percent	20	36	23	16
Number	1,185	213	1,398	
1964:				
Percent	21	36	23	15
Number	1,233	264	1,497	
1965:				
Percent	20	34	22	14
Number	1,185	238	1,423	
1966:				
Percent	22	33	24	11
Number	1,214	287	1,501	
1967:				
Percent	26	31	27	5
Number	1,176	279	1,455	
1968:				
Percent	27	27	27	
Number	1,136	323	1,459	
Total:				
Percent	22	34	24	12
Number	8,222	1,798	10,020	
Difference by year of entrance	+5	−15	+2	

Source: Graduate Division, University of California, Berkeley. In the entering cohort of 1962, 22 percent of the 1,093 men had dropped out of the doctoral program by the 4th year. In that same cohort, 42 percent of the women had dropped out by the 4th year. By the entering cohort of 1968, the sex differences in 4th year doctoral dropouts had disappeared. There was a reduction of 15 percentage points in 4th year dropout rate for women from 1962 through 1968.

There is considerable variation across disciplines in the kinds of attitudes and commitments required for success. One possible approach to student initiated organization on their own behalf is outlined below. It would need to be tailored to meet the special needs of individual departments, disciplines, curriculum requirements, and job opportunities and limitations.

STUDENT ORGANIZATION ACTIVITIES

Students could learn to become autonomous in three major areas of their graduate careers by organizing seminars around those areas, and taking the initiative to invite faculty to contribute their special expertise on particular topics. At the same time, they need faculty support and encouragement for taking initiative.

The first major area is that of clarifying their first year students precisely what a serious professional commitment involves. This could be done in a seminar held by advanced doctoral students on behalf of entering students during their first quarter. Weekly sessions could help first year students decide early in their graduate careers whether they really want to commit themselves to the exacting demands of their discipline. A useful text for such a seminar would be Pierre van den Berghe's little gem, ACADEMIC GAMESMANSHIP, New York, Abelard, 1970. Topics for such a seminar might include:

1. *Introduction to the Department.*—Overview, and introduction of the entire faculty to first year students. Examination of the diversity of research interests, theoretical perspectives, and methodolcgical strategies of the faculty. This could help students to decide with whom they might be intellectually compatible during their first few months.

2. *Introduction to the job market.*—For persons with Master's degrees, and with doctorates. Presentation of data on approximate number of new doctorates in the field; approximate number of openings each year, nation wide, and at various types of institutions; range of job alternatives open (graduate teaching and research; undergraduate teaching; industry; business; government—Federal, State, Local; Private research organizations; other options.)

The remaining sessions might be devoted to the means of achieving career advancement, given the options available, and those in which the student is interested. Means to advancement include:

3. *Publications.*—Importance of research and publications for each of career options; which journals most appropriate for which options; how to submit papers; constructive ways of handling rejections.

4. *Graduate Student Job Experience.*—How to make teaching assistantships and research assistantships contribute to career advancement, rather than impede it; importance of early building up of Vita; extra-curricular activities that will enhance or hinder advancement.

5. *Organization Membership.*—Which scholarly, scientific, or professional societies are important for each of the career alternatives? How do you join them? How do you use them for career advancement? Importance of participation in regional and national meetings; importance of developing relations with graduate students with similar research interests at other institutions.

6. *Fellowships and Research Grants.*—Letters of recommendation, based on classroom performance, written work, results; recognizing the importance of choosing research topics with long-range payoff in terms of theoretical and empirical fertility in a field.

7. *First postdoctoral job strategies for various alternatives.*—Importance of keeping options open as long as possible.

The second major function could be filled by a series of seminars for students who are preparing for qualifying examinations. These could be organized around substantive areas in the discipline, so that students working on similar areas could work together to carve out the major issues and codify relevant materials in preparation for exams. The underlying assumption is that students will be free to work hard to meet each other's expectations, and that they work harder in such a context than in meeting the imaginary expectations of faculty who will ultimately decide whether they pass or fail.

The third function could be filled by a series of seminars for students engaged in dissertation research. It would provide students who are working on similar research topics with an opportunity to resolve some of the intellectual and emotional issues involved in the design, execution, and writing up of their research before submitting it for the ultimate evaluation by faculty.

This paper has traced through recent trends in sex differences in doctoral attrition, suggested some of the processes which operate to drive men as well as women out of graduate school, and suggested some concrete ways in which graduate students can take charge of their own autonomy to become apprentices, and ultimately, colleagues.

Field	Mean number of years to doctorate by field			
	Years from bachelor's to doctorate, total	Years from start of postmaster's work to doctorate		
		Public	Private	Total
Humanities:				
Percent	11.8	6.2	5.5	5.9
Number	1,395	722	690	1,412
Social sciences:				
Percent	9.2	5.3	4.8	5.1
Number	2,446	1,325	1,148	2,473
Biological sciences:				
Percent	7.4	4.4	3.2	3.9
Number	1,378	764	621	1,385
Physical sciences:				
Percent	6.6	3.8	3.6	3.7
Number	2,503	1,422	1,106	2,528
Total:				
Percent	8.5	4.8	4.3	4.6
Number	7,722	4,233	3,565	7,798

Source: A. Tucker, D. Gottlieb, and J. Pease, "Attrition of Graduate Students at the Ph.D. Level in the Traditional Arts and Sciences," Office of Research Development and the Graduate School, publication Nov. 8, 1964, Michigan State University, Mean years from bachelor's to doctorate taken from p. 59, mean years from time postmaster's study began taken from p. 63.

Number in parenthesis is number of doctorates on which the mean number of years to completion is calculated. Read "The mean time to completion for 1,395 doctorates in the Humanities was 11.8 years."

The study was based on all students who were enrolled in work beyond the master's degree in the traditional arts and sciences at twenty-four selected universities between 1950 and 1953. Data were gathered in 1962.

Data are based on Stratum I Institutions: Schools which fall within the top 15 schools rated by Keniston. Private schools are Chicago, Cornell, Princeton, and Yale. Public schools are Illinois, Indiana, Michigan, Minnesota, UCLA.

AVAILABILITY POOLS AS THE BASIS FOR AFFIRMATIVE ACTION*

(By Lucy W. Sells)

Federal policy requires that all institutions with Federal contracts totaling more than $50,000 develop written affirmative action plans on behalf of women and minority employees.[1] These affirmative action plans are required to include numerical goals and timetables, based on the available pool of qualified persons. In the context of hiring for University faculty, the pool of qualified persons consists of those who have earned the doctorate, or its professional equivalent, in their field.

This paper will argue that affirmative action requires both greater use of persons in the existing pool, and long range action to increase the number of women and minorities in that pool. First, it will indicate the distribution of women in the recent pool of doctoral production. Second, it will demonstrate that, at least for women, the already available pool is not being adequately used. Third, it will show that certain persons have, until very recently, been systematically filtered out of the pool. Fourth, it will conclude by suggesting that really effective affirmative action requires an educational process aimed at three target groups: Those who do the hiring, those who seek access to the pool of doctorates, and those who have traditionally contributed to the filtering process which has kept women and minorities out of the pool.

In a world of only random differences between the sexes, and among ethnic groups, we would expect only random differences in their distribution within social institutions, such as universities. The discrepancy between the proportion of women and minorities in the population and at various levels within the institution is one measure of the existence of non-random factors.

This paper is based on data about women. However, it is clear that some of the same casual mechanisms are operating to filter minority persons out of the doctoral pool. These include a social climate which systematically lowers aspirations and expectations, sense of competence and self-esteem—both actively, by discouragement, and passively, by absence of social support and encouragement.

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*Presented at the 44th Annual Meeting, Pacific Sociological Association, Camelback Inn, Scottsdale, Arizona, May 5, 1973.

[1] This policy comes out of: Executive Order 11246 as amended; Title VII of the Civil Rights Act of 1946 as amended; Equal Pay Act of 1963 as amended; Title IX of the Education Amendments Act of 1972.

1. THE DISTRIBUTION OF WOMEN IN THE DOCTORAL POOL

It seems reasonable to assume that a minimal definition of the "pool of qualified persons" eligible for hiring at tenured faculty levels in the University is "those persons with doctorates in the field." Among those who actually entered that minimal pool from 1960 through 1969, 12% were women.[2] These range from 97% of the doctorates earned in Home Economics, to less than 1% in Engineering. In the academic disciplines, English has the highest percentage of women doctorates with 24%. It is followed by Anthropology, with 21%; Psychology, with 20%; Sociology with 17%; the Biology Sciences, with 14%; History, with 12%; Political Science with 9%; Chemistry, Economics, and Mathematics, each with 6%; and Physics, with 2% of the doctorates earned by women.

2. THE DISTRIBUTION OF WOMEN ON UNIVERSITY FACILITIES

This section is based on a secondary analysis of the National Survey of Higher Education, sponsored by the Carnegie Commission on Higher Education. The analysis was restricted to the twenty-five Universities designated "High Quality" in column 30 of the public codebook for the study.

Table I, below, shows the juxtaposition of Availability Pools and Utilization for selected academic disciplines. Availability Pools are here defined as the percentage of women earning the doctorate in the 1960's for each field. Utilization is here defined as the percentage of women among those persons with a doctorate on the faculties of the "High Quality Universities" in the national sample.

Underutilization is largest in the field of English, which has an availability pool of 24% women, and only 6% women among the faculty members with doctorates, giving an underutilization of eighteen percentage points. Not only is the available pool of qualified women being underutilized at High Quality Universities, but also, it is disproportionately distributed at the lower end of the faculty ranks.

TABLE 1.—PERCENT WOMEN IN AVAILABILITY POOLS AND PERCENT WOMEN PH. D.'S ON FACULTIES OF HIGH QUALITY UNIVERSITIES FOR ACADEMIC DISCIPLINES

Discipline	Availability pool		Utilization		Underutilization
	Percent	Number	Percent	Number	
Humanities	18	22,392	8	1,525	[1] 10
Social sciences	15	22,854	8	1,319	[1] 7
Biological sciences	14	17,706	8	957	[1] 6
Physical sciences	5	31,902	3	1,388	[1] 2
Total academic	12	94,856	7	5,189	[1] 5

[1] The percentage difference as a measure of underutilization is statistically significant at the 0.05 level, using a conservative estimate of a 2-tailed test. The number column is the basis of the percentage. Read "18 percent of the 22,392 doctorates in the humanities were women. 8 percent of the doctorates on the faculties of high quality universities were women, giving an underutilization of 10 percentage points."

[2] NS.

Source: Availability pools: Women's Equity Action League, "Proportion of Doctorates Earned by Women, by Area and Field, 1960-69," June 1971. Distributed by the Project on the Status and Education of Women, Association of American Colleges, 1818 R St., NW., Washington, D.C. 20009. Utilization: Secondary Analysis of the National Survey of Higher Education, sponsored by the Carnegie Commission on Higher Education.

Table II, below, shows the percentage of women among faculty with doctorates, by rank and field. For each field, the percentage of women gets larger from Full Professor down to Instructor or Lecturer. There are large and statistically significant differences in the percentage of women among Full Professors and Instructors and Lecturers in all but the Physical Sciences, where the small size of the availability pool places an artificial ceiling on underutilization.

In order to test the possibility that the rank difference was merely an artifact of academic women following their husbands from place to place, number of years at institution was controlled. The rank difference for the entire sample increases from seventeen percentage points to twenty-eight percentage points among those who had spent seven or more years at their current institution.

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[2] Women's Equity Action League, Proportion of Doctorates Earned by Women, by Area and Field, 1960–1969. Distributed by: Project on the Status and Education of Women, Association of American Colleges, 1818 R St., N.W., Washington, DC 20009.

Table III, below, shows the increase in the Rank Difference in percentage of women with increasing number of years at the institution, for all academic and professional fields.

TABLE II.—PERCENT WOMEN AMONG FACULTY MEMBERS WITH DOCTORATES, BY RANK AND FIELD

	Full professor	Associate professor	Assistant professor	Instructors lecturers	Rank difference	Total
Humanities:						
Recent	3	7	12	30	[1] 27	8
Number	588	332	529	76		1,525
Social sciences:						
Percent	2	6	11	27	[1] 25	8
Number	490	298	441	90		1,319
Biological sciences:						
Percent	2	8	13	33	[1] 31	8
Number	393	235	287	42		957
Physical:						
Percent	1	3	5	4	[2] 3	3
Number	587	292	390	119		1,388
Total academic fields:						
Percent	2	6	10	20	[1] 18	7
Number	2,058	1,157	1,647	327		5,189

[1] Statistically significant at the 0.05 level.
[2] NS.

Source: Secondary analysis of Carnegie data.

This section has demonstrated both the underutilization of those who already belong to the pool of qualified persons in a national sample and the differential distribution of women at the lower ranks. The difference in the percentage of women from Full Professor to Instructor-Lecturer grows *larger* with each increase in length of time at the institution. It appears from these data that some non-random factors are operating on women who have already entered the pool of qualified persons. Further research is needed to isolate particular problem areas and situations, so that effective affirmative action might be implemented at the hiring and promotion level. Such a program would free those already employed in teaching and research at Universities to rise as high as their talents, energies, and ambitions might take them, regardless of sex or ethnicity. The next section will discuss some filtering points at which access to the pool of qualified persons is blocked.

3. FILTERS WHICH BLOCK ACCESS TO THE POOL OF QUALIFIED PERSONS

To the extent that certain groups of persons are systematically filtered out of the pipelines to the pool of qualified persons, effective affirmative action requires that the filtering mechanisms be identified and remedied. This section will trace through some of the filtering points which impede free access to the kind of academic achievement which ultimately leads to hiring at tenured faculty levels.

TABLE III.—PERCENT WOMEN AMONG FACULTY WITH DOCTORATES BY RANK AND NUMBER OF YEARS AT INSTITUTION

	Full professor	Associate professor	Assistant professor	Instructors lecturers	Rank difference	Total
Less than, or up to 3 years:						
Percent	2	5	7	16	[1] 14	7
Number	326	423	1,513	291		2,553
4 to 6 years:						
Percent	4	4	13	23	[1] 19	8
Number	296	533	633	71		1,533
7 or more years:						
Percent	2	8	25	30	[1] 28	5
Number	2,391	833	142	76		3,442
Total all fields:						
Percent	2	6	10	19	[1] 17	6
Number	3.013	1,789	2,288	438		7,528

[1] Statistically significant at the 0.05 level.

Source: Secondary analysis of Carnegie data.

In the first place, we know that certain groups of students are less likely to take any more mathematics in high school than is required for admission to the University. These include women and non-Asian minorities. A study of admissions applications of Berkeley Freshmen shows that while 57% of the boys had taken four years of high school math (first year algebra, geometry, second year algebra, Trigonometry, and solid geometry), only 8% of the girls had done so, a difference of forty-nine percentage points in four years of mathematics.[3]

The four year math sequence is required for admission to the first year calculus sequence, Math I A–B–C. This sequence is a prerequisite for the *undergraduate* major in every field at the University of California except the "traditionally female", and hence lower paying, fields of humanities, social sciences, education, and social welfare. Recent data on Berkeley ethnic enrollment suggest the same pattern for non-Asian minority groups.[4]

It appears that high school girls and some minorities are experiencing different kinds of support and encouragement for taking mathematics than boys and Asians. This hypothesis was confirmed in a content analysis of statements made by students in a questionnaire survey about their high school mathematics preparation and performance. It contained questions about performance in elementary school and high school; whether or not respondents had taken mathematics beyond the minimal first year of geometry required in high school; and an open-ended question, "What did you consider to be the most important factors which influenced your interest and aptitude for doing mathematics?" The responses were coded for presence or absence of social support from parents, teachers, or peers with respect to mathematics; whether or not students had taken mathematics beyond the minimal two year requirement for admission to the University of California; what their grades were if they did so.

There was a strong and statistically significant relationship between the presence of social support from parents, teachers, or peers, and the pursuit of advanced mathematics courses in high school.[5] When the relationship between presence of social support and performance, measured by A's or B's compared with C's or D's was analyzed, a strong and statistically significant relation was also found.[6]

An effective affirmative action program for high school students would be one which educates parents, counselors, teachers, and most importantly, the students themselves, on the importance of keeping one's options open as long as possible. The failure of students with the ability to perform to take as much mathematics as they can get while in high school effectively precludes freedom of choice of undergraduate discipline, and filters people into the 'helping' disciplines of education, nursing, social welfare, and the humanities, and social sciences.

In the second place, while women appear to be admitted to graduate departments in the same proportion as they apply, there is a drop from the proportion of women earning the Baccalaureate in a field, to the proportion of women applying to graduate school in that field. At Berkeley, 26% of the Bachelor's of Science (Physical Sciences) are earned by women, but only 11% of the applicants to graduate school in these fields are women.[7] Ambitions and expectations for pursuit of graduate careers are shaped as much by faculty and peer encouragement and support as by individual, idiosyncratic factors. An effective affirmative action program would be one which educates faculty to the need for identifying and encouraging talented students, regardless of sex or ethnicity. It further would work to develop self-esteem and self-confidence among these outsiders to traditional doctoral programs.

In the third place, even when admitted to doctoral programs, women have a history of higher dropout rates than men. A secondary analysis of data on Woodrow Wilson Fellows who entered graduate school from 1958 through 1963 shows a sex difference in dropouts of twenty percentage points, and a field difference of twenty-eight, between the Humanities with 58% dropouts, and the Physical Sciences, with 30% dropouts.[8] The sex difference almost disappears among those who have second year fellowship support. It gets much larger among those who have children. It gets even larger among those rated "Excellent" by their graduate faculty. While 12% of the men in the Physical Sciences who were rated "excellent" dropped out, 50% of the women who were rated "excellent" dropped out, giving a sex difference of thirty-eight percentage points. Among those rated "average to dreadful", only 51% of the men dropped out without a doctorate.

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[3] Lucy W. Sells, Preliminary Report on the Status of Graduate Women: University of California, Berkeley, March 30, 1973. "Pilot Study on High School Mathematics Preparation," pages 44–49.

[4] Lucy W. Sells, "Ethnic Distribution of Berkeley Students, Fall 1972," Mimeographed, April 21, 1973.

[5] $Q = .94$, ($x^2 = 13.87$, $\alpha < .001$, with 1 degree of freedom, $N = 38$).

[6] $Q = 1.00$, ($x^2 = 9.29$, $\alpha < .01$, with 1 degree of freedom, $N = 20$).

[7] Sells, Preliminary Report, p. 5.

[8] Ibid., pages 23–27.

It appears that something other than meritocracy was operating on the graduate careers of Woodrow Wilson Fellows in the early sixties. An effective affirmative action program would be one which identifies those factors which are still operating differently for men and for women, and those which have changed in the past decade. It would result in a table which showed that "Among the 'excellent students, less than 10% dropped out without the doctorate, independently of sex or ethnicity. Among those rated 'average to dreadful' more than 80% dropped out, independently of sex or ethnicity."

While the data presented in this paper are based on sex differences in access to the pool of qualified persons for hiring at tenured faculty levels, the same filtering mechanisms operate to bar access for some minority persons as well. A pilot project at Berkeley suggests some of the processes which impinge on all graduate students, but more intensely on women.[9] It is suspected that these processes impinge even more intensely on minority students, that the further one is removed from the dominant, white male culture of a department, the more intensely these processes operate. They appear to include an increasing sense of isolation from faculty and graduate students, absence of positive feedback, ambiguity of norms governing evaluation of work, ambivalence about success in the academic ratrace, and, unless the student starts to experience some of the rewards and gratifications of academic success, a dropping out from the doctoral program. Research is in progress to try to find ways of overcoming these processes.

4. CONCLUSION

In conclusion, affirmative action is necessary both to utilize the existing pool of qualified persons, *and* to enlarge the pool of those who might become qualified in the future. If women and minorities see only white males on the faculties of their respective departments, it is very difficult to imagine themselves breaking the barrier. This is a fundamental source of ambivalence about earning the doctorate. Why bother if you can't get the kind of job you want?

Genuine affirmative action can only be achieved by creating a social climate in which all persons are evaluated on the basis of their performance, independently of sex or ethnicity. This will involve a long-range educational process aimed at three major targets:

1. Those doing the hiring, to show then that there are women and minority persons already in the pool, and to suggest creative, innovative ways of using them.
2. Those who have contributed to the filtering process in the past, to sensitize them to the nature and extent of their contribution; to help them understand how sex-role and ethnic stereotypes based on the sixties are no longer relevant to the seventies.
3. Those who have the potential to seek access to the pool, by identifying and encouraging talent, commitment, and willingness to work; to help them understand how sex-role and ethnic stereotypes are both internalized in the personality system as need dispositions, and institutionalized in the social system as role expectations, so that such stereotypes can be overcome at both the individual and social system levels.

APPENDIX III

CONSCIOUSNESS RAISING *

Consciousness raising takes place in small, leaderless groups which are structured to maintain a supportive, non-hierachical atmosphere in which we can begin to understand our position as women in society and to apply this understanding to making changes in that society.

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[9] The Graduate Women's Project is co-sponsored by the Women's Center and the Affirmative Action Office at Berkeley. It is being conducted by the author and Nancy Isaac Kuriloff, a doctoral candidate in the Division of Higher Education. It is being supervised by two consultants in group dynamics, Paul Baum and Vivian Gold.

*Thanks to Maxine Raz, Department of Sociology, Berkeley, for providing us with the list of Consciousness Raising Techniques from which this page was derived. LWS

STRUCTURE OF CR GROUPS

1. Go around the circle, allowing each woman to talk uninterrupted on the chosen topic. This procedure prevents confrontations, challenges and debate. It is the essence of CR because it creates a kind of 'Free Space' where women can talk about themselves in a way they never have before. It helps us to listen to each other. It breaks down feelings of competitiveness among us. It enables women who are more reticent to have the same opportunity to talk as more aggressive women. It gives each woman a chance to compose herself and her thoughts.

A. *Always speak personally, subjectively, and specifically* during this part of the meeting, Try not to generalize, theorize, or talk in abstraction; rather, speak directly from your own experience. There is bound to be someone in the group who feels she doesn't fit into a generalization, and she will be alienated. We aren't all the same, and we haven't had the same experiences. We can learn from the differences.

B. *Don't interrupt*, except to ask specific informational questions.

C. *Never challenge anyone else's experience.* This may be the hardest rule to stick to, but it is also the most important. Although other people's experience may seem all wrong to you, it is true for them at the moment. Keep in mind that the other woman speaking may never have had a chance to talk about herself without being interrupted by a father, mother, husband, child, or psychiatrist. Ask yourself why you want to challenge her, and remember that, when it's *your* turn, no one will challenge you.

d. *Confidentiality.* No personal information about any group member should ever be discussed outside the group.

2. Choose a topic from your own ideas, from a list of suggested topics, or from some reading.

3. *Have a rotating facilitator.* Take turns alphabetically or go down the names on your list of members so each woman has a turn. *Don't take volunteers* for this job. We need a rotating facilitator not only to keep the meeting running smoothly (to get it started, remind us of the topic, indicate whose turn it is to talk, etc.) but also so that we can all learn leadership skills. This helps prevent the emergence of informal hierarchies which interfere with the CR process.

4. *Analysis.* After each woman has related her personal experience with the topic, the group should discuss the common elements in all the experiences. What conclusions can you draw about the role of women in society? What social structures enforce these roles? How can we change what we don't like? (The facilitator may want to write down a summary of this analysis for future reference.)

APPENDIX IV

ON INCREASING POLITICAL EFFECTIVENESS*

Political effectiveness means being able to persuade individuals and groups at both higher and lower levels of power and authority that it is in their best interests to help you as an individual or group achieve your goals. This paper tries to accomplish three goals:

1. To suggest some powerful tools for strengthening the political effectiveness of goal oriented organizations.
2. To suggest important issues which need to be raised among those involved in trying to achieve political effectiveness.
3. To suggest an analogy between the personal energy that can be liberated by good therapy, and the social energy that can be liberated by good consciousness raising in groups, and to suggest that this social energy might be used for influencing those up and down the ladder of power and authority, in order to achieve political goals more effectively.

1. TOOLS FOR STRENGTHENING POLITICAL EFFECTIVENESS

An important way for a political organization to become stronger and more effective is to get an accurate profile of its own members. This means gathering information on their background characteristics; their views of what the goals of the organization are, and what they ought to be; their views of what the most effective means to achieve those goals are, and what they ought to be; their views of the resources available within and outside the organization; their views of the sources of conflict in their personal lives coming from their participation in the organization, and how they cope with the stress generated by that conflict; their views of the sources of conflict among the members of the organization itself, and how they cope with the stress generated by that conflict.

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*This paper was written for the First Annual State-Regional Convention of the National Women's Political Caucus of California. September 28–30, 1973.

Such a profile can be a powerful tool for identifying both strengths and weaknesses of a political organization. It can be used as a diagnostic tool for reaching consensus on goals and means, thus freeing social energy within the organization to mobilize resources, and build credibility and legitimacy by producing results in the political arena.

A second important way for a political organization to become stronger is to take stock of the resources available from outside the organization. For example, there are experienced professional organizations which provide for small political campaigns the kinds of services that really sophisticated party organizations provide for large campaigns.

These services are performed by people with many years of experience in developing technical skills and competence in running successful political campaigns. They can help the idealistic, but inexperienced candidate or organization learn to win without having to re-invent the wheel before they discover by failure that it has to be round instead of square.

2. ISSUES TO BE RAISED AND RESOLVED TO INCREASE EFFECTIVENESS

Effective goal achievement at the individual or group level involves at least four parts: being clear on what the goals are; identification of the most effective means to achieve the goals; mobilization of resources (time, energy, money) to carry out the means to achievement; building credibility and legitimacy up and down the levels of power and authority. The following hypotheses are offered for testing against your own political experience:

1. Clarity of goals leads to consensus on means.
2. Consensus on means leads to mobilization of resources.
3. Credibility and legitimacy increase outside resources.
4. Consensus on goals and means, combined with credibility and legitimacy, lead to goal achievement.

I have seen these processes operate in a variety of social groups, moving up and down the levels of power and authority. They occur in student relations with teachers, union relations with management, parent relations with school authorities, and individual and group relations with city councils, state legislatures, and congress.

So long as there is conflict about goals and means, individuals and groups are paralyzed in effective mobilization of resources. This paralysis makes it impossible to build credibility and legitimacy up and down the levels of power and authority. In order to achieve credibility and legitimacy an effective political organization must do the following:

1. Build a strong membership base to carry out the work.
2. Gather information to document arguments in support of goals.
3. Distribute that information up and down the levels of power and authority.
4. Distribute that information to similar organizations at one's own level, to build coalitions of support of goals.

The basic problem of goal oriented groups in the women's movement is the tension between the ideology of equality of all persons, and the reality of inequality based on differences in competence, expertise, and skills. These differences often are related to the amount of experience, which permits growth and development, a person has had. Experience tends to be related to age.

The most effective political organization would be one which gives two things: First, willingness to take the risk of trusting the experience of those who have been successful in developing political effectiveness. Second, willingness to take the risk of trusting those who are trying to develop their own competence, expertise, and skills. It is almost as difficult for inexperienced persons to be open to the successful experience of others as it is for experienced persons to be open to letting the inexperienced risk failure. The most important the issue, the stronger the conflict between the group's need to achieve its goals, and the individual member's need to learn how to be successful by taking risks. If this issue could be resolved, the organization would be stronger, for it would have a larger base of persons who have had the chance to learn effectiveness.

An organization devoted to increasing the political effectiveness of women needs to provide enough structure that people can learn to develop their political skills by carrying out the work of the organization. At the same time, it needs to provide a climate of social support which frees the novice to take the risk of making mistakes, without risking the goals of the group. Clarity of goals makes this possible.

3. LIBERATION OF PERSONAL AND SOCIAL ENERGY AS A POWERFUL RESOURCE

Good therapy releases a tremendous amount of personal energy that used to be drained off in handling conflict within the individual. It is accomplished, very slowly, at first, by the development of trust, good will, and openness of communication between patient and therapist.

Good consciousness raising in groups releases a tremendous amount of social energy that used to be drained off in handling conflict between individuals. It, too, is accomplished, very slowly, at first, by the development of trust, good will, and openness of communication among the members of the small group.

My own experience in trying to influence people up and down the levels of power and authority on the need for Affirmative Action on behalf of students has been: they are willing to listen when I treat them with the same kind of trust, good will, and openness of communication that I've learned from therapy and from the women's movement. If I treat them with mistrust, ill will, and am closed to hearing them, they neither listen, nor hear what I have to say.

By concentrating my energies on areas of consensus at the different levels of power and authority I have been free to accomplish the kind of work which seems to make an impact. Part of my strength in dealing with people at various levels lies in my own confidence in the validity of my data. I don't have to threaten people's sense of good will about themselves by screaming outrage, anger, and ill will. The very fact that 57% of the male applicants for admission to the University of California took trigonometry and solid geometry in high school, compared with 8% of the female applicants, speaks loudly and clearly on the climate of different social expectations imposed on boys and girls.

I use my energy to gather and distribute the data, but leave people free to draw their own conclusions. So far, for me, it is a comfortable way of being politically effective. I hope it works as well for you in your respective efforts to persuade individuals and groups up and down the levels of power and authority that it is in their best interest to help you achieve your goals.

Ms. SELLS. I very much appreciate this opportunity to share my work with the committee.

Mr. O'HARA. Thank you very much. I think your testimony has been very clearly a product of a more thorough analysis than I think this problem received by any of our witnesses.

I noticed your constant attendance, as I said, last week and I am aware, of course, of your having read the transcript of all of the other hearings. So you, of course, have come into this hearing today with a better preparation of what the differing points of view are than the members of the committee themselves do, so it is hard for me to quarrel with you about what was said in the past.

You pointed out that there are a number of safeguards to prevent administrators from imposing what has become known as reverse-discrimination as an easy way out and you list various steps through which a faculty hire must be approached. But, you don't think that that same number of steps is any proof against discrimination, right?

In other words, you feel that those seven steps don't prevent discrimination against women and minorities but that they do prevent discrimination in favor of them?

Ms. SELLS. I think that academic men are reasonable people who are capable of being persuaded by the facts. I think that once I get a chance to get my data in their hands that they will evaluate people on the basis of merit rather than the fact that we have this other situation.

Mr. O'Hara. My point is if they can be trusted to do it on the basis of merit, then what do we need an enforcement procedure for with respect to that, any enforcement procedure at all?

Ms. Sells. That is why I am proposing an educational process rather than an enforcement procedure, yes.

Mr. O'Hara. In other words, you feel that the steps listed by you as being a protection against reverse discrimination can also be our protection against positive old-fashioned discrimination—if there is a proper program?

Ms. Sells. That is how educable faculty are, particularly when I start with the math fact, which is not their fault.

Mr. O'Hara. Did you read President Fleming's testimony?

Ms. Sells. Yes, I did.

Mr. O'Hara. I don't think it was in his testimony to us; I can't remember where it was.

Ms. Sells. I would like to see that feature.

Mr. O'Hara. But there was something like out of 328 faculty new hires their goal had been projected at 311 who would be women and minorities or something like that and that clearly suggested they were going to engage in some real recruiting in order to reach it and one wondered how they possibly were going to do it without discriminating.

So, I would think that whatever we do, and I like the way you approached this problem, it is a positive approach, but whatever we do also has to provide adequate protection for the members of the majority groups so that they are not going to be quota'd out of jobs or out of promotions.

Ms. Sells. I hope we can reach Mr. Dellenback's ideal state of no discrimination whatsoever.

Mr. O'Hara. Right.

Well, I would like ~~to see~~ that.

I appreciate very much your taking the time to thoroughly research your testimony and to present us with some thoughts and I would appreciate it if you would permit us to be in touch with you as we move forward in this area.

Ms. Sells. Yes.

Mr. O'Hara. Thank you.

The subcommittee will now stand in adjournment until Wednesday morning at 9:30 a.m. at a location to be announced.

[Whereupon, at 12:30 p.m. the subcommittee recessed, to reconvene at 9:30 a.m., Wednesday, September 25, 1974.]

CIVIL RIGHTS OBLIGATIONS OF INSTITUTIONS OF POSTSECONDARY EDUCATION

WEDNESDAY, SEPTEMBER 25, 1974

House of Representatives,
Special Subcommittee on Education
of the Committee on Education and Labor,
Washington, DC.

The subcommittee met at 9:40 a.m., pursuant to recess, in room 2175, Rayburn House Office Building, Hon. James G. O'Hara (chairman of the subcommittee) presiding.

Present: Representatives O'Hara, Dellenback.

Staff members present: Jim Harrison, staff director; Webb Buell, counsel; Elnora Teets, clerk; Yvonne Franklin, minority counsel; Richard H. Mosse, assistant minority counsel.

Mr. O'Hara. The subcommittee will come to order. Today we will continue our hearings into the obligations of institutions of postsecondary education that they be considered eligible institutions for the purposes of the Higher Education Act and in particular title IV.

We have been examining civil rights obligations of institutions of postsecondary education both with respect to employment and admissions.

Our first witness this morning is the newly elected president of the American Federation of Teachers, Mr. Albert Shanker who will be introduced by our old friend Carl Megel, director of legislation for the federation.

TESTIMONY OF ALBERT SHANKER, PRESIDENT, AMERICAN FEDERATION OF TEACHERS, ACCOMPANIED BY CARL J. MEGEL, DIRECTOR OF LEGISLATION, AMERICAN FEDERATION OF TEACHERS, AFL-CIO

Mr. Megel. Thank you, Mr. Chairman, members of the committee. It is a great privilege and honor for me this morning to be able to present our distinguished and newly elected president of the American Federation of Teachers, Mr. Albert Shanker.

Mr. Shanker will make the presentation this morning on behalf of the American Federation of Teachers.

Mr. O'Hara. Thank you, Mr. Megel.

Welcome, Mr. Shanker.

Mr. Shanker. Mr. Chairman, members of the committee: I am Albert Shanker, president of the American Federation of Teachers, AFL-CIO, a union of 440,000 teachers and other educational workers.

We represent over 40,000 persons employed in the field of higher education.

I am pleased to make my first appearance representing the AFT before this committee on the subject of employment policies in institutions of higher education. The health of our institutions providing post-secondary education is very important to the AFT, and I hope to be here on other occasions to discuss other problems in higher education with you.

These hearings are a hopeful sign. We hope it is the intention of this committee to provide some guidance to the Government officials currently enforcing guidelines in relation to racial, ethnic and gender representation on university staffs. In the past, we used to ask whether or not an institution was practicing discrimination. It is a sign of progress that today the question is what are we doing that will help offset the effects of discrimination.

The AFT has always been a vigorous advocate of any program which would abolish discriminatory employment practices. Our collective bargaining agreements, now covering faculties at more than 140 higher education institutions. reflect that advocacy. The AFT concern for equal employment opportunities for all is also reflected in its support and endorsement of meaningful and effective affirmative action policies.

Unfortunately, there is presently some confusion as to what constitutes an effective affirmative action program. Some have argued that affirmative action must mean a system of quotas and/or preferential hiring practices. We, in the AFT reject that concept on the grounds that such programs are neither meaningful nor effective. In fact such a narrow definition not only subverts the very objectives which affirmative action intends to reach, but dooms such goals to inevitable failure.

For an affirmative action program to meet AFT requirements that it be both meaningful and effective, it must not deal only with the numbers of new minority hirings and promotions, nor merely the question of salary inequities. It must consider the root problem of increasing the available pool of qualified job aspirants. To do less, that is to equate affirmative action with quotas, is to flirt with forms of discrimination no less repugnant than Jim Crow laws were.

The result of this practice for many highly qualified individuals seeking teaching positions will be the understanding that their academic qualifications are really secondary to their purely biological classifications and that when they draw up their résumés, ability and scholastic achievement should be placed after their status as a preferred group under this year's affirmative action goals. Programs that foster this sort of frustration have serious consequences. It is not an overstatement to say that policies that restrict employment opportunities and in the process affect an individual's opportunity to make a living and support his or her family will lead to the most basic sort of conflict and could result in a reaction that will set us all back many years.

Our view as to what an affirmative action program should contain starts with open admission, free tuition, interest-free loans and grant money which will not only open the doors of educational opportunity to minorities, but encourage their pursuit of professional careers. Any significant increase in minority hirings on college staffs must begin by significantly increasing the pool of available personnel. In 1970, approximately 10.6 percent of all undergraduate admissions were black, American Indian, Spanish surnamed, and Oriental American. These groups constituted 16.8 percent of the U.S. population as a whole. (While this figure represented a tripling of these groups' participation from 1960, still more should be done.) Of bachelor degrees awarded in 1970, 5.2 percent were awarded to blacks, 1.2 percent were awarded to those of Spanish surname, and 1 percent to orientals.

With this pool to draw upon, the number of minority group members entering advanced study is roughly comparable to the percentages receiving bachelor degrees. According to a survey taken by the American Council on Education of 156 Ph. D.-granting information, 1.2 percent of all students enrolled in Ph. D. programs were from minority groups. These minority group students were concentrated in education, sociology, and the health professions. Fields with an unusually low percentage of minority group students were engineering, physics, biochemistry and other like sciences.

What these enrollment figures show is that in selecting faculty, one is not drawing candidates from the population at large, but from a significantly smaller pool of qualified candidates. The only way to increase minority employment opportunity in higher education is to increase the number of qualified applicants and at the same time increase the available positions.

If more minority students are to be accepted into graduate school, many who come from underprivileged backgrounds will certainly require academic and financial compensatory help at both the undergraduate and graduate level to allow them to compete with students who enter college better prepared for academic pursuits. This would be a useful method of achieving the two goals most crucial to increased minority participation. It is folly to believe that significant numbers of minority job applicants will be hired while colleges and universities are cutting back on teaching positions. Furnishing this extra help under an open admissions program would require the hiring of additional personnel to provide the compensatory assistance to make the open admission program work. We would have an increase in both minority hirings and completion of degree programs.

We advocate the provision of this help—academic, financial, and in other ways—to allow minority students to compete successfully. Open admission does not mean that everyone who enrolls will automatically do well. What is important and must be guaranteed is that everyone admitted has the opportunity and is encouraged to do well. It is a strongly held American belief that this is the land of opportunity where each citizen has the right to succeed in his or her own abilities. The kind of program that we advocate would enhance opportunity without the lowering of standards for we believe that standards must be maintained or the degrees awarded will become meaningless.

There are things that can be done and have proven successful. While this hearing applies only to higher education, I would like to take the time to talk about a couple of affirmative action programs that work without the imposition of quotas and goals and timetables. The United Federation of Teachers, Local 2 of the American Federation of Teachers, represents almost 10,000 paraprofessional employees of the New York City School Board. Paraprofessionals are largely black and Puerto Rican women for the most part, former welfare recipients, who work in the classroom, assisting teachers. Most did not have high school diplomas when they started, and almost none had bachelors degrees. Through the provisions of their collective-bargaining agreement, there are approximately 6,000 paras currently upgrading their formal education. Thousands of them have now received bachelors degrees under the program. Many of these are now teaching in the New York City schools, and many more are awaiting employment because of the very tight job market. All this was done without displacement and the lowering of standards. These union members who had in the past been denied the chance to pursue a higher education made the most of this opportunity provided by the union contract.

There is a similar story to be found in noneducational employment fields. The recruitment and training program, which is a plan to increase minority job holders in the construction trades, has had great success in securing apprenticeships in the construction skills and in providing minority recruits with the knowledge to successfully complete their training. There are more than 10,000 people currently working in the building trades who were recruited through the RTP. Contrast this with the so-called Philadelphia plan which concerned itself only with the numbers on any particular jobsite and led to the formation of motorcycle squads of minority construction workers shuttling from jobsite to jobsite in order to show the Labor Department inspectors that each federally funded project provided minority job opportunities. To our knowledge, the Philadelphia plan produced almost no new hirings, and certainly provided no avenue for unskilled workers to secure the skills needed to hold a construction industry job. It only resulted in the shifting of minorities from one job to the other.

The premise behind both the paraprofessional and recruitment and training program is the same: Any program that wants to make a dent in the low participation figures and to promote minority hirings must begin by providing qualified personnel. Affirmative action can be useful in other ways, for example, in evaluating institutions, to see that they make it their policy to expand the hiring pool to include all qualified individuals. Programs for the evaluation of promotion and pay policies to assure nondiscrimination would be useful for achieving the objectives of equal employment opportunities. Further, compilation of available personnel seeking employment and positions that are open would aid in minority hiring.

If all of these things are done, the degree of minority participation in higher education will increase; and it will increase without resorting to numbers, timetables, and other polarizing, and discriminatory factors. Quotas or numerical goals and timetables are based upon the assumption that when all artificial barriers that impeded minorities are removed, minority groups still need preferential treatment to achieve their employment goals. This is not only a false assumption, but it indicates a patronizing attitude toward the abilities of our minority citizens.

One final observation that occurs to me from a life spent as both an educator and trade unionist. In the long run, no group can succeed at the expense of another group, and those programs that intensify the conflict that comes from a shrinking job market and increased aspirations for those jobs, under the guise of improving minority hiring do none of us a service. In our society, either we all succeed together or we all bear the consequences of failure. In the current situation, only an expanding job market with affirmative action programs can begin to solve the problems. Our current employment situation is grim. The observation was made at the HEW summit last week by Virginia Trotter that education is not a growth industry. This is a national tragedy. Our efforts should be aimed at correcting this situation. If this employment situation remains stagnant, the hopes for a real inclusion of previously unrepresented groups in higher education teaching positions may be illusory, because job openings simply do not exist in sufficient numbers to meet expectations. There is great danger in the frustration produced by too many applicants for too few jobs. Higher education as a national priority in a democratic society should be made available to more students for many important reasons unrelated to the numbers on any particular university staff.

In conclusion, the goal in any hiring program must be equal opportunity for all our citizens. Equal opportunity does not guarantee that university or any other teaching staffs will reflect numerically the population as a whole. It does provide assurances that individual ability, scholastic achievement, and individual merit are the best methods for success in higher education or any other vocation. Equal opportunity is the goal; practices and programs that frustrate this goal are not useful in a democratic society. Undemocratic and discriminatory methods for whatever purpose are not viable solutions to any problem that we have.

I think there are two models. One of them unfortunately is a model which is developing in many of our institutions.

There is a model which seemingly affords equal educational opportunity. It is a model which opens the doors of the university to minority groups students.

It then changes the standards for those students, offering them no help, offering them no tutoring, offering them nothing to overcome the obstacles of discrimination and perhaps inferior education at the elementary and secondary levels.

Degrees are then awarded on the basis of those lowered standards thereby supposedly creating job opportunities by establishing a certain number of positions at the university reserved for the minority groups.

Ultimately such action will result in our total society looking upon minority group members who are doctors, lawyers, engineers, professors, as people who made it with pieces of paper labeled diplomas that do not have the same value as others in our society have. We are not doing them a favor.

We are not doing our society a favor when we set up essentially a phony second-class system which has a different quality, a different content and a different meaning than that which we generally require.

I would contrast that with a true affirmative action program where we seek out minority applicants. When we get these applicants into college we do everything in college to make sure they are given special help so that they can compete within the same framework and standards as everyone else competes in, maintain the same standards on the part of the academic institution, fail those who do not make it, to give all the help possible and then provide for those who do make it, an expanding job market so there will be positions for them.

One of the major focuses of the American Federation of Teachers in this period will be to provide some expanding opportunity throughout our educational system to provide for universal early child education.

This is to provide many professional opportunities for minority groups and others coming out of our colleges. Also to develop a program of life-long education so that people who, maybe, made a mistake and perhaps dropped out of high school or who left college early and who have been in a tough, perhaps unrewarding job, and who now realize the mistake they made, when they were younger, can return to continue their education at a later time.

It would open additional opportunities for employment within universities and the jobs vacated by workers returning to school to further their education would ease the massive unemployment situation that our country has right now, by taking someone off welfare or unemployment and putting him into the job, temporarily left by the person who went back to school.

So we have essentially two models. One of them perpetuates the discrimination that our society has always had except that instead of denying higher education to a minority group applicant it gives a meaningless degree and then says that our society has not provided equal treatment.

A degree thus attained is not the same degree unless it involves the same skills and the same effort. Just handing out a mere piece of paper is papering over the real problem. That is precisely what should not be done.

Thank you.

Mr. O'HARA. Mr. Shanker, thank you very much. I can see you and I are going to get along very well.

I am looking forward to your appearances before this committee.

I think you have stated a sound proposition. That indeed echoes some of the things I have been saying. We have talked for instance about the law schools and their admission practices.

I hope that we in the committee can at the appropriate time soon come up with a way to expand opportunities for those who aspire to careers in the law.

Right now we are talking about a situation where only a small percentage of those who apply for admission into law school or to medical school are actually admitted which seems to me to be the great shame of the entire situation.

So we are talking about rationing scarce resources. The question is, on what basis do you ration them? You ration them on a nondiscriminatory basis by picking the best qualified applicants or if you want to make a pool of qualified applicants and then draw at random from them, that would be all right with me.

Mr. SHANKER. That would be fine, yes.

Mr. O'Hara. I don't want any picking out by saying "we are going to take five Chicanos and 16 Afro-Americans and we are going to take three Japanese-Americans and two Chinese-Americans," you know? I don't think that is the way we want to put our society together. I don't think the Constitution permits it.

One of the things that kind of disturbed me in terms of affirmative action programs, admissions, and so forth. I would like to see affirmative action programs that make certain that we open the door to all groups, that we are absolutely certain that all groups are aware of opportunities, that perhaps were not formerly available.

But I don't think that affirmative action programs aim particularly at one racial or ethnic minority. In other words, I sometimes use the expression of two youngsters who are children of migrant farm workers and who suffered from grinding poverty, suffered from interrupted education.

I can't see any reason to help one more than the other based upon the color of their skins. I think the two have comparable problems and ought to be helped.

Would you comment on that?

Mr. Shanker. I would agree with that but every effort must be made to ameliorate the effects of racial bias. The beneficiary of programs aimed at blacks and Puerto Ricans have often been poor whites. At the University of New York the greatest beneficiaries to date have been Italians, Poles, and Irish. The population in New York City which has not taken advantage of higher education to date are the blacks and Puerto Rican groups. They have not yet taken advantage of the open admission program to the extent that it was felt that they would.

But this has reached people who were previously unaware or weren't in the 85-percent bracket in high school. They were in the 82-percent level or the 81-percent or 80-percent level.

I would agree that I would find it repugnant to deal with this in terms of race. I have reminded people on a number of occasions that when you do it on that basis you may very well be favoring a youngster who came from a fairly well-to-do black family and deny the right to some poor white who had really struggled to that particular position.

When you try to move from the implication of group rights to a question of two individuals who are competing, it just doesn't follow that the sufferings of a group have been suffered by all members of the group.

I would target the affirmative action at all those who have been either economically or whose historic patterns have been such that ethnic groups decided not to seek education but to go into some other field or it could be to make up for previous racial or religious discrimination.

But I think all those patterns ought to be targeted.

Mr. O'Hara. I couldn't agree more. It is a point that I have been trying to make in these hearings. I am glad that you make the point of the great importance of open admissions and other programs to assist all of those who have missed the opportunity for one reason or another in the past, failed to graduate from high school, dropped out at some stage, who want and need an opportunity.

To me the idea of saying that the high school diploma and certain grade point averages in high school ought to be necessary to obtain the advantages of postsecondary education is crazy. That denies more people an opportunity than any form of discrimination or indeed even financial circumstances.

I think when you look at the disparity between the number of college-aged persons who are attending postsecondary educational institutions from the lowest income group and the highest income group you find a very large disparity.

Fully half of that disparity can be accounted for at least in part by the lack of a high school diploma.

Mr. SHANKER. Yes.

Mr. O'HARA. I think we have to open up those doors. I know a lot has been done in that regard in recent years. But I think a great deal more needs to be done to bring in the student who didn't succeed at some earlier stage and now can be helped to succeed.

Mr. SHANKER. This Nation conducted a great experiment in that regard some years ago. It was not conducted for the purposes that we would want it conducted now.

But under the GI bill of rights, which I suppose had as its two major reasons: First, a reward for their service to our Nation and second, perhaps even more important, a fear of a massive recession or depression if all those veterans were thrown back into the economy and at the same time. Here were millions of men who had dropped out of school or college at some point and had gone to work. Now they learned what the world out there was like and they were the most mature generation of college students this Nation had ever seen.

I had the privilege of being in college with them. I just happened to have missed being a veteran. I was a junior among all of these veterans. There was an atmosphere on campus which is quite different from what one gets from a high school person who has never had the feeling of working for a living and doesn't know how important it is to stay in school to succeed.

Also, I think it is extremely important that we take the position that it is cruel for us to assign to that person who makes a mistake once in life and has learned from that mistake, that he is doomed forever. We do not have such behavior in our criminal justice system anymore.

To say that a person who hasn't committed a crime but who has made a mistake isn't given a second chance is really an outrage.

In this regard my experience has been very heartwarming. In 1966 and 1967 at least 10,000 paraprofessionals were hired in the New York City public schools. Very few of them had high school diplomas.

These paraprofessionals were given jobs in the classroom. They were told that they could only keep the job if they continued to try to get their high school diploma. They all did get their high school diploma. By June 1974, 2,000 of them are college graduates.

Instead of having 10,000 welfare mothers there are now 10,000 employees in the public school system, 2,000 of whom are about to become college graduates.

By the way, we could have said that these paraprofessionals should automatically receive a certain number of college credits for their experience in the classroom. We could have tried to give them a favored short-cut route into the position of teaching. We refused to do that.

We said to these paraprofessionals:

> We can get you a cheap college degree which may or may not 10 or 15 years from now get you a job in the school system. As long as this superintendent is here and this board of education is here. But we did move. We said we are going to give you the money and the opportunity and the help to go to college. When you graduate you will have something that is of value to our society.

They accepted it. It can work.

Mr. O'HARA. I think that is a very good example.

Mr. Dellenback, I see, is busy executing an important document in the midst of all this.

Mr. Dellenback?

Mr. DELLENBACK. Thank you, Mr. Chairman.

I wish to indicate to Mr. Shanker that it is a tribute to him and the subsequent witnesses that I am executing a proxy so that I can be here to listen to what you have to say.

It was very helpful. Thank you very much for what you have done. Your emphasis on increasing the available pool of qualified job aspirants is really an emphasis that we haven't had from any of the witnesses who have been before us prior to this time. It is very helpful, and what you say makes very good sense.

We can talk all we want about being sure that everybody who is potentially able to get a particular job—whatever their race or sex classification—there is nobody in the pool, or it is a proportionately small number of people in the pool, you are not getting the position filled in any substantial number.

I agree with you that there are difficulties which are present in attitudes at the present time.

The point still remains that this is a fundamental part of what we can do to help. I think you put it well. For the sake of emphasis, that is what you say in a few lines on page 6 of your testimony. I agree that an important part of affirmative action should be action to expand the hiring pool to include all qualified applicants.

Everyone who is qualified should be considered for whatever jobs are available. Implicit therein is a vast revolution in what many institutions have actually followed as a policy.

Am I correct?

Mr. SHANKER. That is correct. It is intended in exactly that way.

Mr. DELLENBACK. That is the way I read it. I think for the sake of the record, I want to be sure that you are saying affirmatively, there are institutions that aren't doing that. There may be a pool out there somewhere, and they don't solicit.

You also go on and talk in terms of evaluation programs for promotion and pay policies to assure nondiscrimination. That is another very important part of what needs to be done.

If qualified personnel are hired, you still haven't solved the problem if once in that situation there is discrimination in promotion and/or pay on the grounds of race, sex, or any other qualification you can dream of.

So again I read into those words, if I understand what you are saying correctly, a strong program of affirmative action which assures that within the employment pool there is equal opportunity in that area.

Mr. Shanker. That is right. I want to stress another point. I think the problems with respect to women are different from the problems with respect to blacks, Chicanos, and Puerto Ricans I think that the available pool is much greater.

For example consider the New York City School System. There has been a lot of agitation, stating that 60 percent of the children in schools are from minority groups and therefore 60 percent of the teachers should be from minorities. But we do not select our teachers from a pool of children.

The pool of minority group people in New York City is considerably below 60 percent. Furthermore we aren't even selecting from the adult pool. We are selecting from the college graduates, which is still smaller.

So when you start analyzing the kinds of demands that are made it doesn't make very much sense.

But on the other hand I think that women have a much better case of discrimination. They are very well represented in the teaching force but a much smaller percentage are assistant principals, principals. At the district superintendent level it is still smaller.

There is no evidence that they are poorer teachers, poorer administrators. Here I think is a case where more immediate steps can be taken. There are people on the job who are there and who are suffering immediate discrimination at the present time.

Mr. Dellenback. That is helpful. A second question deals with the compilation of available data of all personnel seeking employment in positions that are open.

If the institution is ready to circularize to everyone they know about—not just a narrow group—and there is no really broad-based data as to who is available, they are going to be limited in getting out full information as to available jobs.

Again, do I read you correctly that this is part of what you are pushing?

Mr. Shanker. It certainly is. Many unions try to get into their contracts, a posting of everything available as a fairness mechanism so that everyone who feels that he or she is qualified will at least be able to compete for the job.

Mr. Dellenback. In talking about the goal of equal opportunity, those are dangerous and ambiguous words. What your testimony has given us is a good "fleshing out" of aspects of this.

I am grateful for your being with us this morning.

Thanks for your very helpful testimony.

Mr. Chairman, thank you very much.

Mr. O'Hara. Thank you very much, Mr. Dellenback.

I understand, Mr. Shanker, that you have another meeting. It is a miracle. But you are going to get there on time.

Mr. Shanker. Thank you very much.

Mr. O'Hara. You are probably the only man who has ever appeared before a congressional meeting and got to his other meeting on time.

Mr. Megel. We want to thank the chairman for giving us the opportunity to participate and to the members of the committee. We are grateful. Thank you very much.

Mr. O'Hara. Thank you, Mr. Megel.

We look forward to hearing from you further.

Mr. DELLENBACK. Mr. Chairman, may I ask unanimous consent that a statement which is going to be coming from Reed College of Oregon when it is received in connection with affirmative action be made part of the record?

Mr. O'HARA. Without exception it is so ordered.

[Information referred to follows:]

REED COLLEGE,
Portland, Oreg., October 11, 1974.

MS. MARLAINA KINER,
Director, Office for Civil Rights, Region X, Department of Health, Education, and Welfare, Arcade Plaza Building, Seattle, Wash.

DEAR MS. KINER: In accord with your letters of August 16 and September 25, 1974 and my initial response of September 6, 1974, I am forwarding my comments on the Report of Findings, Reed College.

Before commenting on the specific provisions of the Report I would like to reaffirm my strong personal belief in the desirability of eliminating all traces of discrimination from higher education. I have no doubt that one of the reasons I was offered the Presidency of the College, and certainly one of the reasons I accepted, was that my deeply held convictions in this area found a congenial home in Reed's long tradition of equality and openness. That tradition, and my own views, antedated the development of federally sponsored affirmative action programs. It is not surprising, therefore, that my staff shares with me sympathy for the objectives of affirmative action—the widening of recruitment to include all qualified applicants, the elimination of sexism, racism, or any other kind of discrimination from all aspects of college life.

Having said this, I would like you to know that we were hampered in responding to the Office of Civil Rights (OCR) Report on Reed because we found significant portions of the orders and regulations issued or administered by the OCR, particularly Executive Order 11246, inapplicable to Reed College. While I will respond in greater detail below, I can say at the outset the regulations as they are currently interpreted appear to us deficient in four major areas:

(1) They apply to Reed without any reservation, the industrial, or large scale model of personnel management. As a result the College is asked to do many things (for example, assemble data and keep records on literally thousands of applicants for the few sought after faculty openings) for which we lack the organization and resources.

(2) There appears to be little recognition on the part of OCR of the financial constraints under which the College operates. Thus we would be required to embark on a costly program of "validating" the entire recruitment process.

(3) In many respects the Report assumes a uniform system of governance and practices for all College employees. As you know, this is not the case. Faculty and staff have distinct career systems with separated procedures for recruitment, promotion and, in the case of faculty, tenure. Thus, the requirement that the College prepare job descriptions for faculty as well as nonacademic staff is completely unworkable for faculty where rank is not dependent on particular responsibilities of the position, but is related to qualities of mind, and teaching and research skills.

(4) The critique of the College's utilization analysis and goals is based on flimsy data (for instance, the study on which OCR derives higher women and minority faculty hiring targets for Reed includes many academic disciplines not represented here), ignores the small number of openings projected at Reed, and lacks basic probability analysis to measure the likelihood of Reed meeting targets under the best of circumstances.

A further area of concern to us is the change over time in what OCR requires in the Reed Affirmative Action Plan. You will recall that our initial Plan was submitted to your office March 12, 1973. The response, in a letter from Larry Omo, Acting Chief, Higher Education Branch, on June 1, 1973, noted deficiencies in the following sections:

Required Utilization Analysis
Goals and Timetables
Dissemination of Policy
Responsibility for Implementation
Identification of Problem Areas

Development and Execution of Programs
Internal Audit and Reporting System
Maternity Leave and Nondiscriminatory Nepotism Policy

Our revised plan which addressed these specific problem areas was submitted on September 27, 1973. We were informed by your office in a letter from Tricia Watson, Equal Opportunity Specialist, on November 13, 1973, "The Higher Education Branch staff has completed its analysis of Reed College's revised Affirmative Action plan. Some remaining weaknesses were identified and will be briefly discussed below." The only two deficiencies in the Reed College Plan according to her letter were in the: "Required Utilization Analysis" and "Identification of Problem Areas."

Since these were described as the "remaining weaknesses" we assumed OCR had eliminated the other six problem areas, noted in Mr. Omo's June 1 letter, on the grounds the College actions had effectively corrected any alleged deficiency.

Working on this basis following the November 13 instruction, we addressed ourselves to the two remaining problems. These were revised and submitted as part of our Affirmative Action Plan to the Review Team during their visit February 25-27. You will understand our bewilderment, I am sure, when we received our next communication from the OCR. The Report of Findings, Reed College, dated August 16, 1974. The Report is divided into three sections: the first, an evaluation of our Affirmative Action Program; the second, deficiencies resulting from the February on-site review; and third, findings related to student services. The first part of the Report—that dealing with an evaluation of our Affirmative Action Plan—no longer was limited to the two "remaining weaknesses" described in Ms. Watson's letter of November 13, 1973. Instead we were told our Plan was deficient in eight areas most of which were included in Mr. Omo's letter of June 1973. A new finding—possible discrimination in salary based on sex—was part of the list. This finding had not appeared on any previous communication from OCR. As we look back on our experience over the last year or so we find the changing OCR evaluation of our Plan perplexing and confusing. Any explanation you can provide on what appear to be substantial shifts in judgment by your office would be appreciated.

On a number of occasions in the comments that follow I refer to the small size of the Reed staff—even relative to schools with roughly the same number of students. During the visit of the Review Team I turned over comparative data we had assembled on Reed's endowment, current operating budget, financial aid, voluntary giving and faculty salary scale. With regard to faculty salaries, the most recent data available, a Colorado College survey of eleven colleges, shows Reed ranks either tenth or eleventh on the median scale of Associate, Assistant and full Professor. (Please see Attachment A.) I believe the information made available to the review team provides strong support for assertions—made later in this document—that Reed lacks the staff and resources to carry out many of the data gathering and record keeping requirements suggested by the OCR. As is apparent from these documents, Reed's endowment is a tenth of the nearest comparable institution. One consequence is that our operating budget (and expenditures for administration) is extremely low. A statistical profile of colleges and universities in the September 15, 1974 issue of Forbes magazine shows Reed with the lowest operating budget of twenty four-year colleges surveyed (Attachment B). Swarthmore, with roughly the same number of students, has an operating budget twice that of Reed's. It follows that we do not have many of the offices and services commonly found in such institutions. There is no Office of Institutional Research at Reed to which one normally would turn for much of the data requested by the OCR. We also do not have a personnel or employment office to establish job descriptions or assemble and analyze data on job applicants.

Budget restraints are only part of the reason Reed's administrative structure is lean. Traditionally the Reed faculty have taken on a substantial portion of the administrative load, the evidence of which is a list of 1974–75 committee assignments (Attachment C). The burden of much of the data gathering and analysis required by OCR would fall on the faculty—assignments which could be discharged only at the expense of the central academic mission of the College.

One last point before moving to the Report itself. We noted in the paragraph on Student Services in your letter of August 16 the instruction that "The College will not be required to modify any of its existing programs in areas where policy has not yet been established." We have chosen, nevertheless, to respond to the findings in the Report in the field of student services, recognizing, as you advise, federal policy is still uncertain.

My comments refer to the findings in the order in which they appear in the Report.

REQUIRED UTILIZATION ANALYSIS

The Report first refers (page 1) to Section 60-2.11 of Revised Order #4 regarding inadequacies in the College's utilization analysis for staff. Specifically, we are required to provide information on:

(a) the availability of promotable and transferable women and minorities within the contractor's work force;

(b) the existence of training institutions capable of training persons in the requisite skills;

(c) the degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to women and minorities.

We are at somewhat of a loss in determining exactly what is meant by the need to identify "promotable and transferable women and minorities." In practice, the women and minorities on our staff from food service and janitorial employees through technical and professional staff—represent a wide range of abilities, experience and interest. In this sense, all of our employees are promotable or transferable should a suitable opening occur. When there is a vacancy, the College, in common with many employers, carefully reviews its entire staff, including all women and minorities, before seeking applicants outside of the College. (At the same time, we publicize the opening to the widest possible audience.) This has always been College policy and it is particularly important now in a period of retrenchment when the opportunity for advancement to greater responsibility (and income) plays an important role in employee morale and productivity.

In connection with "training institutions capable of training persons in the requisite skills" (page 2) again we are perplexed as to exactly what is wanted from us. Obviously many of our employees have skills which can be learned in universities, trade or professional schools. Does the OCR wish us to provide an inventory of such institutions? If so, it is beyond the capability of our limited staff. Similarly, we are asked to provide on the job-training in an effort to make "all job classes available to women and minorities." There are no resources or staff here to establish formal training programs, if that is what is suggested by Executive Order 11246.

The Report states (page 2) that the Reed utilization analysis for staff "does not identify underutilization by particular job classification." It would be appropriate here to describe how all the activities falling under what is normally called "personnel management" are handled at Reed College. First, as I noted above, there is no personnel office, per se, with responsibility for hiring, firing, maintaining records on each employee, etc. To a large extent, decisions are decentralized; department heads are responsible for their employees, subject, of course, to the overall College policies (such as Affirmative Action and Equal Employment Opportunity) and budget controls. Reed does not have a system whereby each nonfaculty position is ranked, with formal job description. As a matter of fact, progression up the academic ladder reflects qualities of mind and teaching skills which cannot be identified in a job description. We firmly believe large scale, industrial model personnel systems are inappropriate for the small staff and informal working relationships at the College. More importantly, we lack the capability—given present and expected restrictions on size of staff—to both establish personnel procedures of this type and monitor and administer them. Furthermore, because of the small size of the College, work for a large percentage of the staff is less specialized and defined; people are expected to apply their general capabilities to a much larger variety of tasks which it is not in the interests of the College to closely specify or categorize. This is true over a large range of employees, who partially prefer to work more as generalists than would be true in commercial, industrial or large-scale university work forces.

The devised E. O. (Section 60-2.11) notes the College's utilization analysis is required to include:

"An analysis of all major job groups at the facility, with explanations if minorities or women are currently being underutilized in any one or more job groups (job "groups" herein meaning one or a group of jobs having similar content, wage rates and opportunities)."

We submit that our utilization analysis breakdown of non-faculty employees into professional, technical, clerical, maintenance, janitorial and food service is responsive to the E. O. definition of job group.

The Report continues (p. 2) that Reed's utilization analysis distorts "the true underutilization of women and minorities." We believe an analysis of the Reed submission does not justify this conclusion. For example, it can be seen that in the "Professional" job group (which includes the senior college administrators), of the 33 employees 15 are women. We fail to see how this presents a distorted picture of the utilization of women and minorities.

The faculty utilization analysis, according to the Report (page 2) "provides no summary statistical data to show the utilization of women and minorities by job classification (rank) for the entire institution." As a matter of fact, our submission identified women, minorities and total faculty by Lecturer, Assistant Professor, Associate Professor, and Professor from 1973 through 1977.

We are also advised (page 2 of the Report) that the "faculty utilization analysis provides no comparison of the availability of women with requisite skills (i.e., Ph.D. in specific discipline) with their utilization in the corresponding organizational unit (department)." This is what we have attempted to do in Table A of the faculty Utilization Analysis. That is, of the eleven departments where vacancies are expected to occur, we indicate seven women faculty members for the 1973–74 academic year. In your letter of September 25 you asked for a breakdown of available women Ph.D.'s in departments where vacancies are not expected to occur. We will be happy to provide this information as soon as we receive the *National Research Study on Doctorate Recipients from U.S. Universities, May 1973*, which is more current than the documents on which our figures were based.

In this connection the Report states (page 3):

"Although an agreement has been reached between Reed College and the Office for Civil Rights which allows the College to set academic goals and timetables by the faculty as a whole, it is nonetheless necessary to identify the individual departments where there is underutilization of women and, in seeking to meet the established goals and timetables, to assure that there is a distribution of women in all departments where underutilization has been identified."

We find this language confusing and apparently contradictory. Pending further instructions, we will assume timetables can be set for the faculty as a whole, and not for departments.

The Report asserts (page 3) that our goal of women as 15 percent of the faculty in five years is not acceptable. In support of this finding a preliminary study of the National Center for Educational Statistics is quoted, indicating that for 1972–73, women represented 23.6 percent of the total faculty at all ranks in privately controlled four-year institutions. As noted in Biology Professor Helen Stafford's letter to you of September 18, the so-called availability figure of 23.6 percent includes colleges and staffs of widely varying qualities. We have reviewed the National Center for Educational Statistics study, from which this figure was abstracted, and we can find no comprehensive data on the kinds of private four-year schools and disciplines included in the study. A footnote advises the study includes but is not limited to "organized theological schools, schools of art, and miscellaneous independent professional schools offering programs in medicine, law, business, pharmacy, etc." Obviously, there is no way to determine—from the scarce information provided in this study—the size or quality of the pool of women Reed can draw on.

Another key variable, which apparently was not considered by OCR in reviewing our faculty utilization analysis, was the small number of vacancies, sixteen, projected over the next five years. Section 60–2.12 of Revised Order #4 states: "In establishing timetables to meet goals and commitments, the contractor will consider the anticipated expansion, contraction and turnover of and in the work force."

We have calculated the probabilities of reaching a goal greater than 15 percent women in the Reed faculty with the low turnover and small number of projected vacancies. To reach a goal of approximately 23 women in a faculty of 100 within five years, 12 of the expected 16 vacancies will have to be filled by women. Assuming that the nationwide pool of 23.6 percent represents nothing but well-qualified applicants in the limited number of disciplines we expect vacancies (there is every reason to conclude this is not the case), and assuming the total absence of sexual discrimination in hiring, the probability of meeting the goal is 0.0000204, or one in 50,000. Insofar as the applicant pool of women is less than 23.6 percent of the total pool of men and women, the probability of meeting the goal decreases even further.

With regard to goals for faculty recruitment of minorities (Blacks, American Indians, Spanish surnamed Americans, and Asian Americans) the Report advises (page 3), "No goals set exclusively on the basis of availability of only one of these groups will be acceptable." Also, in your letter of September 25, 1974, commenting on our revised plan, "No data was given on the availability of minorities by the department." At the same time the Report notes, "It is acknowledged by HEW that data indicating availability of minorities to academic disciplines is difficult to obtain. Such information will not be required at this time." These instructions appear to be contradictory and we would appreciate your advice.

The Report implies (page 4) that our goal of two percent minority employment in the faculty is too low considering the Carnegie Commission Report which indicates that minorities represent 5.3 percent of all full-time faculty in colleges and universities. We have not yet had the opportunity to review this study, but again, as was the case in the estimate of the size of the pool of women Ph.D.'s, we have no way of knowing what portion of the minority pool represents—in either subject matter or quality—potential faculty for the College.

If we were to meet the inflated goals of *both* women and minorities over the next five years only one position out of the 16 available would be filled by a white male. Clearly this is not feasible given the representation of white males in the total qualified applicant pool. Thus, in the case of both women and minorities, even if the College accepts the most generous assumptions about the pool of qualified applicants, elementary statistical analysis leads to the conclusion that the probabilities of meeting higher faculty employment targets—as suggested by OCR—are extremely unlikely unless reverse discrimination is applied.

Reed College will continue to seek out applicants from the widest possible pool and then select the best candidate, irrespective of sex, race, or origin. To revise our women and minority hiring targets upward would require abandoning this long standing policy of selecting faculty on merit alone. We strongly believe that in hiring the best qualified candidate we are complying with the law. As you know, the Health, Education and Welfare Higher Education Guidelines (p. 9) instruct us:

"In the area of academic appointments, a nondiscriminatory selection process does not mean that an institution should indulge in "reverse discrimination" or "preferential treatment" which leads to the selection of unqualified persons over qualified ones. Indeed, to take such action on grounds of race, ethnicity, sex or religion constitutes discrimination in violation of the Executive Order."

Similarly, Title VII of the Civil Rights Act of 1964 states:

"Nothing contained in this title shall be interpreted to require an employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer . . . in comparison with the total number or percentage of such race, color, religion, sex, or national origin in any community, state, section, or other area, or in the available work force in any community, state, section or other area."

Finally, we believe the College's nondiscriminatory faculty hiring policy is completely consistent with the U.S. Supreme Court decision in *Griggs* v. *Duke Power* (1971):

"Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications, Congress has made such qualifications the controlling factor, so that race, religion, nationality and sex become irrelevant."

With regard to the finding that "neither of the two minorities currently on the faculty have academic rank," this was answered in my letter to you of September 6, 1974. One of the two Black faculty members is Assistant Professor of Black Studies with academic rank as defined in the Reed Constitution. The second minority member is Director of the Black Studies Center, a position which normally does not carry academic rank.

GOALS AND TIMETABLES

We are told (page 4) that "The goals and timetables in the Reed Affirmative Action Program are inadequate." Specifically, "There is no indication that the goal setting process involved personnel relations staff, department and division heads, and local and unit managers as required in 41 CFR 60–2.12(b)." We believe this is an excellent illustration of application by OCR of administrative and management standards more suitable for a large industrial concern than Reed College. We do not have personnel relations staff or local and unit managers. The staff goals submitted to OCR were discussed by all appropriate College officials. Faculty goals were reviewed and approved by me, the senior faculty advisory committee, and the faculty as a whole. These are the only existing comparable decision makers.

The second reason cited (page 5) for the assertion that our goals and timetables are inadequate is that "The goals do not meet the requirements of 41 CFR 60-2.12(g)." We have carefully reviewed this section of the Executive Order and believe our goals and timetables do meet the specific provisions of the Executive Order. For example, the Executive Order states (Section 60-2.12), "Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire Affirmative Action work." We believe the goals and timetables established by the College are completely consistent with the regulations. In order to correct any possible deficiences in this area, we will require more detailed instruction from your office.

DEVELOPMENT OR REAFFIRMATION OF THE EQUAL EMPLOYMENT OPPORTUNITY POLICY

The Report asserts (page 5) that the College's "Equal Employment Opportunity Policy does not meet all of the requirements of Section 60-2.20, specifically:

"(a) the policy statement does not include prohibitions against discrimination on the basis of color and national origin;

"(b) it does not state that discrimination will be prohibited in each of the areas listed in Section 60-2.20(1) and (4)."

The revised policy statement reflects the changes suggested by this finding. It was printed in the September 4th issue of REED BRIEFLY, a semimonthly publication, copies of which are distributed to all members of the Reed community as well as off-campus friends of the College. The revised policy statement is as follows:

"This statement on equal opportunities at Reed College puts into writing the fundamental philosophy that has characterized the college since it was founded: all relationships with the college are based on personal merit. Individual characteristics of race, color, religion, sex, and national origin are extraneous. The preparation of this formal statement is in response to current federal regulations that require such a statement as condition to receive federal grants.

"In operation, Reed's policy of equal opportunity based on personal merit means:

"1. Students are admitted on demonstrated competence and intellectual potential in the context of Reed academic goals, and academic opportunities are available in equal measure to all.

"2. Employment, job status, pay, and promotion are based on the individual's qualifications, performance, and appraised potential for future performances. In particular, Reed will continue to recruit, hire, train, and promote persons in all job classifications, without regard to race, color, religion, sex, or national origin, except where sex is a bona fide occupational qualification, and to conduct all personnel actions such as compensation, benefits, transfers, layoffs, return from layoff, company sponsored training, education, tuition assistance, social and recreational programs, without regard to race, color, religion, sex, or national origin.

"3. To avoid the remote possibility that Reed's policy is not recognized by potential and present employees, such measures as necessary will be taken to establish understanding of this policy.

"To insure that this policy is completely achieved in employment and in all phases of college operation, Carleton Whitehead has been designated as Equal Employment Opportunity Officer, and Richard Dent and Leila Birnbaum as Associate Directors. If any employees or students of Reed College have any questions about Reed policy or believe that the conditions of their employment or college life have been adversely affected because of their race, color, religion, sex, or national origin, they should advise one of the above individuals."

DISSEMINATION OF THE POLICY

In my letter of September 6 (pages 1 to 6), I answered in detail the finding that the College "has not adequately disseminated its affirmative action policy to staff and faculty." Please let me know if you have any questions (other than the comments in your letter of September 25, 1974) on the extensive list of statements, meetings, publications enumerated in my letter designed to publicize the Reed policy to the widest possible audience.

RESPONSIBILITY FOR IMPLEMENTATION

We have reviewed the pertinent section of the Executive Order referred to in the finding that the "Reed College Action Program does not clearly indicate line responsibilities as required in Section 60-2.22(b)." In eight of the nine examples of line responsibility detailed in the Executive Order, the College's Affirmative Action Officer plays a major role. The only exception is career counseling (60-2.22(b)6), a service to students which the College has just initiated. Our Affirmative Action Officer does not do career counseling per se (if this is what is meant by the Executive Order) although he does monitor the activities of this office along with all others in the College. Please advise what changes, if any, need to be made in our procedures to address this finding.

IDENTIFICATION OF PROBLEM AREAS

Under Section 6, Identification of Problem Areas, the Report finds (page 6), "The College has not established procedures for systematically monitoring applicant flow data." We are instructed to establish a comprehensive system of data gathering and analysis including:

(a) statistical data by organizational unit (department) for faculty and job classification for staff showing the total number of applicants for the past year by race, sex, source of referral and disposition (including reasons for nonemployment);

(b) an analysis of our recruitment and selection procedures; that is, an assessment of the productivity of each recruitment source and a review of the performance of each College employee in the recruitment process.

[There are, in addition, two requirements we do not understand and about which we will need further information from your office. They are:

(1) an "analysis of the applicant flow data to determine the impact on minorities and females who apply for or are referred for employment," and

(2) an evaluation of "the effect that the College's image as an Equal Opportunity employer in the recruitment areas has on the number of minority and female applicants who apply or make inquiry to the facility for employment."]

The OCR findings in the monitoring of applicant flow data raise two major problems for the College. First, many of our faculty searches generate 500–1,000 applications by mail from all across the country and from other countries, and we expect this kind of response to continue or increase in the foreseeable future. I am sure you can appreciate the fact that the staff required to assemble and analyze data on this scale is completely beyond our meager administrative capability.

Second, and possibly more important, requests for such data from our applicants raise a serious question of principle. For many of us in the college community the solicitation of race and sex information from job applicants is a step backward in the fight for equality of opportunity. Pertinent federal and state legislation appear to substantiate this conviction. As I noted in my letter of September 6, our counsel has advised a College request for information on race and sex may be a violation of Title VII of the Civil Rights Act of 1964. The regulation we are referring to is the Equal Employment Opportunity Guideline in Pre-Hire Inquiries, #4030, as amended on May 27, 1968 (Attachment D). The Oregon State guidelines (Bureau of Labor Rules on Employment Inquiries #27.050—Attachment E) clearly state, according to our counsel, "that it is unlawful to make a preemployment inquiry regarding race or sex."

Aside from the questionable legality of seeking information from applicants on their race, sex or national origin, there is a likelihood the College would be subject to legal action by unsuccessful minority and women job seekers. Our counsel advises, "You may rest assured that charges of discrimination would be filed against the College by minorities and women if, during the application process, they were asked to state their race, sex, etc. and were subsequently denied employment. The State of Oregon and the Equal Employment Opportunity Commission would clearly take the position that the rejected applicant had established a prima facie case of discrimination by the College if the prohibited information were requested and applied in the final review by the search committee or other individual responsible for making the hiring decision."

The OCR is aware, I believe, that the top three to five candidates of each faculty search are normally invited to the campus for interviews. In these cases it is, of course, not necessary to request information from the applicant on race and sex. It is feasible to keep track of the number of women and minority candidates and we are, in fact, doing so.

This section of the Report concludes with the statement (p. 10) that two studies referred to by Mr. Whitehead in his letter of September 27. 1973, "were not included in the submission to the OCR. Therefore no determination as to their adequacy can be made." In fact, as noted in page 11 of the Report, one of the studies, entitled "Staff Equitable Salary Review," was given to the Review team during their visit. (It was not provided prior to the review because Ms. Watson advised us on November 13, 1973, "Copies of the analyses (the staff and faculty studies) must be kept on file for possible review.") No request was made for the second faculty study on equitable treatment of women teaching staff, and it is appended as Attachment F.

DEVELOPMENT AND EXECUTION OF PROGRAMS

As noted above, Reed College does not have a personnel office, nor do we have job descriptions which would flow from such an office. As a result, there is no capability within this understaffed administration to draft job descriptions (page 10 of the Report) as specified in Section 60–2.24 of Revised Order #4, and equally important, administer and update them. Absent a substantial increase in staff (given the financial constraints under which we are operating this does not appear likely), we will not be able to "conduct a detailed analysis of position descriptions . . .", nor "provide approved position descriptions and worker specifications to all personnel involved in the recruiting, screening, selection and promotion process." Further, for the reasons stated above, we believe such descriptions neither feasible nor appropriate for Reed College. We can state emphatically that all College employees, particularly those connected with recruitment and selection are very much aware of the College's equal opportunity policy. Should a job applicant bring a complaint of racial or sexual discrimination to the Affirmative Action Officer or President's Office, the complaint would be investigated; if valid, the employee in question would be disciplined. To date, no such complaints have been made.

This section of the Executive Order continues (page 10): "(The College) . . . must validate worker specifications to insure that requirements do not in themselves constitute inadvertent discrimination and that specifications are consistent from one location to the next." We assume this refers to procedures whereby large business firms verify that tests, interviews or educational requirements do not disadvantage any applicants because of their sex, religion, race or background. We have reviewed in detail the informed arrangements used by the College in selecting staff and are confident that no single element in the process nor the process as a whole is discriminatory.

When "validation" of recruitment techniques is applied to faculty we run into serious problems, however. At Reed, the Faculty Advisory Committee has the responsibility of recommending to the President the most qualified candidate for each available position. The Committee's judgment is based on an analysis of candidates' résumés (reflecting experience and accomplishments), reviews of published and unpublishd work, letters from other faculty, and, in the case of top candidates, personal interviews. From a practical standpoint, it would be next to impossible to "validate" in a formal sense each element in this process. Even if we were able to do so, I would consider such procedures a threat to the traditional system of faculty self-determination whereby jobs are offered to the best qualified candidates in the professional judgment of other faculty members.

ADDITIONAL REQUIRED COMPONENTS OF AFFIRMATIVE ACTION PROGRAM

The Report continues (page 11): "The College has not provided evidence that it is in compliance with the Sex Discrimination Guidelines." Specifically, "The employer must not make any distinction based on sex in employment opportunities, wages, hours, or other conditions of employment."

We disagree with the finding that we have not provided evidence re compliance with the Sex Discrimination Guidelines. First, all College equal opportunity statements (beginning with my notice of December 13, 1972) clearly assert that with regard to admissions, job recruitment, and employment status after hiring, "individual characteristics of religion, race, ethnic origin and sex are extraneous." The Affirmative Action program submitted to the OCR provides ample documentation that the College's policy is, in fact, carried out. For example, of the 33 senior professional jobs in the College administration, 15 are held by women, including the Registrar, Director of Job Placement and Career

Services, Director of Commons and Dormitories, head of the Office of Public Affairs, and Alumni Director.

To justify the conclusion that "The College has not provided evidence it is in compliance with the Sex Discrimination Guidelines," the Report cites a preliminary analysis of the 1973–74 Faculty Personnel Budget and Reed's informal maternity leave policy.

In my letter to you of September 6 I described in some detail the faculty-wide procedures and criteria used by this College in setting salaries and recommending merit increases. As noted, factors of sex, race and religion are completely extraneous to the criteria used in evaluating faculty and in fixing salaries. I also pointed out in my letter that a careful review by my administrative staff of the salaries of faculty members listed in Attachment A to the Report disclosed no evidence of sexual discrimination. In addition, the Faculty Advisory subcommittee, which had investigated possible sexual discrimination in salary in March, 1973, was reconstituted. The Committee—again chaired by Professor Gail Kelly—came to the following conclusions regarding the Report's "salary analysis."

October 9, 1974.

To the Faculty Advisory Committee: Following the suggestion in the Office of Civil Rights Report of August 16, 1974, that the College undertake an investigation of "possible discrimination" in faculty salaries, this committee met to review the data. We are satisfied that there is no evidence of any case of salary discrimination attributable to sex. The cases chosen for our special consideration in Confidential Attachment A were carefully considered. The matched pair analyses do not reveal differential treatment by sex but, in every case, discrepancies may be accounted for by traditional formal criteria of academic appointments: experience expressed in number of years of teaching by type of appointment and institution, rank at appointment, and adjustment for partial teaching load. Judgments of teaching competence, which are the central consideration in advancement of Reed faculty, figure only peripherally in these examples, since they are mostly drawn from initial or temporary appointments, but cases of progress at more advanced levels appear to us to be attributable to evaluations in terms of the normal criteria.

MARSHALL CRONYN,
Professor of Chemistry.
GAIL KELLY,
Professor of Anthropology.
JOHN LEADLEY,
Professor of Mathematics.

Since your finding of possible discrimination in salary was based on a "preliminary analysis of the computer printout, 1973–74 Personnel Budget," I am confident that a more thorough review of the data—including the information provided in my letter of September 6 and the most recent Faculty study—will result in the elimination of this finding from the Report.

In connection with the College's maternity leave policy (page 12), we are instructed that while a written statement is not necessary at this time, we are required to show that our policy "is in compliance with the Guidelines and is applied consistently to all female employees." The College's procedures are completely consistent with the Guidelines (Section 60–20.3(9)(1). The Staff Handbook of February, 1974, states under Maternity Leave (page 3), "Maternity Leave is granted. The details of the conditions of the leave are worked out on an individual basis." Requests for maternity leave have become increasingly rare at the College; there has been only one case in the last decade. An Assistant in the Computer Center was granted maternity leave from March 1, 1973, to May 31, 1973. She returned to work on June 1, 1973, and resigned January 18, 1974. As stated in the Guidelines, the College does consider childbearing as justification for a leave of absence for a reasonable period of time. After childbirth, we will continue to reinstate female employees to their original or equivalent job should they wish to return to work.

ALLEGED DEFICIENCIES IDENTIFIED THROUGH ON-SITE REVIEW

The Report asserts (page 13) the College does not have an acceptable grievance procedure. We must establish such procedures "which provide for prompt and equitable hearing of employee grievances relating to employment discrimination. These procedures must be disseminated to all employees."

Notwithstanding the assurance in your letter of September 25, 1974, "The question of the existence of a grievance procedure was not the main concern of my letter," I would like to describe our two major grievance mechanisms, one for faculty and one for staff. The Faculty Constitution (which is distributed to all faculty members) provides for an Appeals and Review Committee under Article VII, as follows:

ARTICLE VII.—THE APPEALS AND REVIEW COMMITTEE

"*Section 1.*—The Appeals and Review Committee as established under the Bylaws of the Reed Institute consists of ten members: Four Trustees appointed by the Chairman of the Board of Trustees, four members of the Faculty elected by the Faculty, and the Chairman of the Board and the President ex officio. The Committee chooses its own chairman. The Committee meets on the call of the President or upon the written request of two or more members.

"*Section 2.*—The Appeals and Review Committee has authority to consider matters pertaining to the general welfare of the College and in particular matters referred to it by the Board of Trustees, the President, the Faculty, or the Faculty Advisory Committee, or by any member of the Faculty where the matter concerns his employment status. The Committee makes such written reports or recommendations to the Board of Trustees, to the officers of the Board, or to the officers of the College as it deems advisable, transmitting a copy of such reports or recommendations to the Faculty Advisory Committee for its information. In case of disagreement, a minority may, if they desire, submit a written minority report to the Board of Trustees or its officers or to the officers of the College, with a copy to the Faculty Advisory Committee for its information."

With regard to nonacademic staff, Carleton Whitehead's memorandum of February 15, 1973, has been distributed to all employees. We believe the instructions are clear that complaints concerning discrimination on the job may be made verbally or in writing to the Director or Assistant Director of the Equal Opportunity Program. In practice, this system has worked well. There have been few complaints, but they have been handled promptly to the satisfaction of all concerned. We believe, therefore, that the College now has procedures which insure the fair and speedy treatment of cases where discrimination is alleged.

The next finding (page 14) directs the College to confer academic rank on the Director of the Women's Physical Education Department on the same basis as that of the Men's Physical Education Department. You also questioned Ms. Atkinson's status in your letter of September 25. As I explained in my letter of September 6, I consider the essential facts to be:

(1) The Director of the Women's Physical Education Department has been tenured member of the Reed faculty since 1964.

(2) This position does not carry academic rank because of the special character of teaching responsibilities in Physical Education.

(3) The decision not to confer academic rank for this position follows from a Collegewide policy that full-time directors of campus activities not directly related to classroom teaching such as the Black Studies Center, the Dance Department (and Physical Education Department) not receive academic rank.

(4) This decision was made after Mr. Barta received academic rank in 1962.

The Report advises (page 15), "The College currently uses two gender-linked job titles in the area of staff employment." The titles referred to, "watchman" and "lead lady," are the job titles in our current agreement with the Service Employees Union, Local #49. (Please see Attachment G.) It would be more accurate to say that the contract refers to "lead man" or "lead lady," depending on the sex of the person hired to fill this position. It is now a woman, hence the designation "lead lady" in the College's salary budget. Please note that the contract distinguishes between "janitor" and "janitress." With regard to the title of "watchman," we will suggest the inclusion of a "watch women" title when our contract is renegotiated.

PROVISION OF SERVICES TO STUDENTS

The concluding portion of the Report deals with student services. In connection with the requirement of prominently stating the College's policy of nondiscrimination (page 2 of Part II) all publications relating to admissions and employment will carry the following statement:

"Reed College admits students and provides services, benefits, and equal opportunity in employment and education without regard to race, color, religion, sex, or national origin."

Please note that we have deleted the references to legislation from the proposed statement in my letter of September 6, 1974. We have done so on the advice of counsel that the language which includes the legislative reference implies Reed College provides equal opportunity only because of the relevant governmental rules and regulations. In fact, as I have stated above, the College followed a nondiscriminatory policy before federal programs in this area were initiated.

In my letter of September 6 I provided a detailed description of our substantial, expanding program to recruit minority students, including a special minority student financial aid fund, visits to minority high schools and counseling organizations, and active pursuit of minority scholarship recipients. The information made available to your office should assure the OCR that Reed College will continue to "recuit minority students as actively as it recruits nonminority students."

You expressed concern in your letter of September 25 over the recruitment practices in the Master of Arts in Teaching Program. The scholarship money and recruiting trips in the period 1968–71 directed to predominantly Black schools, to which you refer, were financed by the Federal government (The Higher Education Act of 1965), not by Reed College. We have sought, but not been able to obtain, financing after the $85,636 received under this program was expended. With regard to additional financial aid for minority students, the M.A.T. Department is budgeted as a self-sufficient program. The estimated expenditures of $42,400 this academic year will be matched, we expect, by tuition income. A high percentage of the total budget ($12,000) has been earmarked for financial aid. If it were feasible to do so, we would very much like to allocate additional financial aid for minority students. Given the current job market for M.A.T. graduates and corresponding decline in enrollment (an average of 30 students up to 1972; an average of 12 the last two years) this does not appear likely. I commented on the question of M.A.T. recruitment trips to minority colleges in my letter of September 6. That is, because of the small size of the program the Director of the M.A.T. Program is unable at the present time to make any recruiting trips. He does interview candidates who have applied in response to catalogs and brochures mailed to all institutions, minority and nonminority alike.

According to the Report (page 5 of Part II), College procedures for arranging off-campus student housing are deficient in three respects: (1) We must obtain "written assurance from each owner, lessor or renting party who lists off-campus housing through the College that he or she will make said housing available without regard to race, color, or national origin"; (2) we must verify that "comparable off-campus housing is available to members of both sexes when said housing is listed through the College; and (3) students must be advised of the policy that housing is available without regard to race, color, or national origin, and of their rights and recourse if they believe discrimination has occurred."

During the OCR Review Team's exit interview in February, 1974 we discussed the need to obtain written assurance from off-campus landlords that housing will be made available on a nondiscriminatory basis. We agreed at that interview to use the forms the Review Team offered to send us. On March 1, 1974, the College Director of the Equal Employment Opportunity Program wrote Ms. Watson as follows:

"As soon as we receive your recommended equal rights form for landlords and employers we shall require compliance by all who utilize the College facilities."

To date we have not received the forms. When they arive we will seek to obtain the signature of each off-campus landlord before such housing is listed here. With regard to the second point—assuring that comparable off-campus housing is available to members of both sexes—the Deans' Office, which is responsible for arranging such housing, systematically reviews listings to insure comparability. They have found no evidence of one sex being offered more or better housing than the other. Should this occur in the future, that office will place housing wanted advertisements to bring offerings into balance.

To address the last finding in the area of student housing, all material connected with such listings will contain the following statement:

"Reed College admits students and provides services, benefits, and equal opportunity in employment and education without regard to race, color, religion, sex, or national origin. Specifically, the listing of off-campus housing is included in the services provided. In the event you believe a landlord is discriminating because of race, color, or national origin, please advise the Dean or the Director of Equal Opportunity (ext. 376) immediately."

I pointed out in my letter of September 6 the Report erred in the facts of student employment on campus and, based on those errors, arrived at an unjustified conclusion of discrimination in the College's use of student labor. Contrary to the statements in the Report (page 8 of Part II), women have been hired to work in the heating plant since 1970 and the night supervisor position in the Sports Center has been open to women since November, 1970. Your letter of September 25 notes that the Report has been corrected with regard to employment in the heating plant. However, the letter also implies remedial action may still be required in the Sports Center night supervisor position. In fact, as I explained in my letter of September 6, the Director of the Equal Opportunity Program became aware of the situation in the Sports Center last fall. He instructed the Director of Physical Education as follows:

November 9, 1973.

Memorandum
Subject: EEO sports center complaint, resolution.

A review of the facts demonstrates that:

1. The basic requirements of the Sports Center student supervisor's position are honesty and responsibility. The primary specific tasks are opening the Center for evening activities, periodically patrolling the Center to make certain it is being used correctly and no unauthorized visitors are present (e.g., high school students), terminating activities at the close of the evening, and locking the Center for the night. On rare occasion other special actions may be required to resolve special situations.

2. None of the requirements of the position appear beyond the capabilities of a woman.

3. The position has been reserved for men, and women have been told this was a man's position.

4. Two of the three supervisors occupied these positions last year. The other position was filed after fall break by a student whose only previous experience was during the fall break.

The above facts were reviewed with Marvin Levich, Provost, and it was agreed that the third supervisor's position would be opened for applications by all interested students and that the best qualified student would be hired, regardless of sex. Mr. Barta will review the qualifications of applying students and his employment recommendation with Mr. Whitehead prior to the final employment decision.

In the future, all student employment in the Sports Center will be available without regard to sex unless there are specific approved exceptions.

This has been discussed with Mr. Barta and accepted by him.

CARLETON WHITEHEAD.

At that time an announcement was made that women as well as men would be considered as supervisor, and in fact, a woman is now employed in that position. The important point here, I believe, is that the College took remedial action before the visit of the Review Team.

All campus employment has been carefully reviewed and no instances of sexual or any other kind of discrimination have been found. There have been no complaints of sexual discrimination. The Financial Aid Office, which has become the focal point for student employment—both Work Study and non-Work Study—does not, as a matter of policy, list jobs by gender. That office is alert to the nondiscriminatory provisions of the relevant legislation; their work is monitored by the Director of the Equal Opportunity Program. Since we can find no evidence of discrimination, and since the OCR requirement to submit a plan to overcome the effects of past discrimination in student employment was based on erroneous assumptions, we fail to see the need for such a plan or indeed, what it would contain.

Lastly, we believe the recommendation for seminars with campus hiring officials by the Equal Employment Opportunity Officer is more suitable to a large university than the Reed campus. With respect to off-campus employment, we will require such employers to affirm their compliance with prohibitions against discrimination on the basis of race, color, national origin or sex as soon as the forms to be provided by your office are received. A statement of the relevant legislation will be displayed prominently in the office responsible for such employment. I would like to point out that we have not found a single instance of discrimination in our own thorough examination of off-campus employment.

As I indicated in my letter of September 6, there are no Physical Education courses restricted to students of one sex. The Physical Education Handbook, distributed to all new and returning students states, "All of our activities are coeducational, open to both men and women." I believe, therefore, the College has fully responded to the required action, that is, "to take affirmative steps to offer all physical education courses to students of both sexes and to apprise students of the policy of nonsegregation in such courses."

In your letter of September 25, 1974 you state: "If both men and women have in fact been participating in all courses, we would appreciate receiving statistics on enrollment by sex for each course for the past three years." I believe this request results from a misunderstanding of my letter of September 6. In that letter I acknowledged that "there were limitations on men participating in what were considered to be courses designed especially for women." Men and women have not been participating in all courses for the reasons stated in my letter. This lack of participation situation was corrected, however, in November, 1973, and there are no restrictions on enrollment for members of either sex in the courses in question.

The Report continues: "The College must establish an internal procedure for the prompt and equitable hearing of student complaints alleging discrimination on the basis of race, color, national origin, and sex." I believe the Judicial Board as authorized under the Community Constitution is well suited to deal with possible complaints of discrimination. The procedures (under Article VI of the Constitution) are carefully spelled out:

ARTICLE VI.—THE JUDICIAL BOARD

Section 1.—The Senate Judicial Board shall investigate all cases of possible violations of the Honor Principle and Reed Community rules and shall make recommendations to the Senate as to how such cases shall be acted upon by the Reed Community.

"*Section 2.*—The Senate Judicial Board shall consist of five members of the student body, selected in accordance with Article III of the By-Laws of the Reed Community.

"*Section 3.*—The portfolio of the Senate Judicial Board shall be reported to the Senate at each of the meetings of the Senate.

"*Section 4.*—The Senate shall take only one of the following actions on a Judicial Board recommendation: approval, disapproval, or separate action.

"A. A Judicial Board recommendation to the Senate shall receive Senate approval when at least a majority of the Senators present at a Senate meeting vote to approve the recommendation of the Judicial Board and at least a majority of the Senators are present when the vote to approve is taken.

"B. A Judicial Board recommendation to the Senate shall receive Senate disapproval when a vote to approve the recommendation of the Judicial Board fails and at least a majority of Senators are present when the vote to approve is taken.

"C. For the Senate to take separate action on a Judicial Board recommendation, an affirmative vote of at least a majority plus two of the membership of the Senate is required on the motion to take separate action.

"D. The Senate shall not take separate action on the first recommendation that the Judicial Board makes on any case.

"E. Senate disapproval of a Judicial Board recommendation shall automatically place the Honor Case under consideration in the portfolio of the Judicial Board again unless the Senate subsequently votes to take separate action on the Honor Case.

"*Section 5.*—Any person who has been declared a potential honor violator by the Judicial Board shall be informed of the complete nature of the complaint against him as soon as possible.

"*Section 6.*—Any person involved in an Honor Case as a complainant or as a potential honor violator shall be given a hearing before the Judicial Board if he so desires.

"*Section 7.*—Neither the Honor Principle nor any of the Community rules shall be so construed as to require any person to answer any questions put to him by a Judicial Board member in the course of a Judicial Board investigation or hearing."

Finally, in response to the question raised in the last paragraph of the Report, the College official responsible for assuring compliance with Title VI and Title IX legislation is the Director, Equal Opportunity Program.

I hope the foregoing is helpful in clarifying Reed College's performance in this important area.

Sincerely,

PAUL E. BRAGDON, *President*.

Encs. 7:

ATTACHMENT A

SURVEY OF FACULTY SALARIES 1973-74 AT 11 COLLEGES—ANTIOCH, BELOIT, CARLETON, COLBY, GRINNELL, KNOX, LAWRENCE, OCCIDENTAL, POMONA, REED, WABASH

[The data consists of salaried compensation alone, and does not include benefits]

	11 college average		11 college						Reed rank order	
			Maximum		Minimum		Reed			
	1972-73	1973-74	1972-73	1973-74	1972-73	1973-74	1972-73	1973-74	1972-73	1973-74
Professor:										
Maximum	24,906	26,070	30,000	28,400	21,800	23,100	22,800	23,100	8	11
Median	18,443	19,438	20,000	20,300	15,970	18,400	18,700	18,500	6	10
Minimum	15,173	15,829	16,200	16,600	13,900	14,386	14,600	15,000	8	10
Associate professor:										
Maximum	16,684	17,555	18,450	19,100	14,600	15,000	14,600	15,000	11	11
Median	14,084	14,614	15,200	15,490	12,270	13,700	13,300	13,700	10	10, 11
Minimum	12,027	12,711	12,500	13,200	9,700	12,200	12,200	12,750	11	6
Assistant professor:										
Maximum	13,718	14,615	15,400	15,750	12,050	12,600	12,050	12,600	11	11
Median	11,629	12,067	12,400	12,600	10,470	11,000	11,050	11,150	10	10
Minimum	10,050	10,385	10,800	11,000	9,500	9,300	9,700	10,300	9	11

[From Forbes, Sept. 15, 1974]

ATTACHMENT B

THE COMING SHAKEOUT IN HIGHER EDUCATION

If economics alone calls the tune, many U.S. colleges and universities are not going to survive.

Gone are the barricades and the posters, the nightsticks, the obscenities, the blood. But now the nation's colleges and universities face a new crisis, less headline-worthy, but perhaps more lasting. To put it bluntly, many of our colleges and universities are going broke.

The U.S. possesses an educational plant scaled to the proposition that higher learning is one of the great growth industries. And it *was:* Between 1952 and 1962 the number of students doubled, then more than doubled again between 1962 and 1972. Today there are more than 9.3 million students in nearly 3,000 institutions with annual expenditures of over $32 billion. Colleges and universities consume more than one-third of the $90 billion-plus that the U.S. spends annually on education.

In the Fifties and Sixties, the smallish private colleges and universities, which had traditionally absorbed about half the U.S.' students, were no longer able to handle the growth. Higher education was a politically popular goal, however, so the state legislatures opened wide the purse strings, and the big public institutions filled the gap. The most spectacular example is the State University of New York. Put together in little more than a decade, partly from scratch and partly through the acquisition of a number of private institutions, SUNY is already the biggest such system in the U.S., boasting 384,899 students and a budget of $600 million. With competition like that, the private colleges inevitably lost ground, and now serve less than 25% of the market.

WITH A BUMP

Now the overall growth of college enrollments has suddenly slowed. In the Sixties enrollments were rising at 9% a year; in the early Seventies the increase dropped to below 5%. This fall it will probably not exceed 3%. If present trends continue, by 1980 the growth will halt entirely and thereafter enrollments will begin to decline. (A serious recession could, of course, make the situation worse.)

The sheer numbers are not yet so bad, but the trends are alarming. Only 43% of the U.S.' 18- and 19-year-olds were in college last year, *vs.* 50% as recently as 1969. Demand is continuing to boom in the vocationally oriented professional schools—dentistry, medicine, law, journalism—but enrollments in graduate schools as a whole are down 25% over the past five years. At the lower end of the educational scale, enrollments are also rising rapidly in the vocationally oriented two-year colleges. Elsewhere demand is soft. A good third of the 121 state universities and land-grant colleges expect enrollment declines this fall. From close to 100% of capacity, our educational plant is probably running at only 94% of capacity today—a serious drop in a leveraged industry with high fixed costs.

"It is an overbuilt plant for however far you can see into the future," says John Everett, president of New York City's New School for Social Research. "And I say you ought to start now to turn some of these country institutions into old folks' homes—total dormitory-type, retirement villages. With very little physical change, everything people need is there. If you look at the longevity curve and the birthrate curve, that's what the U.S. is going to use these places for."

But the birthrate is not yet the problem. The slackening growth rate is. One explanation of what has happened is simple: With the Vietnam war ended, fewer students are hiding from the draft behind the walls of ivy. Another explanation is less obvious: We may be witnessing the beginning of the end of America's long love affair with higher education. Witness the increasingly vocational orientation of the students and the growing proportion of students at two-year colleges.

CUTTING COSTS

Whatever the reasons, the colleges and universities have had to do what any business must do when sales fall off: They have begun cutting costs (*see p. 120*). Since personnel absorbs 85% of the cost in higher education, this has meant cutting faculty—including, horror of horrors, tenured teachers: 88 at the University of Wisconsin, 100 at New York University, 104 at Southern Illinois University. Whole programs, whole departments have been cut: the dental school at St. Louis University; the criminology school at Berkeley, along with the schools of demography and design. All this is taking place in an economy where thousands of Ph. Ds are looking for appropriate jobs.

The budget stringency shows in small ways, too: a broken window plugged with plywood at Ohio University; the grass grown tall on the Midway at the University of Chicago, graffiti unerased on a column at Columbia.

For the moment, at least, the cutbacks, in combination with higher tuition, seem to have erased the horrendous deficits that were yawning for many educational institutions. Columbia University, for example, lost $72 million between 1966 and 1973. Stanford lost $4.3 million in five years.

But the easy remedies have already been used. Those remaining entail certain risks. Education is a highly leveraged business. Costs drop only slightly, if at all, as enrollments decline. "A small shift in the full-time enrollment has a very big budget impact," says Hans H. Jenny, vice president of finance and budgets at Ohio's College of Wooster, a widely respected liberal arts institution. "When you prepare a budget, you never know until September how many students you will have, and how much income they'll bring in. And when you're short a hundred students, you're talking about 100 times almost $4,000 a year—$400,000 It makes it very difficult to plan."

"The old lock-step system of four years of high school followed by four years of college has broken down," says the New School's John Everett. "They're dropping out of this place, that place, showing up all over. You used to be able to say, by experience, this many of your freshman class would some back as sophomores: this many sophomores would come back as juniors. You used to have regular attrition charts, and you knew where you could fill in with transfers. It just blows all that."

PUBLIC, PRIVATE, BIG, LITTLE—A STATISTICAL PROFILE OF 45 REPRESENTATIVE COLLEGES AND UNIVERSITIES

	1973 enrollment		Operating budget (millions)	Endowment (millions) [1]	Student to faculty ratio	Students receiving financial grants (percent)	Cost of instruction [2]	1974-75 tuition and fees		1974-75 total charges [3]	
	Total	Undergraduates						Resident	Nonresident	Resident	Nonresident
15 largest public universities:											
State University of New York	384,899	346,471	$600.0		17.5:1	NA	$2,050	[4] $675	[4] $1,075	[4] $1,950	[4] $2,350
California State universities and colleges	286,633	223,130	522.4	NA	18:1	15	NA	175	1,475	1,490	1,790
City University of New York	259,374	227,064	528.5	$23.0	17.5:1	10	2,366	95	[5] 645	95	645
University of Wisconsin	135,365	114,594	533.7	54.9	20:1	35	2,966	[6] 485	[6] 1,818	[6] 1,485	[6] 2,818
University of California	119,657	85,221	454.3	331.8	17.4:1	35	3,136	636	2,136	2,246	[illegible]
State university system of Florida	100,179	75,523	293.3	.3	22:1	NA	NA	585	1,665	1,885	2,965
University of North Carolina	90,454	75,082	370.3	NA	18:1	20	2,600	[7] 459	[7] 1,956	[7] 1,363	[7] 2,860
University of Texas	69,064	56,465	124.8	[8] 758.1	23:1	[9] 40	2,062	358	1,218	1,658	2,518
Indiana University	68,869	46,462	147.9	7.9	15:1	25	1,954	682	1,560	1,779	2,657
Pennsylvania State	65,541	48,107	270.0	.5	20:1	53	NA	960	2,160	2,199	3,399
University of Minnesota	62,330	36,893	370.0	85.2	[10] 13:1	[9] 30	2,016	716	1,679	2,104	3,067
University of Illinois	59,733	41,925	337.6	12.1	17.5:1	36	[illegible]	[11] 690	[11] 1,680	[11] 1,890	[11] 2,880
Oregon State System	57,201	46,522	231.0	[illegible]	17.6:1	17	NA	573	1,833	1,623	2,983
University of Maryland	54,788	32,294	210.4	[illegible]	17:1	7	1,915	708	1,858	1,947	3,197
University of Missouri	52,548	37,763	207.3	[illegible]	20.1	15	2,196	540	1,610	1,640	2,710

	1973 enrollment		Operating budget (millions)	Surplus or deficit (millions)	Endowment (millions) [1]	Applications to openings ratio	Student to faculty ratio	Students receiving financial grants (percent)	Cost of instruction [2]	1974-75 tuition and fees	1974-75 total charges [3]
	Total	Undergraduates									
10 Largest private universities:											
Northeastern	42,709	33,155	$45.0		$31.5	1.7:1	15:1	31	$1,557	[12] $1,995	[12] $3,600
New York University	38,125	8,861	114.0	$(4.0)	120.0	3:1	11:1	40	4,602	2,950	4,600
Bringham Young	24,997	22,730	NA	NA	NA	1.1:1	[illegible]	16	NA	640	[illegible]
Syracuse	24,879	10,080	100.1	.02	54.0	4:1	15:1	[illegible]	3,005	3,030	4,530
University of Southern California	20,200	9,000	122.5	([13])	58.4	1.4:1	13:1	35	4,866	2,910	4,300

University of Pennsylvania	19,707	7,753	229.0		175.0	4.2:1	11:1	47	3,873	3,450	4,950
University of Miami	16,066	9,793	57.1	NA	31.4	1.3:1	19:1	32	2,534	2,500	3,932
Harvard	16,008	6,247	217.0	2.1	1,200.0	5:1	6:1	43	5,993	3,400	5,350
Columbia	15,432	5,036	184.4	(5.8)	438.0	6:1	7:1	50	6,266	3,400	5,115
George Washington	15,359	5,173	79.5		13.8	4:1	14:1	20	2,8[illegible]5	2,518	4,313
10 national 4-year colleges:											
Yale	9,427	4,938	144.8	(.90)	550.0	7:1	7:1	45	7,460	3,650	5,300
MIT	7,888	4,113	221.2	(1.7)	440.9	4:1	5:1	[9] 48	8,595	3,472	5,442
University of Chicago	7,496	2,177	173.6	(4.0)	291.3	4:1	7:1	[9] 63	NA	3,000	4,690
Princeton	5,694	4,225	86.0	(.02)	532.7	8:1	6:1	45	6,039	3,500	5,045
Vassar	2,398	2,288	15.8		73.9	4:1	11:1	32	3,852	3,050	4,400
Wesleyan University	2,155	2,060	18.7	(1.7)	118.0	6:1	9:1	43	7,631	3,573	5,173
Wellesley	1,963	1,908	15.5	([13])	129.5	5:1	11:1	35	3,852	3,050	4,650
Williams	1,901	1,868	13.3	(.25)	60.0	9:1	12:1	26	4,310	3,056	4,626
Amherst	1,272	1,272	12.7	(.25)	59.0	8:1	9:1	5	5,963	3,425	4,525
Swarthmore	1,180	1,180	9.0	.10	52.2	6:1	8:1	45	4,718	3,125	4,550
10 regional 4-year colleges:											
Tulane	8,796	4,569	52.0	(1.0)	71.7	3:1	10:1	27	NA	2,600	3,910
Rice	3,311	2,433	26.3	(.01)	176.5	4:1	10:1	[9] 53	4,136	2,100	3,596
Oberlin	2,805	2,701	18.5	(.25)	69.3	5:1	12:1	40	3,935	3,296	4,661
Carleton	1,750	1,750	10.0	.01	32.0	3:1	12:1	47	3,597	2,975	4,200
Kenyon	1,394	1,394	7.0	.02	6.4	4:1	13:1	30	2,909	3,036	4,408
Pomona	1,319	1,319	8.7	.00	28.3	4:1	11:1	47	4,103	2,850	4,450
Grinnell	1,267	1,267	6.9	.01	27.0	3:1	11:1	40	3,071	3,125	4,270
Reed	1,132	1,105	4.3	(.05)	4.5	4:1	12:1	31	2,703	3,438	4,698
Goucher	1,076	972	5.5	(.45)	15.4	2:1	11:1	27	3,455	[14] 2,600	4,250
Haverford	751	751	6.0	NA	18.0	5:1	11:1	40	5,133	2,975	4,675

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[1] Market value.

[2] Cost to educate 1 student for 1 year. Figures calculated from data filed with the Higher Education General Information Survey of the Office of Education.

[3] Tuition and fees plus average room and board costs.

[4] Freshmen and sophomores only.

[5] Non-New York State resident charge: $995.

[6] Freshmen and sophomores at Madison and Milwaukee campuses.

[7] 1973–74.

[8] Income shared with Texas A. & M. University.

[9] Includes university loans and employment.

[10] Includes teaching assistants.

[11] Urbana-Champaign campus.

[12] Freshmen only.

[13] Surplus.

[14] Optional January-term tuition: $270.

Note: Some schools are cheap, some costly, some prestigious, some not. Some are easy to get into, some difficult. But none of these factors may have much to do with how good an education they provide.

Source: Individual colleges and universities.

INFLATION CUTS DEEP

Higher education is one of the hardest-hit victims of inflation. Lacking any real potential for productivity gains, it must pass on to its paying customers almost the entire burden of its rising costs. According to a higher education cost-of-living index devised by Hans Jenny and the University of Michigan's G. Richard Wynn, educational costs over the past decade have risen nearly twice as fast as the consumer price index. Tuitions, it is true, have risen as well—5% a year in public institutions, 7.5% a year in private ones—but that's not enough to offset the rise in costs.

"After discounting the effects of inflation," says Jenny, "we are now spending less per student than we did four years ago. How long can we go on spending less and less and charging the student more and more?"

Despite their call on tax revenues, the public institutions have been very nearly as vulnerable as the private ones. In California, state support has not kept pace with enrollment, much less inflation. At City University of New York, neither the state nor the city has ever adequately funded the open-admissions program that nearly doubled CUNY's enrollment in under five years, though the program was prematurely forced on the university for political reasons.

In Wisconsin, state support of education has always been among the most generous in the U.S. But the romance is ending. The legislature has decreed a 7.5% increase in educational "productivity" over a two-year period—a move that will cut $21.5 million out of the university's budget at a time when costs are rising.

Wisconsin is comparatively lucky. Its total enrollment is still growing slightly. The real damage is being done to public institutions like Ohio University. This old and highly regarded liberal arts-oriented regional research university has seen its enrollment drop more than 25% in three years—by 5,000 students, to around 13,500. Ohio University admittedly brought a large part of its problem upon itself. In the Sixties it more than doubled its enrollment, drawing its enlarged student body not only from Ohio but from nearby states like New York and New Jersey. It was the growth-for-growth's-sake syndrome. "For years," says OU's former president, Claude Sowle, "out-of-state students were supported at the same level of subsidy from the state as in-state students. But the big push the university made to attract out-of-state students got the legislature rather angry, and they wiped out the subsidy." Result: The gap between in-state and out-of-state tuitions moved from zero to $1,200 and OU's out-of-state students dropped from nearly 30% of the student body to 18%.

Besides closing five of its 45 dormitories, Ohio U has reduced the faculty by 104 since 1971 and plans to let another 70 go by 1975.

OU's ordeal is not yet at an end. The latest outbreak of student violence provoked Sowle himself—one of the more able young administrators around—to resign after five years in office. "There is no more difficult position in the country than being a university president," he says. "You've got so many constituencies to deal with—faculty, students, administrative people, nonacademic employees, the town, alumni, parents, the legislature, the governor and the general public. Sometimes you imagine they're all behind you, but then you look around, and nobody's there."

With tax money to fall back on, Ohio University and most other state institutions obviously will somehow endure. But private institutions, particularly those without big endowments and national reputations, may not. Take Pennsylvania's Wilkes College, which over the last 25 years has transformed itself from a small community college serving the Wilkes-Barre area into a four-year liberal arts school with over 2,000 students. In financial terms, Wilkes has been well run. Unlike many such schools, Wilkes carefully husbanded its modest $3.-million endowment and scrupulously financed its ambitious building program without borrowing any substantial sums of money as so many private colleges had.

But financial prudence is not enough. Last year Wilkes opened in the fall with 2,250 students, down from its 1971 peak of 2,593 and had budgeted for a modest surplus. Before the year was out it had lost 200 students, and wound up the year with a $124,000 deficit, the first such deficit within memory.

Wilkes' administration raised the tuition $150, to $2,000 a year, and has budgeted for an $18,000 surplus next year. But Thomas H. Kiley, chairman of the Wilkes board and head of the local First National Bank of Eastern Pennsylvania, is worried about the future.

"We have an overload of faculty," he says, "and this is the problem of many independent colleges. The student/faculty ratio is 15 to 1, and that's a luxury ratio. We should be at 18 or 19 to 1, to be real healthy. Survival is probably at 17 to 1. The question is: Are we going to be strangled by tenure?" And Wilkes is typical of dozens, even hundreds of four-year private colleges.

What makes the labor problem so inflexible, of course, is the tenure system under which a faculty employee, after a period of probation, cannot be dismissed except for gross incompetence or moral turpitude. This is a terrible burden in a time of rapidly rising costs and rapidly falling student enrollments.

College teachers have reacted to these economic pressures much as bricklayers or coal miners do. They have organized. Over the past five years, the number of faculty members under collective bargaining (not necessarily all of them union members) has gone from 10,000 to 80,000—one-eighth of the total—on 315 campuses, most of them public, in 21 states. This is almost certain to put even greater upward pressure on costs.

CAN EDUCATION BE "MANAGED"?

Quite clearly, higher education is on a collision course between flat or declining enrollments and runaway costs. Barring a miraculous end to inflation, the best way out would seem to be better educational productivity. But how do you measure "productivity" in education, especially in higher education?

"There is nothing in education," says New York University's President James M. Hester, "equivalent to the profit-making objective to provide a measure of achievement."

The most elementary index of educational efficiency and productivity is the student/faculty ratio. If you want to improve academic productivity, you can obviously increase the size of classes, eliminate courses or even departments where enrollment is low, decrease the size of the staff. But doesn't that reduce the effectiveness of your teaching? Nobody is sure. Says the New School's John Everett: "Not one study has ever shown there is any difference in learning—meaning the information that can be sent back on tests to a grader—between classes of 300, which they have had at Berkeley, and classes of ten."

Everett is, of course, talking about test results rather than quality of education: there is, after all, no way to measure *quality* in education. But there is plenty of reason to believe that class size can be increased to some degree without sacrificing either quality or quantity. After a solid decade of deficits, Brunswick, Me.'s prestigious Bowdoin College raised its enrollment by a third (to 1,250), without adding a single teacher. Tuition income was thereby enhanced without any corresponding increase in costs, but to accomplish this Bowdoin had to sacrifice its student/faculty ratio, which rose from 9.5 to 12. "We lay very strong stress here on teaching," says President Roger Howell, Jr., "but I don't think the quality of education has been hurt. If we cut any further, however, it would be." Here, then, is one area where productivity can be improved.

SHARING THE BURDEN

Like the society it reflects, higher education in the U.S. bears an increasingly heavy burden of welfare costs. Just as the society is committed to providing equal opportunity among income classes, so are the colleges and universities. This has meant increasing the subsidization of lower-income, primarily minority, students. Between 1967 and 1973, Hans Jenny and Richard Wynn calculate, student aid at a group of liberal arts colleges rose from 19.9% of tuition and fees to 32.3%. Most of the institutions increased their student aid without the endowment or gift income to support it. As a result, more than 30% of student aid now comes out of general funds—not out of scholarships of various sorts, that is, but straight out of tuition. The more affluent parents thus are subsidizing the less affluent.

In a sense, this student aid is simply good business. Few students today want to attend a country-club school or one with a homogeneous student body. Thus student aid is the price to be paid for diversity and for a student body selected for ability rather than for family wealth.

But this is rough on the middle class. "The larger the percentage of students who receive aid," says Wooster's Hans Jenny, "the larger will be the addition to student charges for those who receive no discount. I have to charge the student who is not subsidized $300 or $400 more so I can subsidize 38% of the students in the institution. And every private institution has this problem."

"What everybody worries about," says Bowdoin's Howell, "is pricing yourself out of a particular market. We're not terribly worried about the bottom of the market and we're certainly not priced out at the top. The real problem is the people in between." So, like other schools, Bowdoin is stretching the parameters of aid. Says Howell: "In the right set of circumstances, a man can qualify for aid with a parental income of $30,000. In fact, a third of our students receiving aid come from families with incomes in excess of $15,000 a year."

TWO-TIER PRICE SYSTEM

One of the great anomalies in higher education is the two-price system. A family paying full charges must spend $5,115 a year to send a student to Columbia, $3,400 of it for tuition alone. A few miles downtown the student can attend City University of New York for a fee of only $95 a year. This is an extreme contrast, but the fact remains that it costs in general about twice as much to attend a private college as a state one. Including room and board, it cost a student around $3,100 a year in 1972 to attend the average private college; the figure for the average public institution was about $1,400.

This disparity in charges has little to do with efficiency. It is a simple matter of subsidy. "Basically," says Eldon T. Smith, executive secretary of the National Council of Independent Colleges & Universities, "it costs just about as much to educate a student in a public institution as it does in a private one." Private colleges, with their emphasis on personalized education, do tend to have lower student/faculty ratios—12 to 1 in private, *v.* 20 to 1 in public. But this cost differential accounts for only a tiny part of the differences between the *charges* at public and private institutions. The bulk comes from the state's subsidy to public institutions. At public institutions, undergraduate tuition and fees contribute only 35% of instructional cost; the general taxpayer puts up the rest. At private institutions, tuition and fees yield something like 75%; endowment income and philanthrophe support account for the balance. Thus, at the University of Wisconsin freshman tuitions and fees are $485 a year for out of state residents, 25% of the cost. At Wilkes, they are $2,000, or 75% of the cost.

The competitive disadvantage is quite obvious.

Even so, at the U.S.' prestige schools—the Ivy League schools, the eastern liberal arts colleges in general—enrollments have held firm, and applications are coming in at the highest level in history. As in any other market today, there are people willing to pay for quality—and, rightly or wrongly, quality is what they think they are getting at the prestige schools.

For example, Columbia, by no means the most prestigious of the Ivy League schools, had 3,400 applicants for the 725 openings in its freshman class. Little Bowdoin had over 4,000 applications for 350 openings. At Cornell, Connecticut and Vermont, there are six applications for every freshman opening. The picture is less rosy at the nonprestige schools. At Wilkes the ratio is 1.5 to 1, at the land-grant colleges, 1.3 to 1.

Obviously the earliest victims of the educational recession will be those private colleges that lack either the endowment, the prestige or both needed to stay in business against subsidized competition from public institutions "Because the name is not known," says Ralph Huitt, general secretary of the National Association of State Universities & Land Grant Colleges, "people just don't feel that going to this little private college will give them an advantage over going to a community college."

Nearly 150 such private colleges have closed their doors in the last five years. The biggest percentage losses have been among women's colleges, hit both by inflation and the competition of men's colleges that have gone coeducational. There were 259 of these women's colleges a decade ago. The number is now down to 193. Hundreds of other four-year private liberal arts colleges are in danger. Especially vulnerable are the Catholic schools that sprang up over the past decade and the black schools that have been losing their best prospects to predominantly white schools. "Education has fallen in priority in the nation," says Andrew Billingsley, vice president for academic affairs at Howard University, the U.S.' most prestigious black university. "The black college has always been at the bottom for resources. It will suffer even more."

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PUBLIC SOLUTION

The taxpayer is already paying a price for this decline of private education. In states like New York, Texas, Kansas and Ohio, a number of private colleges have already disappeared into the state systems. Temple, Pittsburgh and the University of Cincinnati are already semi-taxpayer-supported. And the trend is unlikely to stop there.

"Partial public support of private institutions is already with us," says John C. Weaver, president of the University of Wisconsin. "At some of the big private universities, half of their operating funds are public money right now." Weaver lists Stanford, Harvard and MIT as being among those that are, basically, already living off the taxpayer.

Says Columbia's President William T. McGill: "It costs us $20,000 a year to educate a full-time medical student, and what's our tuition—$3,000? So we've become increasingly dependent on public funds—a staggering $50 million for the medical school alone. We can see," McGill goes on, "a gap of $35 million opening up between our university's current resources and what we will need by 1980. Those resources will be found, but the question is, what portion will be public resources? We do not think the intellectual health of a research university would be improved for us to drift into quasipublic operation. But clearly we seem to be headed in that direction."

It is certainly cheaper—to the taxpayer—to run an institution off private money than off public. For $10 million in various kinds of state aid, says NYU President James Hester, New York State keeps NYU and its $200-million-a-year university and medical school operation alive. "If NYU were a public institution," Hester estimates, "it would cost the taxpayers an additional $100 million a year."

In a few states, private institutions are getting direct support along the lines of the so-called Bundy money pioneered in New York, a fixed amount paid to institutions for every academic degree they award. In addition, many states are making tuition grants available to students in private institutions, generally on the basis of their parents' income. In combination the two seem the most promising means of maximizing aid and minimizing the opportunities for state interference in the private institutions.

Unfortunately, except in places like New York or Pennsylvania, there isn't very much taxpayer money available and not much likely to materialize any time soon. Education is no longer a high-priority political item.

THE VICTIMS

In any case, the state institutions will survive, although with possibly truncated budget. So, most likely, will the prestigious private colleges and, in one form or other, the great private universities. What is most immediately threatened is some 1,400 four-year private colleges that carry only 15% of the U.S. total enrollment. Does this matter? Shakeouts, after all, have occurred in businesses before. The weak units get squeezed out. The industry emerges the better for it.

The answer is: Yes, it does matter. The big taxpayer-supported schools are not really more efficient than the small private schools. Says Wooster's Hans Jenny: "The difference in the *cost* of educating a student at a state university and at a private institution is small. But the difference in *price* is very large.

A fair analogy is the way government-subsidized competition squeezed and continues to squeeze the railroads. Trucks and buses are not inherently more efficient; they were made so by federal financing of the highways. As New York State's vast state system grew, its private system of college contracted: Twenty-eight private colleges have closed in New York State since 1968 when the State University was expanding most rapidly.

With the closing of these smaller schools, a good deal of the diversity of the U.S. educational system is being lost. Maybe the schools that have already closed are not all that important. But now some of the better private schools are in trouble. And such schools, because of their very size, offer something the giant institutions cannot really provide: the close social and intellectual relationships of a small community, where student/faculty contacts are warm and intimate and where education becomes as much a matter of social behavior as of patterned instruction.

Indeed, it is not impossible that the extreme alienation that swept across the academic world in the late Sixties stemmed in large measure from the fact that educational institutions had grown too large and too impersonal. At least one Canadian public institution, the University of Toronto, has been so concerned about the problem of becoming too large that instead of growing, it sets up new institutions and then spins them off as they mature.

"The kind of thing we stand for," says Rhoda Dorsey, president of Goucher College, a small, highly respected women's institution near Baltimore, "takes time and personal attention, and you don't get in classes of 500 people. We exist because we think there are students who still want what we give. Now that is a gamble. If the students don't want it, then we are going to be out of business. We are not going to turn ourselves into a factory for diplomas. It all boils down to the value society places on individual development and achievement. All the private institutions that are run this way run the risk of being charged with being elitist, and in a sense they are, because their reputation is based on their having standards." And not simply grades, but standards of intellectual discipline as well.

Harold Williams, former head of the Norton Simon Inc. executive committee and now dean of the School of Management at the University of California (Los Angeles), recognizes that there is waste and inefficiency in higher education, but he cautions against letting economics alone make the decisions about which institutions will survive and which fail. Says he: "To justify our tremendous investment in higher education in straight business terms is not possible because the strengths are nonquantifiable. Sure, we've got to spend our education dollars more effectively. But it's like advertising in a way. Half the money you spend is wasted. Only you don't know which half. And just try to do without it."

Unless the public makes a choice, however, economics *will* dictate the decisions. What will survive will be the giant public schools and the prestigious private ones. The precious and irreplaceable middle ground will gradually disappear.

ATTACHMENT C

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Pre-Hire Inquiries—¶ 4030

ISSUED BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, JANUARY 13, 1966, AND AMENDED MAY 27, 1968

Some state fair employment practice laws expressly prohibit inquiries on applications for employment concerning the applicant's race, color, religion or national origin, and state Commissions have determined that such direct inquiries, as well as the elicitation of indirect indicia, such as former name, past residences, names of relatives, place of birth, citizenship, education, work and military experience, organizational activities, references and photographs, may be unlawful.

Title VII of the Civil Rights Act of 1964 does not expressly prohibit pre-employment inquiries concerning a job applicant's race, color, religion or national origin. The legislative history of the statute is silent as to the Congressional intent on the subject.

Although Title VII does not make pre-employment inquiries concerning race, color, religion or national origin *per se* violations of law, the Commission's responsibility to promote equal employment opportunity compels it to regard such inquiries with extreme disfavor. Except in those infrequent instances where religion or national origin is a bona fide occupational qualification reasonably necessary for the performance of a particular job, an applicant's race, religion and the like are totally irrelevant to his or her ability or qualifications as a prospective employee, and no useful purpose is served by eliciting such information. The Commission is also mindful that such inquiries traditionally have been used to deprive individuals of employment opportunities and to discriminate in ways now proscribed by Title VII.

Accordingly, in the investigation of charges alleging the commission of unlawful employment practices, the Commission will pay particular attention to the use by the party against whom charges have been made of pre-employment inquiries concerning race, religion, color or national origin, or other inquiries which tend directly or indirectly to disclose such information. The fact that such questions are asked may, unless otherwise explained, constitute evidence of discrimination, and will weigh significantly in the Commission's decision as to whether or not Title VII has been violated.

Pre-employment inquiries which are made in conformance with instructions from, or the requirements of, an agency or agencies of the local, State, or Federal Government in connection with the administration of a fair employment practices program will not constitute evidence of discrimination under Title VII.[1]

ATTACHMENT D

RULES ON EMPLOYMENT INQUIRES ¶ 27,050

The following is the full text of a statement of policy and specific rulings on lawful and unlawful employment inquiries under the Oregon Fair Employment Practices Act, Oregon Revised Statutes, Sections 659.010 to 659.115 and 659.990. The statement and rulings were issued by the Fair Employment Practices Division of the Bureau of Labor.

[RE-STATEMENT OF THE LAW]

The Oregon Fair Employment Practices Act demonstrates the desire of the people of Oregon to translate into action the words of the Oregon constitution, which declare "that all men, when they form a social compact, are equal in right."

This law guarantees to everyone *equality of opportunity* in employment regardless of his race, religion, color, or national origin. It does not restrict the right of an employer to define the qualifications necessary for satisfactory job performance. It merely requires that the same standards of qualification be applied equally to all persons.

The Oregon Fair Employment Practices Act applies by its terms only to employers of more than five persons, employment agencies, and labor organizations. The term "employer" does not include "a club exclusively social, or a fraternal, charitable, educational or religious association or corporation, if such a club, association or corporation is not organized for private profit" (Section 659.010(6)). The prohibition contained in the law with respect to labor organizations (Section 659.030(2)) is that they may not, because of the race, religion, color, or national origin of any individual, exclude or expel from their membership such individual or discriminate in any way against any of their members or against any employer or any individual employed by an employer.

The law provides (Section 659.030(3)) that it is an unlawful employment practice "for any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification or discrimination as to race, religion, color or national origin, or any intent to make any such limitation, specification or discrimination unless based upon a bona fide occupational qualification."

The above stated prohibition with respect to employers and employment agencies applies to oral inquiries as well as forms of application for employment. In both respects, the prohibition is aimed at inquiries made of prospective employes prior to employment. The terms "race" and "color" are deemed to be synonymous. Discrimination against Negroes because they are Negroes is classed as discrimination because of color.

[CONSTRUCTION OF TERM "DIRECTLY OR INDIRECTLY"]

An inquiry, in order to fall within the statutory prohibition contained in the law [Section 659.030 (3)], must express "directly or indirectly" any limitation, specification, or discrimination as to race, religion, color, or national origin. Obviously, a direct prohibited inquiry is one which asks a question, the answer to which, on its face, discloses the applicant's race, religion, color, or national origin, for example: (1) "What is your religion?" or (2) "What is your national origin?" or "Where were you born?" An indirect prohibited inquiry is one which does not ask a direct question as to applicant's race, religion, color, or national origin, but is one the answer to which will probably disclose the applicant's race, religion, color, or national origin, for example: (1) "What religious holidays do you observe?" The answer to this inquiry by any Jewish applicants would be "I observe Yom Kippur, the Jewish day of atonement, and Rosh Hashana, the Jewish New Year." The answer would, therefore, reveal the applicant's religion. (2) "If you have changed your name, what was your original name?" An applicant of Polish descent, whose original name was Pulaski and who has changed his name to Post, would, in answering this inquiry, probably disclose his national origin.

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[1] Last paragraph added in May 27, 1968 revision of statement.

The fundamental basis of the statutory prohibition is that race, religion, color, or national origin have no place in the consideration of an applicant's qualifications and, therefore, have no place on an application form or during oral interviews. Applicants may not be encouraged to volunteer answers to prohibited inquiries.

An example of an item on an employment application form legitimate on its face, but undoubtedly unlawful, is a requirement that an applicant produce proof of age in the form of a birth certificate or baptismal record. A birth certificate or baptismal record discloses place of birth, ancestry, or religion. Consequently, the production of such documents may not be required by prospective employers or employment agencies. Such requirements for the purpose of establishing age to insure compliance with the state and federal child labor laws is not based on a bona fide occupational qualification. In lieu of requiring the production of a birth certificate or baptismal record, it is suggested that employers require an applicant to state his age and submit proof thereof in the form of a Certificate of Age or Work Permit issued by the Wage and Hour Commission. These suggested alternative documents do not reveal the applicant's place of birth, ancestry, or religion, yet they do furnish satisfactory proof of the applicant's age and may be obtained by persons of any age from the Bureau of Labor.

Following are rulings as to whether certain employment inquiries are lawful or unlawful:

Subject	Lawful employment inquiries	Unlawful employment inquiries
Name	Have you ever worked for this company under a different name?[1] Maiden name of a married woman applicant.[1]	Original name of an applicant whose name has been changed by court order or otherwise.
Address or duration of residence.	Applicant's place of residence Previous address in United States How long a resident of this State or city?	How long a resident of the United States? Birthplace of applicant.[2] Birthplace of applicant's parents, spouse, or other relatives. Requirement that applicant submit birth certificate, naturalization, or baptismal record.
Age	Requirement that an applicant state his age and submit proof thereof in the form of a certificate of age or work permit. These documents are issued to persons of any age by the Bureau of Labor.	Requirement that an applicant produce proof of age in the form of a birth certificate or baptismal record.
Creed or religion	An applicant may be told, "This is a 6-day job. We work Monday through Saturday."	Whether an applicant for employment regularly attends a house of worship. Inquiry into an applicant's religious denomination, religious affiliations, parish, church, pastor, or religious holidays observed. Applicant may not be told "This is a Catholic (Protestant or Jewish) organization."
Race or color		Questions which directly or indirectly indicate race, complexion, or color of skin.
Photographs		Requirement that an applicant for employment affix a photograph to his employment application form. Request that applicant, at his option, submit his photograph. Requirement for photograph after interview but before hiring.

See footnotes at end of table, p. 699.

Subject	Lawful employment inquiries	Unlawful employment inquiries
Citizenship	Are you a citizen of the United States? If not a citizen of the United States, does applicant intend to become a citizen of the United States? If you are not a U.S. citizen, have you the legal right to remain permanently in the United States? Do you intend to remain permanently in the United States?	Of what country are you a citizen? Whether an applicant is naturalized or a native-born citizen; the date when the applicant acquired citizenship. Requirement that applicant produce his naturalization papers or declaration of intention. Whether applicant's parents or spouse are naturalized or native-born citizens of the United States; the date when such parents or spouse acquired such citizenship.
National origin	Inquiry into applicant's—	(a) Lineage. (b) Ancestry. (c) National origin. (d) Descent. (e) Nationality of applicant, his parents or his spouse.
Languages	Inquiry into languages applicant reads, speaks or writes fluently.	What is your mother tongue? Language commonly used by applicant. Inquiry into how applicant acquired ability to read, write or speak a foreign language
Education	Inquiry into the academic, vocational or professional education of an applicant and the public and private schools he has attended.[1]	
Experience	Inquiry into work experience	
Character	Have you ever been convicted of any crime? If so, when, where, and disposition of case.	
Relatives	Name of applicant's father, mother, spouse, or children. Address (within the United States) of applicant's father or mother, spouse or children.[1] Names of applicant's relatives already employed by this company.[1] Do you live with your parents? If not, with whom do you live? What dependents have you?	Names of any other relatives of applicant, other than parents, spouse or children. Address of any relative of applicant, other than address within the United States. Maiden name of applicant's wife or mother.
Notice in case of emergency	Name, address, and relationship of person to be notified in case of accident or emergency.	Name and address of next of kin.
Military experience	Inquiry into an applicant's military experience in the Armed Forces of the United States or in a State militia. Inquiry into applicant's service in particular branch of U.S. Army, Navy, etc.	Inquiry into an applicant's general military experience.
Organizations	Inquiry into the organizations of which an applicant is a member, excluding organizations the name or character of which indicates the race, religion, color or national origin of its members.	List all clubs, societies and lodges to which you belong.
References	Who suggested that you apply for a position here?	

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[1] The inquiries that are starred are inquiries which have been ruled to be lawful because they are based on a bona fide occupational qualification although they may indirectly express a limitation or specification as to race, color, or national origin. The remainder of the lawful inquiries have been ruled to be lawful because they do not "express directly or indirectly any limitation, specification or discrimination as to race, religion, color or national orgin, or any intent to make any such limitation, specification or discrimination." (Sec. 659 030(3), law against discrimination.)

[2] Where an inquiry, herein ruled "unlawful" is required because, in the particular circumstances, an employer or employment agency deems race, religion, color, or national origin to be a bona fide occupational qualification, application may be made for a ruling; e.g., where an inquiry as to birthplace or related informationi s required for security reasons, as in work on particular types of government contracts, it is recommended that application be made to the Commissioner of Labor for a ruling that such inquiry is lawful.

Note: When an employment application form contains prohibited questions we do not deem the following legend, stamped on the blank to be in compliance with the law: "To conform with the Oregon State law against discrimination, ignore all questions relating to race, religion, color, or national origin." No questions prohibited may lawfully appear on the application form. It is impossible to deal here with all employment inquiries which might be construed as violations. The questions above are offered simply for your assistance.

ATTACHMENT E

March 14, 1973.

Memorandum
To: Vice President/Provost Marvin Levich
From: Subcommittee on Affirmative Actions of the Faculty Advisory Committee

A subcommittee of the Faculty Advisory Committee has reviewed practices of appointment and promotion of faculty members to evaluate the employment situation of women on the teaching staff. The small size of the total faculty and the considerable fluctuation in the number of women employees from year to year must be taken into account in interpreting these data (see attached). We conclude that Reed College has over the years fulfilled its commitment to equitable treatment of women faculty both in its procedure of appointments and in concern for imposing the same standards for promotion for both men and women of equivalent merit.

Gail M. Kelly,
Chairman.
Larry N. Ruben,
Frank Gwilliam,

Full professor (N=36, women=1)

Average age at appointment to rank: N=42, women=42
Average number of actions in ten years: N=3.8, women=5

Associate professor (N=29, women=2)

Average age at appointment to rank: N=35, women=33.5
Average number of actions in ten years: N=5.8, women=3.5
Average years at present rank: N=6.2, women=12

Assistant professor (N=29, women=3 (1 is half-time))

Average age at appointment to rank: N=28, women=31
Average number of actions in ten years: N=.75, women=2.
Average years of teaching: N=3, women=5.

Visiting assistant—Persons not regarded as potentially permanent members of the faculty (N=6, women=1)

Average age at appointment: N=30, women=27
Average years of teaching: N=2, women=1

Visiting instructor—including tenured and non-tenured members of the physical education dept. (N=7, women=3)

Average age at appointment to rank: N=50, women=40
Number of actions in ten years: N=.25, women=1.75.
Note: N=total population at rank:

ATTACHMENT F

Reed College and SEU, Local No. 49

July 1, 1973.

PREFACE

This agreement, resulting from collective bargaining between Reed College and the Service Employees Union, Local No. 49, is for the purpose of promoting good relations between the College and the Union, and between the College and the employees represented by the Union, and of making clear the basic provisions upon which such relations depend. It is the intent of both the College and the Union to work together to establish and to maintain proper and acceptable terms and conditions of employment.

The College recognizes the right of employees to organize and to bargain collectively and assures them that, in their exercise of such right, they shall be free from any and all restraint, interference, and coercion.

The Union recognizes the peculiar circumstances inherent in educational institutions which operate on different schedules at different times of the year and which have residential facilities in varying degrees throughout the year.

The Union recognizes the right of the College to give work to worthy and deserving students, since such employment frequently is a crucial means by which such students may obtain an education.

Employees shall feel free to consult with the Union concerning matters within the framework of this agreement. The Union is the instrument of the employees and was organized by them to serve their needs.

AGREEMENT

This Agreement, made and entered into this 1st day of July, 1973, by and between Reed College, of Portland, Oregon, hereinafter designated as the Employer, and the Service Employees Union, Local No. 49, AFL–CIO, of Portland, Oregon, hereinafter designated as the Union, for the purpose of governing their mutual business relations by fixing the following scales of wages, schedule of hours and regulations affecting the members of the organization of the Union, to-wit:

ARTICLE ONE—RECOGNITION

Section 1.1—The Employer agrees to recognize the Union as the sole and exclusive bargaining agent for the employment of all persons coming under the jurisdiction of Service Employees Union, Local No. 49, with respect to wages, hours and working conditions, adjustment of grievances existing under the Contract, and all other pertinent matters.

Section 1.2—Inclusions:

Employees who because of length of service or special assignments may have job titles with the prefix "Senior" or "Leadman".

Section 1.3—Exclusions:

1. Superintendents and foremen who have the right to hire and fire, to enforce discipline, or to promote or demote employees.
2. Reed College students. (It is understood that a regular employee dismissed by the Employer will not be replaced by student labor.)
3. All donated work of any kind whatsoever.
4. Gymnasium attendants.

ARTICLE TWO—UNION SECURITY

Section 2.1—It shall be a condition of employment that all employees of the Employer covered by this Agreement who are members of the Union in good standing on the effective date of this Agreement, shall remain members in good standing, and those who are not members on the effective date of this Agreement, become and remain members in good standing of the Union. It shall also be a condition of employment that all employees covered by this Agreement and hired on or after its effective date, shall, on or after the thirty-first (31st) day following the beginning of such employment, become and remain members in good standing of the Union.

ARTICLE THREE—ACCESS OF UNION BUSINESS REPRESENTATIVES

Section 3.1—The Business Representative for the Union shall have access to all properties covered by this Agreement to discharge his duties as representative of the Union, excepting the Administrative offices and resident rooms and excepting laboratories and classrooms when in active academic use. In these exceptions the Business Representative shall have access if accompanied by the Controller of the College, or his representative, and only if the occupant is willing.

Section 3.2—It is understood that the Union will set up the ordinary shop machinery for collective bargaining.

ARTICLE FOUR—EMPLOYMENT

Section 4.1—When needing new employees in covered classifications, the Employer shall notify the Union, which will provide such available applicants as it can: the Employer agrees to interview and seriously consider for employment such applicants.

Section 4.2—The Employer shall notify the Union within seventy-two (72) hours of first employment, of any new employees in covered classifications.

Section 4.3—The Employer shall send to the Union each month a list of the names of newly hired employees and of those who have terminated their employment during the same period.

Section 4.4—Students shall not be used as relief for regular employees *except in emergencies*.

Section 4.5—It is agreed that all employees covered by this Agreement shall be recognized as combination workmen and may be required to work at any type of work as the need may arise.

Section 4.6—The Employer shall be the sole judge of the qualifications of all employees and shall have the sole right to hire and discharge any employees.

Except in cases of immorality, use of alcoholic beverages, dishonesty, untidiness, absenteeism, tardiness, failure to get along with the students, insubordination, or similar conduct, two (2) weeks' notice or two (2) week's pay in lieu thereof shall be given in cases of dismissal. Absolute proof of these exceptions shall not be necessary to constitute grounds for dismissal, but only a moral certitude as to the facts. If an employee feels that he has been unjustly terminated he shall have the right within fifteen (15) days to a hearing before a Board which is to be established under Article V.

No employee or applicant for employment covered by this Agreement shall be discriminated against because of Union membership or Union activities.

The Union agrees that employees covered hereby shall be admitted to membership without discrimination because of race creed, color, or national origin. It is understood that the Employer is an Equal Opportunity Employer and that qualified applicants for employment shall be referred by the Union to the Employer without regard to race, creed, color, or national origin.

The normal policies of the College regarding retirement for age shall apply to employees covered hereby.

Reductions of force will be based on seniority within each classification (janitor, watchman, etc.).

ARTICLE FIVE—SETTLEMENT OF DISPUTES

Section 5.1—All difficulties arising out of the interpretation of this Agreement, or its application between the parties hereto, shall be taken up for settlement within five (5) days notice in writing of the complaint. The Union will be represented by one Business Representative, and the Employer by one authorized agent. If the above parties are unable to agree, the matter shall be referred to one umpire selected by the Union and the Employer who shall be a competent and disinterested person, and who shall have the deciding vote in the matter at issue. The decision of the aforesaid, or the umpire, shall be final and binding upon all concerned. Each party shall pay one-half (½) of the costs of the third representative or umpire. There shall be no interruptions of work by the Employer or by the employees, pending, during, or after such final adjustment.

Section 5.2—The Employer and the Union, realizing that a college is different in its operation from industries because of the type of service rendered to the community, and for humanitarian reasons, agree that there shall be no lockouts on the part of the Employer, nor suspensions of the work on the part of employees, it being one of the purposes of this Agreement to guarantee that there shall be no strikes, picketing, or work stoppage, and that all disputes shall be settled by adjustment between parties, as herein provided.

ARTICLE SIX—HOLIDAYS

Section 6.1—The following shall be recognized as holidays: New York's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day.

Section 6.2—If other official college holiday time is granted to non-academic employees generally by the Employer, it shall apply also to employees covered by and under this Agreement.

Section 6.3—Employees working on such an official college holiday shall be granted, at their option, either (1) compensatory time off during the week preceding or following the holiday, for which they will receive their full regular pay, or (2) extra pay, at their regular rate, for the time worked on such a holiday.

Section 6.4—Schedules of watchmen will ordinarily include work on holidays as part of their regular duties and for regular pay without overtime, for the necessary protection of college property during such periods. Watchmen working on holidays shall be granted, at their option, either (1) an adjustment of their schedules so that they will have total time off, without reduction of regular pay, equal to the total official holiday time received by other covered employees (but such time off will not necessarily coincide with the holiday dates themselves, or (2) extra pay, at their regular rate, for the time worked on holidays.

ARTICLE SEVEN—VACATIONS

Section 7.1—All employees who have been continually in the employ of the Employer for a period of:

Six (6) months may take one (1) week's annual vacation with pay.

One (1) year shall receive two (2) weeks' vacation with pay.

Five (5) years shall receive three (3) weeks' vacation with pay.

Ten (10) years shall receive four (4) weeks' vacation with pay.

Section 7.2—In the event of termination of employment prior to six (6) months, no vacation is accrued. In the event of termination after six (6) months, an employee shall receive one-twelfth (1/12) of a two week vacation per month of employment.

Section 7.3—Vacations shall be taken at times desired by employees as far as practicable but the final allotment of vacation period is reserved by the Employer to insure orderly and efficient operation of the institution.

Section 7.4—Vacation pay shall be based upon the employee's regular schedule of hours of work per week and his regular rate of pay at the time the vacation is taken.

ARTICLE EIGHT—HOURS OF WORK

Section 8.1—Eight (8) hours shall constitute a day's work and forty (40) hours shall constitute a week's work. All work in excess of eight (8) hours in any one (1) day or forty (40) hours in any one (1) week shall constitute overtime and shall be paid for at the rate of time and one-half (1½). The forty hour week shall be worked in five (5) consecutive days.

Section 8.2—Work schedules shall provide for an additional one-half (½) hour each day, on the employees' own time, for lunch or supper.

Section 8.3—No employee shall be called for less than four (4) hours work in any one (1) day. Any employee called back after the regular shift, if he has already worked eight (8) hours, shall receive at least two (2) hours' pay at the overtime rate which shall be time and one-half (1½).

Section 8.4—No employee shall be required to work a split shift unless it is mutually agreed upon by the employee, the Union and the Employer.

Section 8.5—From time to time an individual may work for the college in both the classifications of janitor and watchman. The Employer shall not require any individual to do so. If he does, he qualifies for overtime pay according to total hours worked in one classification, not in both added together.

Section 8.6—Any working time requiring overtime pay must be requested and approved in advance by the Supervisor.

ARTICLE NINE—SICK LEAVE

Section 9.1—Employees shall be entitled to a maximum of twelve (12) working days sick leave annually. This is accumulated at the rate of one (1) day per month, effective when hired, but no sick leave is granted during the first six (6) months of employment, and the accumulation shall extend over a period of two and one-half (2½) years to a total of thirty (30) days.

Section 9.2—An employee who terminates after two and one-half (2½) years of employment shall be entitled to the following sick leave:

From July 1, 1973, to June 30, 1974, ½ of accumulated sick leave.
From July 1, 1974, to June 30, 1975, ⅔ of accumulated sick leave.
From July 1, 1975, to June 30, 1976, all accumulated sick leave.

Section 9.3—Employees are expected to give two (2) weeks written notice of intended termination. Failure to give such notice may result in loss of any earned sick leave pay. The Employer agrees to be reasonable and observe cases of hardship.

Section 9.4—Sick leave is not allowed for any illness induced by the excessive use of alcoholic beverages, drugs, negligence, or a violation of law.

Section 9.5—Sick leave is defined to include emergency leave of up to three (3) days for attendance at the funeral in the event of a death in an employee's immediate family. However, when such funeral attendance involves extensive travel, up to five (5) days sick leave may be granted.

Section 9.6—The immediate family is defined as father, mother, brother, sister, wife, husband, children, mother-in-law, father-in-law, and grandparents.

Section 9.7—The Employer may require proof of sickness or death.

ARTICLE TEN—BENEFITS

Section 10.1—The normal college policies covering benefit plans for non-academic employees, who are not administrative officers of the College, shall apply to employees covered hereby. Benefit plans include social security, retirement program, health and hospitalization plan including major medical, state industrial accident insurance, tuition remission, salary continuation insurance, mortgage loans, and the Portland Teachers Credit Union. Employees may initiate participation in the College retirement program if they have not reached age sixty-two (62) at the time of application and are otherwise eligible according to the general policy on retirement for members of the college staff. The Employer shall notify the Union when changes in benefit plans are made.

ARTICLE ELEVEN—PAYDAYS

Section 11.1—Employees covered by this Agreement will be paid every other Thursday (commencing July 2, 1970) for the two week period ending the previous Friday.

ARTICLE TWELVE—REDUCTION OF PAY

Section 12.1—No employee shall receive a reduction in pay by reason of the adoption of this agreement.

ARTICLE THIRTEEN—WAGE RATES

Section 13.1—The Employer agrees to pay the employees covered hereby, and the Union agrees that its members will accept wages for the various classifications, continued in the schedule of minimum wages attached hereto as Appendix A, and by the reference, made a part hereof.

ARTICLE FOURTEEN—TERM OF AGREEMENT

This Agreement shall be in full force and effect during the period from July 1, [illegible]973, to and including June 30, 1976.

[illegible]ither party desiring to change, modify, or terminate this Agreement may do so [illegible] giving written notice to the other party of its intent to do so, at least sixty (60) days prior to the 30th day of June, 1976. In the event such notice is not given this Agreement shall continue in effect for the ensuing year, and annually thereafter, until a notice, as aforesaid by the party desiring the change, is given the other party not less than sixty (60) days prior to any succeeding anniversary date (June 30). Effective date of any modification or change, after notice, as aforesaid, shall be the first day of May in the year in which such notice is given, unless otherwise mutually agreed.

Dated at Portland, Oregon, as of the ——— day of ——————, 1973

For the employer: Reed College

For the union: Service Employees Union, Local No. 49

TROY WATTS, *President.*

MARTELL F. BLAKE,
Secretary-Treasurer.

Appendix A—of Agreement as of July 1, 1973, between Reed College and the Service Employees Union, Local No. 49.

From July 1, 1973, to and including June 30, 1976, the following schedule of minimum salaries and wages shall be in effect beginning with the effective date indicated:

	Effective July 1, 1973	Effective July 1, 1974	Effective July 1, 1975
Janitor and janitress: For starting period not to exceed 3 mo (per week)	$109.72	$117.72	$123.72
Janitor and janitress: After not more than 3 mo (per week)	112.02	120.02	126.02
Watchman: For starting period not to exceed 3 mo (per week)	112.02	120.02	126.02
Watchman: After not more than 3 mo (per week)	113.18	121.18	127.18
Leadman or lady (per week)	117.80	125.80	131.80
Forelady (per week)	120.10	128.10	134.10
Janitor or watchman on hourly rates (per hour)	2.74	2.94	3.00

Mr. O'HARA. Our next witness is John Bunzel, who is president of California State University, San Jose, Calif.

Dr. Bunzel has won his reputation in this field as a student of these problems.

The committee has been looking forward to hearing from him.

Dr. Bunzel?

TESTIMONY OF JOHN BUNZEL, PRESIDENT, CALIFORNIA STATE UNIVERSITY, SAN JOSE, CALIF.

Mr. BUNZEL. Mr. Chairman, thank you for those nice comments. I have been following these hearings with some very deep interest. I have been involved in this area for some 2 to 3 years.

I have heard some of the testimony that has been presented here, not only by Mr. Shanker, whom I heard this morning, but by other witnesses.

I feel somewhat like Zsa Zsa Gabor's fifth husband. I know what to do. But I don't know how to make it interesting.

I appreciate very much the invitation to appear before this committee. Both as a private citizen and as an educator I have been an active participant for more years than I care to remember in the struggle against discrimination and unequal treatment, and I am delighted to reaffirm this commitment today.

I also welcome the opportunity to join with you and others who are examining recent efforts of the Government to forbid discrimination and insure equal treatment not only in our colleges and universities but everywhere—specifically, the policy and program of affirmative action.

In other forums during the past several years I have engaged in public debates and written about affirmative action and the purposes and consequences implicit in its requirements for higher education. My comments today will be more general as I try to address myself to a central question: Is affirmative action, in terms of what it requires and encourages, both implicitly and explicitly, consistent with the principle of equality?

Executive Order 11246 prohibits discrimination, commands equal treatment, and requires affirmative action to eliminate the former and accomplish the latter. But to no one's surprise such terms as "discrimination," "equal treatment," and "affirmative action" do not lend themselves to unanimous interpretation or straightforward application. The result is that the program of affirmative action developed within the Federal bureaucracy has been adopted and claimed by various individuals and groups for a wide range of purposes.

I will pass over the administrative and practical problems which I am certain have already been identified before this committee. I would simply say that educators around the country are still troubled by the uneven compliance activity of the Department of Health, Education, and Welfare and, within the Department, the Office of Civil Rights and its 10 regional branches. The Labor Department's regulations clearly modeled for industrial employment are so sweeping and universal that all contractors, except the construction industry, are lumped together. But surely it is recognized that a university is not a coal mine or a steel industry or General Motors. Simply stated, the regulations do not easily or precisely fit the special character and conditions of the academic world.

There are other problems. One cannot be certain, but there is reason to believe that the standards for approval of affirmative action plans submitted by colleges and universities have become more rigorous and strict. Some programs previously approved apparently do not meet the current requirements. As of April 1974 less than 20 plans from the 4-year institutions of higher education had been approved by OCR. Furthermore, the proliferation of antidiscrimination policies and enforcement procedures has created a situation in which the standards established by one agency may be in conflict with another—or, equally troublesome, may be subject to inconsistent interpretations.

My principal concerns, however, are with the confusion in meaning and direction of affirmative action/equal opportunity policy.

Consider the issue of "goals" and "timetables." The Civil Service Commission, it appears, looks upon goals and timetables as a way of measuring an employer's success in administering an employment program that does not violate the principle of "merit." Other agencies seem to view goals and timetables simply as a device to measure the number of women and minorities recently hired.

The difference is more than one of emphasis or degree. It reaches a fundamental question: Is affirmative action a program and process intended to provide, now and in the future, equal opportunity and treatment to everyone without regard to race, color, religion, sex, or national origin, or is it a program designed to bring about as rapidly as possible the same distribution of results as would have occurred had there been no past discrimination in this country?

The latter view is result oriented. It leads to a pronounced tendency to consider race and sex by those who must choose among applicants. It is also much more likely to result in discrimination against whites and males. Why? Because—according to this view—the best test, indeed the only real test, for determining whether discrimination is being remedied is a results test that will show if women and minorities are being hired in sufficient numbers. But it is realistic to believe that these results can be achieved without using race or sex as a criterion in making decisions about whom to hire?

Consider still another example of where the basic difficulty lies in the ambiguity of Federal policy and its purposes. The prohibition of employment practices in title VII of the Civil Rights Act which would deprive or tend to deprive someone of employment opportunities or otherwise adversely affect his status is much too vague. What has happened is that any practice which adversely affects someone in the preferred groups is taken to be a practice which discriminates because of that individual's race, color, religion, sex, or national origin. This is the sophistry which renders the policy dangerous.

I think it is fair to say that every thoughtful and fair-minded American agrees with title VI of the Civil Rights Act which states that "no person in the United States shall, on the ground of race, color or national origin, be . . . subjected to discrimination under any program or activity receiving Federal financial assistance—in short, the elemination of discrimination—because of in employment everywhere, and the encouragement of positive action to accomplish that elimination. But I would point out to the members of this committee that it is neither necessarily nor logically true to say that a practice or policy which adversely affects is one which does so because of race, color, religion, sex, or national origin.

The fact is that the courts and the compliance agencies have almost succeeded in eliminating the concept "because of" or "on the grounds of" from our understanding of discrimination and discriminatory practices. This elimination has far-reaching consequences. In principle and practice the intent of the law and Federal policy has been shifted from the elimination of "discrimination because of" and equal treatment to a race-conscious practice of preferring some groups over others that is necessarily a step into discrimination in employment. I think the Congress must decide whether this is indeed its intention.

A similar point can be made with respect to the concept of underutilization. The claim is frequently heard that statistical underrepresentation of women and minorities in employment is irrefutable proof of sexual and racial discrimination. For some people it is a seemingly powerful argument because they automatically equate discrimination with underrepresentation. In their view the fact that women and minorities are underrepresented proves they are the victims of discrimination.

But does it? Are we really entitled to conclude that because of the statistical underrepresentation of women and minorities on the faculty of a university there is clear-cut evidence of discrimination? I submit that underutilization is not in itself discriminatory, nor is it necessarily or conclusively a sign of past or present discriminatory practices. I am not arguing that underrepresentation never provides evidence relevant to the discovery of discrimination. Of course it might. But does it constitute prima facie evidence of discrimination?

I believe Congress should be urged to consider the establishment of guidelines which would treat underutilization as an evidentiary problem in which the burden is upon the Government to demonstrate in the particular case that the underrepresentation in question is a consequence of deliberate discrimination.

It should be noted that goals and timetables are tied to the concept of underutilization and the requirement to eliminate it. It should also be noted that goals and timetables must in practice be the functional equivalent of quotas, and are necessarily a form of preferential treatment.

Thus one is led back to a major question: Is the intent of Congress to eliminate deliberate discrimination, "discrimination—because of," or is this merely a legal fiction masking the real intent of forcing employers everywhere to hire and promote more women and members of certain minority groups regardless of whether there has been real discrimination or not? Is the aim of Federal policy to eliminate discrimination and thereby promote equal opportunity, or is it to force a dramatic equalization of economic conditions for a selected segment of the society?

I was an early and strong supporter of the Civil Rights Act of 1964. It was a big step because it moved this country forward in its efforts to eliminate discrimination in our society. As identified in the act, discrimination was not a misunderstood term. Nor was its approach to discrimination statistical or based upon a mass of data or a numbers game. In title VII its point of departure was the particular action of a given employer with respect to anyone who applied for a job. Each job applicant, regardless of race or gender, must be treated as an individual and human being and judged in terms of his or her talents and qualifications. At bedrock, the act was a call to all Americans to stop thinking in terms of common stereotypes.

Affirmative action is not the legal and policy offspring of the Civil Rights Act It has a different angle of vision and in crucial respects points in a different direction. In the hands of some of its most ardent defenders, affirmative action would have a university try to hire so many from this group or that group, or from one sex rather than another. Title VII says only that an employer must not refuse to hire some one because of his or her membership in one group or another or in one sex or another.

Affirmative action encourages a policy of preferential treatment for women and minority group members—and for some affirmative actionists the real mandate is a preferential policy of proportional employment. In this view, arithmetic proportionality becomes the defining principle of equal treatment—and since certain preferred groups are not, by this definition, treated equally, they must be hired in arithmetic proportion. The syllogism is admittedly inexact, but the point, I think, is made.

Title VII does not approach the problem of discrimination in terms of proportions or ratios or percentages. These was no requirement in the Civil Rights Act that an employer must maintain a racial balance in the work force. That would have required an employer to hire or refuse to hire on the basis of race which was strictly prohibited. Title VII said an employer would be guilty of discrimination if whites were hired when they were less able and qualified than available blacks.

The point of title VII can be put another way. It prohibits discrimination not against blacks or women, but on grounds of race or sex.

Professor Howard Sherain has drawn attention to the "classic" analogy given in justification of affirmative action: If you have two runners and one is shackled, the one without the shackles will go further obviously. If after the race begins, the shackles are removed from the second runner, he will still be behind if the race continues. How do we help the now unshackled runner catch up?

Title VII removed the "shackles" from the black and female "runners." Affirmative action wants to let them "catch up." But as Professor Sherain points out, affirmative action under Executive Order 11246 does not bring the black or female "runner" to a position of "equal treatment" with the white, male "runner." It deals not with treatment but with results. "The affirmative action of 11246," Professor Sherain says, "tells the scorekeeper that he must 'make a good faith effort' to insure that the black runners and the female runners win at least *x* percent of the races."

The true character of affirmative action policy must be seen against the backdrop of some significant changes underway to redefine equality in America. In higher education as well as in other areas of society, the principle of universal access has been accompanied by a shift from privilege to right, from equal opportunity to equal representation, from equality of individual opportunity to equality of group achievement. Further, traditional notions of equality of opportunity are under attack by those who want the Federal Government to enlarge its role in shifting the emphasis from an equality of opportunity through equal access to a positive and interventionist responsibility to bring about an identity of outcomes—in short, an equality of results.

The transformation is one of enormous proportions. I am concerned that the means by which this shift in values will be accomplished in higher education is the strategy of a quota mentality which seeks, for example, to award faculty appointments not on the basis of individual achievement and merit but in terms of group attribution.

I do not believe the Government should be in the business of treating groups of certain ancestral background differently from those of other backgrounds. The trouble with quotas under any name or guise is that they put into practice the pernicious belief that jobs—or any other rewards—should be assigned and equalized on the basis of the new ascriptive principle of group identity rather than on the individual's ability and accomplishment. As I have suggested earlier, the logic of equal results for a group is proportionate representation and preferential treatment, and the strategy for group representation is a quota system.

Affirmative action in practice has moved from eliminating discrimination to increasing the representation of certan groups over a specified period of time. My quarrel is with a preferential policy aimed at proportionate employment of preferred groups which is supposed to mean equal opportunity. We are apparently asked to believe that equal opportunity means some fixed percentage of the results, and that equality does not mean equal rights. I am not persuaded.

My own values lead me to support a program of affirmative action that has as its major goal the elimination of all kinds of discrimination and accepts the principle that an individual's worth has a higher moral claim than his color, his sex, his group or class identity, or his origins. I also believe that there is no such thing as black justice or brown justice or female justice. There is only justice. Justice wears her blindfold that she may recognize no favorites, but she holds a scale in which merit is weighed.

Mr. BUNZEL. Thank you.

Mr. O'HARA. Thank you very much, Dr. Bunzel.

I was very impressed in your statement by one of the questions you raised that has to do with the intent of Congress in enacting title VII of the Civil Rights Act.

I have looked at the act many times, of course. During your testimony I dragged out my copy and looked at it again. I didn't believe that the congressional language was as broad as was suggested in your testimony although perhaps the interpretation has been that broad.

I look at section 703A–2 and 703C–2. Section 703 sets up unlawful employment practices, 703A for employers, 703C for labor organizations, 703A–2 applies to employers:

> An unlawful employment practice to limit, segregate, or classify employees and applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such an individual's race, color, religion, sex or national origin.

Although the law talks in terms of depriving an individual of employment opportunities and talks in terms of adversely affecting his status as an employee, the employer may not limit, segregate, or classify his employees in a manner that does that because of such individual's race, color, sex, and so forth.

So I think the intent of the Congress at least is pretty clear. Wouldn't you agree?

Mr. **Bunzel.** I do, Mr. Chairman. As a matter of fact, what I was trying to suggest is that title VII does argue that discrimination "because of", whether it is job classification or other discrimination because of a person's race, color, and so on, is prohibited.

But I am afraid what has happened in many of the discussions with some of the Federal officials is that some of the guidelines are inconsistent. The whole concept of discrimination "because of" has been minimized. What is now being put forward is that we have got to do something more positive.

God knows we all feel there is a positive need to move to eliminate discrimination. But do we move positively and affirmatively when certain kinds of discrimination in favor of some are justified because certain groups in the past have suffered?

There is a conflict between equality of opportunity here and the desire to achieve equality of results.

So we have almost reached the point, it seems to me, in many of these debates and discussions where people must be treated unequally in order to achieve equality. I don't believe that was the intent of the Civil Rights Act.

I think this is sometimes the intent of those who talk in the affirmative action arena.

I think there has been some change and some slippage from this point of view.

I have had discussions and I have been in meetings where in point of fact the predominant tendency has been to move away from being hung up, as it were, on simply eliminating discrimination "because of" and moving to something that would be more productive of results.

Can a democratic society justify this kind of discrimination? Some of us are old enough to remember—and I have heard Mr. Shanker this morning talk about it—when veterans of the Second World War were coming back to campus. I happen to have been one of them at the time.

One of our major concerns at the university 25 or 30 years ago that I attended was to disabuse that university from the practice of requiring pictures for identification on application forms and disabuse the university of requiring an applicant to identify himself by race or religion and to get away from the pernicious practice of the quota system which was used to include and exclude certain groups.

We won that battle in higher education. My concern now is that for what I presume to be higher moral values we are back to a practice of a quota mentality. It bothers me.

Mr. **O'Hara.** I can see you are hopelessly out of date, Dr. Bunzel. That is your problem and mine. We are suffering from something of a generation gap.

Mr. **Bunzel.** Very possibly.

Mr. **O'Hara.** Because I went to school at the same time. That was my objective, to make sure that by George you wouldn't get pictures, you wouldn't get information as to race or religion of the applicant and so forth. You had to treat applicants without regard to those irrelevant factors.

No one thought that you would have to do those things now. I know Michigan State had an article about the experience they had when all those students had to identify themselves with respect to their ethnic background, religion, and so forth.

Mr. **Bunzel.** We had that experience at San Jose State University. Several years ago the regional office of HEW asked for a compliance review or what was to be a compliance review.

The first request—these are more than requests, Mr. Chairman—they call them "requests" and we follow them—was that faculty and staff be identified by race and so on for HEW purposes on computer cards.

This raised a variety of questions which I am sure you are familiar with. There has crept into the academic world now what is known as the "eyeballing" technique. The assumption is made—and I have made this assumption—that a faculty member should not be ordered to divulge his race or religion or what have you if he or she chooses not to.

The position we took was that we would give an option to an individual, that it was the individual's choice whether or not that background information was something that that person wanted to divulge.

But we are told, "We need the data. If we can't get it that way, then I think perhaps you ought to do it in another way."

One of the ways, for example, is to ask the dean or the department chairman to eyeball his faculty members and make an eyeball definition or classification, by race, with or without the knowledge perhaps of members of his own department.

This raises some interesting questions too. Some of these have not been entirely resolved.

The question is a tangled one of means and ends. Then there was the question of whether there are any limits to the right of discovery of a compliance agency. That is a legal question. Fortunately, I am not a lawyer.

Mr. O'Hara. Dr. Bunzel, I know you are well aware, but I thought it might be well in the hearing record to get our agreement on what the actual intent of Congress was.

But here again the executive branch treats the enactments of Congress as an expression of pious hope which they are free to disregard if in their superior wisdom they think it would be beneficial.

Mr. **Bunzel.** We have noticed that.

Mr. O'Hara. Yes. Over a period of time the realization crept in on me that that is what was happening.

Mr. Bunzel. Mr. Chairman, you mentioned title VII. Section J, there was an interpretive memorandum by Senators Clark and Case in their floor management of this act in the Senate.

I am quoting from what they said.

> There is no requirement in Title VII that any employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race.

I think you are quite correct. The intent was pretty clear.

Mr. O'HARA. Very clear. I take the position that in the name of administering these laws we are witnessing violations of title VII and title VI of the Civil Rights Act of 1964 by the imposition or indirect imposition of quotas.

I have finally figured out the difference between goals and quotas. Goals are set forth or hoped for results. You use quotas to reach the goals. So there is a difference.

Mr. BUNZEL. Yes.

Mr. O'HARA. They are not requiring quotas, you understand. They are only setting goals and if anybody is requiring quotas it is the employer who is doing that.

Mr. BUNZEL. It is quite a piece of legerdemain that has taken place.

Mr. O'HARA. Yes.

Mr. BUNZEL. When the question gets down to the chairman of a department at a university we now talk in a given context, that goals must be set.

So the conversation is likely to be, "Well, HEW is mandating that over a period of time—while we may not be able to make it we have to more or less have some goals."

So what happens in practice is that you have personnel committees saying "Maybe this time we ought to be looking for someone who is this or that" rather than saying "We have a position open that happens to be in the department of History, a position in English History. We ought to try to find the best person available for this job."

There is a story that I was told several years ago, which I am also told is not apocryphal, that one of the regional officers of HEW was told a similar story about an individual department looking for, say, a specialist in English history.

They found that there was a minority or a woman available in American history. The chairman of the department was told about this person.

The chairman said, "We are looking for somebody with a specialty in English history."

The rejoinder was, "Well, retrain her."

This notion may not be typical. But it is the kind of thing which suggests a lack of sensitivity to what a university is and is not.

One of the things it is not is a training program. If the Congress were to appropriate a great many more funds for the universities to become training programs in these areas, we might be able to consider some of those problems. I don't think it is very likely.

Mr. O'HARA. One last comment and then we will give Mr. Dellenback a question.

I notice an unfortunate tendency on the part of those associated with higher education—and there was a little of it that crept into your testimony—to say,

> Well, as far as the Labor Department Contract Compliance business goes, they are trying to apply to universities criteria that have been designed for industry. These criteria may be all right for industry but not for universities.

I hesitate at that a little because even though there are great differences I don't think that it is legitimate to say, "well, it is OK for a pox to be visited on someone else's house but not ours." I hope you will be careful about that.

Mr. Bunzel. I agree with you. But I would put it this way. Perhaps we are saying the same thing. I do not believe that higher education should ask for any exemption from or to be given a special treatment under present Federal policy.

I don't believe there is anything in a university's constitutional makeup, structure, or purpose that would suggest that we should be removed from national policy guidelines.

But my point would be that in the application of policy, those criteria which apply to the construction industry are not necessarily the same as those which are to be applied to universities.

Mr. O'Hara. You are not saying that the criteria that are now applied to the construction industry are now OK?

Mr. Bunzel. No, I am not suggesting that.

One thing that has gone through my mind, and I haven't developed it in all candor, Mr. Chairman, is whether or not with respect to the universities in these cases First Amendment rights should be considered with what that implies with regard to confidential files and a variety of things that are particularly characteristic of an academic community.

I haven't developed this. But I am teased by the notion. I think there is some merit to it, that there are a variety of values which attach to an academic community which make it neither better nor worse than the construction industry but make it different.

Mr. O'Hara. Thank you very much, Mr. Bunzel, for your testimony. It is very useful.

Mr. Dellenback?

Mr. Dellenback. Thank you, Mr. Chairman.

Dr. Bunzel, with regard to affirmative action, are you saying there should not be changes made in present practices or policy?

I suspect that you are troubled, and I know the chairman of the subcommittee is troubled, by certain procedures that higher educational institutions have practiced in selecting employees.

We had prior testimony that they failed to fully look at the available resources for employees. There is what has been referred to by various witnesses as the old boy practice of calling up a friend and asking if he knows anybody who is available. There is evidence of discrimination in salary practices and promotion practices.

I don't read your testimony as being critical of efforts to rectify these results—or am I wrong?

Mr. Bunzel. As a matter of fact I am delighted you raised this question because you are right. Two years ago this coming October I wrote an article in Change magazine on this same subject. If I may just quote a paragraph from it, it will go directly to the point you are making because you are quite correct. The higher education community has been derelict. The reason why I have been a supporter of affirmative action in terms of the need for vigorous recruitment efforts is that this has been an area that has simply not been given enough attention.

I said that what I thought we needed to do was to have an unprecedented search for qualified women and minorities, specifically.

We are doing this at our university at the departmental level to get right down to where it happens.

> Procedures should be established to include a current and realistic estimate of the pool of qualified people from which candidates will be drawn. The department must constantly strive to achieve the best faculty possible.
>
> All too often a departmental search is woefully incomplete and confined only to familiar channels that fail to inform women and minority groups of the existence of those jobs.
>
> To this end the administration should obligate the departments to demonstrate that they have reached out in their search for women and minorities.

I think that the major obligation that I shared, and shared long before it became known as affirmative action, is for departments in the academic community to make certain that they are not following simply the "old buddy" technique, that when they are looking for someone it ought to be broadcast widely and professionally and the search should be genuine. There is no way that an appointment will be approved until it has been demonstrated to the academic vice president at our university that in fact a full faith search was conducted for that opening and that includes written telephone call notes, all memorandums and letters to document the search, not just to make the assertion that it took place. It must be documented.

Mr. DELLENBACK. I am pleased to hear that. That is what I would have surmised from what I know about you. I didn't find any contradiction of that in your testimony, but I wanted to be sure that your position was clear on the record when you made the point of distinguishing as to what affirmative action is doing, or is not doing in seeking to add people to the mass and what it means to have discrimination "because of" versus simple discrimination.

You are not saying that these other activities that are being done under the name of affirmation action are not good things.

Mr. BUNZEL. Absolutely not. I appreciate that opportunity.

Mr. DELLENBACK. I go on record myself as saying very strongly that it is clear to me as we have sat through days of testimony that there are evidences of discrimination in the worst sense. I don't mean by this, however, that every institution is involved.

On page 3, I think you pose the fundamental question as to whether affirmative action is a program intended to provide equal opportunity and treatment for everyone, or whether it is a program designed to bring about as rapidly as possible the same distribution of results as would have occurred had there been no past discrimination.

You put your finger on an abuse of affirmative action.

Like the chairman, I am sorely troubled when I look at the Equal Employment Opportunity Act and see the following very clearly articulated:

"Nothing contained in this title shall be interpreted to require an employer, employment agency, labor organization, subject to this title, to grant preferential treatment to any individual or to any group because of race, color, religion, sex, or national origin."

I reaffirm my own feeling that when we deal with this kind of legislation, we mean that we are not saying there should be a granting of preferential treatment or that we require any granting of preferential treatment.

Congress has not yet done everything it should do to bring about real equality of opportunity. I am sorely troubled by some things that exist in this Nation as far as minorities are concerned. I think we have obligations that we have not met. But I also think that this particular law should not be abused and twisted to reach the results that we want to reach. I think your emphasis on that point of distinction is very valuable to us.

We found in dealing with some of the agents of the enforcement departments that they don't seem very clear on that point of distinction. I know from talking to some people in my district that they come close to requiring whatever semantic phrase they happen to use.

I find your emphasis on that point very helpful and we very much appreciate you being here with us.

Mr. BUNZEL. Thank you.

Mr. DELLENBACK. You can now comment on what I have said about what you have said.

Mr. BUNZEL. It is a real tangled problem area that we are dealing with here. It is difficult to put into a short statement everything that one wants to say. I have thought about this as you have. We share a mutual concern about some very serious questions.

In the past I have tried to balance my concerns about some of the inefficiencies and policies and practices now.

I see a terribly important and indeed an urgent need.

I think I would simply say in closing that affirmative action is to me not simply a question of enforcement. I understand that.

But the kind of affirmative action program that I have in mind would be substantial and very significant. I think the Federal Government, for example, and I have written about this before, ought to provide help for fellowship programs for people before they become incapacitated students.

We need to rescue good minds at the high school level before they become dull and ill-equipped to go on to college. This Nation, I think, would be willing to pay for an educational program that would benefit the handicapped in the full and profound sense of the term, by which I mean giving equally on a nondiscriminatory basis a chance to overcome poverty, a bad family situation, and the like.

I think the most promising hope in all of this lies in a combination of longer term efforts by introducing minority students at the earliest possible stage to the opportunities available to them in medicine, law, and so-on, so that the ranks of the truly qualified will be legitimately expanded.

I am sure other witnesses have made the same point here.

If one were to take it on a statistical basis over a period of time and simply use random figures, you could get the qualified applicant pool increased in this way. We are going to be doing far more, without discriminating against anybody, to reach the kinds of results that we all want.

Mr. DELLENBACK. I appreciate that very much.

Thank you.

Thank you, Mr. Chairman.

Mr. O'HARA. Thank you very much, Dr. Bunzel.

Mr. BUNZEL. Thank you, Mr. Chairman.

I appreciate it.

Mr. O'HARA. Our final witness today is an old friend, one of the most effective citizens to appear before our committee. He has appeared before this committee and others on many occasions, Clarence Mitchell, who is director of the Washington bureau of the National Association for the Advancement of Colored People.

Mr. Mitchell?

TESTIMONY OF CLARENCE MITCHELL, DIRECTOR, WASHINGTON BUREAU, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Mr. MITCHELL. Thank you very much, Mr. Chairman.

I am in possession of a written statement which I would like to read. But before I do it I want to offer something for the record which refers to the exchanges between you, Mr. Dellenback, and the previous witness.

You know, I was raised in the Episcopal Church. I got married to a Methodist. We have a system in our Methodist church where on Sunday the people can come up to the altar rail for the purpose of saying prayers, either asking for something or being thankful for something. I usually go up to give thanks. But the next time I go I am going to be petitioning for a greater supply of forbearance than I now have because I just think it is incredible that the history of title VII can be twisted and distorted the way it has been distorted in the exchanges that have taken place within that.

I want to offer for the record proof that it was the intent of the Congress of the United States when title VII was enacted and subsequently strengthened in 1972 to take cognizance of and to give its blessing to affirmative action programs.

As you know, Mr. Chairman, you and I were comrades in arms in the work of title VII and when we got to 1972 on the amendments we did something which we had an opportunity to do.

It isn't often in American law, as you know, when a statute is passed that the courts to interpret the meaning of that statute, they rely upon the legislative history established by debates, as established by the committee hearings. Then the courts announce what they believe is the effective law.

Sometimes many years pass before legislative bodies have the opportunity to change what the case law has enunciated or to affirm what the case law has enunciated.

In 1972, we had what I have said was an unusual opportunity because we had an opportunity to affirm or reject what the courts were saying about the meaning of title VII with respect to affirmative action.

Columbia University Human Rights Law Review officials were good enough to give me an opportunity to submit an article in volume 5 of the Law Review with respect to the amendments to the 1972 act.

On page 329 of that article I quote from the observations of Senators Williams and Javits with respect to the provision of 706G in which they say "the provision of this subsection 706G, the provisions of this subsection 706G, are intended to give the courts wide discretion in exercising their equitable powers to fashion the most complete relief possible." In dealing with 706G the courts have stressed that the scope of relief under that section of the act is intended to make the victims of unlawful discrimination whole and that the attainment of this objective rests not only elimination of the particular employment practice complained of but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be so far as possible restored to a position where they would have been had it not been for the unlawful discrimination.

Then I say further:

> In this connection it should be observed that there was some effort during the consideration of the bill to amend it in such a manner as to prevent the courts from establishing goals and affirmative action plans of employment. These efforts were unsuccessful and in this respect the courts are still free to take such action in this area as equity may require.

I carefully included the footnotes from whence those references are drawn. I offer for exhibit purposes that article because if there is any one clear thing that emerged from our experience in 1964 and 1972, we were dealing with title VII.

It was the overwhelming intent of the Congress of the United States to give the disadvantaged people, whether they were blacks, Mexican Americans, women or anybody else, a realistic remedy, not something on paper which said, "Yes, we are going to stop discrimination."

It was the intent of Congress to give the courts of this country—and I certainly think to the executive agencies of this country—the right to take such positive action as would give realistic results, not just paper compliance.

That is one of the great frustrations of the victims of discrimination, winning the case and not getting the remedy.

You were there, Mr. Chairman. I was there. I say, my recollection of what was the intention of Congress is unlike what you have just said. I will contend that.

Mr. O'HARA. I thank the gentleman for his observation.

Let me first give unanimous consent that the article to which you refer, to which I look forward to reading, will be entered in the record of the hearing. Without objection it is so ordered.

I respectfully dissent from any theory of legislative interpretation that says that failure of the Congress to adopt a particular bill or amendment would be construed as the congressional approval of the opposite.

I don't think, for instance, our failure to adopt equal employment opportunity legislation when it was first presented to Congress meant that we were in favor of discrimination in employment.

I don't think our failure to adopt an antilynching amendment on the occasions it was presented indicated we were in favor of lynching.

I don't think that our failure to adopt an amendment which you say was proffered—and I am sure you are correct although I don't recall it—in 1972 with respect to limitations on affirmative action programs means that necessarily we were in favor of all the ways in which those were being carried out.

Mr. MITCHELL. I didn't say that. As you will see if you look at the source that I refer to in the footnotes, you will find that the Congress did more than simply reject an amendment which was designed to kill affirmative-action programs.

The Congress expressly approved the court decisions and made an actual statement that had to do with affirmative action. In other words, Congress didn't just say "we are against those who are offering amendments." The Congress identified certain specific cases, one of which I think had to do with the Philadelphia plan, in which it said that these "cases are cases which we accept and believe are court law."

Mr. O'Hara. I think some Member of the House or Senate indicated that in a statement.

Mr. Mitchell. No, this was in the official—I have indicated in my points of reference where you can find this for yourself, Mr. Chairman.

Mr. O'Hara. I will be happy to look at that.

Mr. Mitchell. This is in the official report, conference report, of the House and Senate, which was subsequently accepted by both bodies, the House and Senate.

If there was any guidelines for courts as to what was the legislative intent of Congress I don't think it would have been clearer.

Mr. O'Hara. I will look at that.

Mr. Dellenback. Will the chairman yield?

Mr. O'Hara. I yield.

Mr. Dellenback. I am so respectful of the witness that I made a multiple trudge back and forth from another committee in order to be here to hear you.

But I am troubled, because of my great respect for you, about your disagreement with comments we said earlier.

Without seeking to go through the full legal argument at this time, I would make just two points.

I will read your article myself. But you know, and we know as lawyers, that legislative intent is a valuable tool to a court only in the event of an ambiguity. I think this is a misunderstanding of many people who follow Congress, and also many people within the Congress.

If a statute is clear on its face, legislative intent is very questionable to a court in seeking to interpret the statute because the language speaks for itself. Therefore, much of the dialog that takes place in the body of the Senate, or in committees, or in the body of the House is, in my opinion as a lawyer, highly questionable as to really writing legislation.

Second, you have referred in the Equal Employment Opportunity Act of 1972 to section 706. You refer very cogently to subsection 5G; 5G deals with engagement in an unlawful employment practice. Then it says what happens in those events.

If we look back to section 703 which focuses on what unlawful employment practices are, it is there that it explicitly says what constitutes unlawful employment practice, and there is to be no requirement in the title that says certain things must be done relative to granting preferential treatment.

So, as a matter of legal construction, we don't even get to a matter of interpretation of section 706, 5G, until we have first built into the law the structure of what is an unlawful employment practice.

We are bottoming our argument again on the thesis that I was referring to with an earlier witness. I don't seek to make a full legal argument. I don't want to take advantage of saying the last thing. I will read your monograph on this.

Mr. Mitchell. When I referred to the previous section, to put the subsequent statement in proper context, the statement which I read was trying to make two things clear. One is Congress gave to the courts extensive latitude in exercising their equity powers to correct discrimination.

Using that power, the courts, fully cognizant of that language which you and the chairman have read, about not doing anything to overcome imbalance and that sort of thing, fully cognizant, as you will see from reading the decision, nevertheless upheld the right of employers to engage in affirmative action programs and pursuant to the exercise of that right the courts got into trouble with a lot of people, some of them in Congress.

The next thing I read was Congress answer to those people who are saying, "Well, the courts went too far in giving affirmative action." I didn't spell out the language. I gave the reference where you can see it.

But the fact is that the Congress, being aware of the fact that the courts had distinguished between the restraint imposed with respect to quotas and things of that sort and the need to give a truly effective remedy had sanctioned affirmative action.

It was the purpose of the report, it was the purpose of those who voted to approve the report, to say, "Yes, these decisions of the court or the courts are consonant with the intent of Congress."

I think that what is happening is that when the executive agencies of Government attempt either to follow the path that the courts have chared for them or follow what Congress clearly approved in 1972, along come people that say, "Well, they are doing something contrary to what we intended because there is another part of the statute which says you can't have quotas and that sort of thing."

I know what we were trying to do in that period. Nobody wanted quotas. I don't want quotas if quotas imply a ceiling.

But what we were trying to do in that period and I think we succeeded is to devise language which would make it clear we wouldn't want quotas that would impose a ceiling but which would give latitude for establishing a floor above which we could reach decisions that would truly right the wrongs and truly give redress to people who actually are the victims of discrimination.

With that, if it is agreeable, I will go forward with my written testimony.

I am Clarence Mitchell, director of the Washington bureau of the National Association for the Advancement of Colored People. It is customary to express appreciation for an opportunity to present testimony to the committees of Congress. Today, I cannot say that it is pleasing to be here.

I sense that these hearings are harbingers of more of the emotional storms that now threaten our courts as they attempt to uphold the right of black children to attend integrated public schools.

In that connection, Mr. Chairman, there are seven members of this subcommittee all of whom voted for the Esch amendment to the Elementary and Secondary Education Act, which amendment in its original form would have permitted the reopening of closed cases in the area of school desegregation.

It is difficult to believe, because of the philosophy that they have every right to hold, that these members can look objectively at the things which are now before your subcommittee with respect to higher education.

We have noted in his letter of July 22, 1974, to the Honorable Caspar Weinberger, Secretary of the Department of Health, Education, and Welfare, Chairman James G. O'Hara stated that "generally speaking, our present focus is on what an institution must be and do in order to qualify for participation in federally financed programs."

Also an important purpose of these hearings is to "look at antidiscrimination activities of postsecondary educational institutions and any requirements, direct or indirect, which Federal agencies may suggest or impose, under statute, or by regulation or guideline, which bear on the question of an institution's compliance with titles VI and VII of the Civil Rights Act, applicable Executive orders and separately title IX of the Education Amendments of 1972."

I assume by Executive orders and title IX amendments you are referring there to the requirements that there be no discrimination on the basis of sex.

Because I have read the testimony of Chairman John Powell of the Equal Employment Opportunity Commission I am not including any statistics in this testimony.

Also I am sure that the committee knows about many of the so-called practices and recommendations that have emerged as a result of your inquiry.

Casting aside all pretenses of modesty, I want this committee to know that I am perhaps one of the best witnesses it could have on the unconscionable, cruel, and totally destructive racial policies of American educational institutions, starting at the kindergarten level and going through to the highest levels in the academic field.

Because I have known so well the snobbery, the discrimination and the racist practices in American education, I believe it is important for me to urge this committee not to tinker with the present laws that are designed to protect minorities against discrimination in higher education.

If one begins in the State of Minnesota, goes west to California, returns east by the southern route up the Atlantic coast, it is not difficult to see that the virus of racial discrimination continues to infect institutions of higher learning.

I would just like to say with respect to Macalester, when Mr. Arthur College in St. Paul, the University of Minnesota, the location of which is shared by the cities of Minneapolis and St. Paul.

I would just like to say with respect to Macalester, when Mr. Arthur Flemming, now Chairman of the Civil Rights Commission, was president of that college he instituted a program which was designed to try to accomplish a better inclusion of black and minority students in the university and the college life.

He left. Now as of this day I am told Macalester College is trying to wreck that program and trying to use Federal funds in a manner contrary to the way they are supposed to use them as spelled out in their agreement with HEW.

There is a black student who is the president of the student body of that school. He came to me for help to save the program. I tried to give him help. Evidently it wasn't adequate because the black students took over the administration building and sat in it to show their objection to the things that were being done to the program.

I would say that that is only the beginning of things that we are going to face in this country if we continue to try to undermine the benefits that have been gained for persons who are the victims of discrimination under law.

Over 30 years ago, when I was living in the Twin City area, a friend of mine who is now a distinguished skin specialist, was a medical student at the University of Minnesota Medical School. He was one of the few blacks who had been able to gain admission to the medical school.

As I understand it, as of now there is a dispute raging in the medical school of the University of Minnesota, where, upon investigation by the Minneapolis Urban League, it has been found that the medical school unfairly discriminated against six black medical students at the University of Minnesota Medical School. Thus, it would seem that there has not been much change in the medical school admission policy.

We also have complaints against the University of California. In fact our organization is planning extensive suits against the University of California.

We have disputes against the University of Maryland. There is now a case before the U.S. district court against the University of Maryland. The NAACP has filed with the Equal Employment Opportunity Commission a complaint against the University of Maryland for outrageous discrimination in faculty selection.

It is my opinion that those who want to preserve the old patterns of racial discrimination in American education are the chief supporters of unfair attacks on educational institutions that seek to bring racial justice to the campus.

By that I mean that there have been those who have come out in the press saying that the universities such as Harvard and Yale or others, who have tried to embark on affirmative action programs, have actually recruited people who did not meet the standard normally used in selecting faculty members.

I say that such allegations are just efforts to preserve the status quo, efforts on the part of those who want to follow the system which is set forth in this publication, "Anti-Bias Regulations of Universities," by Mr. Richard Lester.

Mr. Lester said something which the chairman put his finger on which I, too, thought unacceptable. The chairman pointed out that running through a lot of the arguments of these people who are saying HEW should be restricted in its efforts to halt discrimination in faculty selection, is the notion that there should be a different standard in the academic world from what we find in the world of industry.

On page 23 running through to page 29 of Mr. Lester's publication, called "Anti-Bias Regulations of Universities," which was a report prepared for the Carnegie Commission on Higher Education, he says a lot of interesting things about how institutions of higher learning select faculty members.

The gist of it is that, as the chairman or maybe it was Mr. Dellenback indicated, "Members of the club" go around and make checks on who might be available. Then the "club members" make a decision on whether these people are eligible for appointment.

Also there is a statement in here which is on page 23 which says "faculty assessment of an assistant professor for promotion to a tenure basis is based on a 5-to-7 year period of experience which ends in a decision either to promote or to terminate."

What industry could survive with that kind of a system where you keep an employee on 5 or 7 years before you decide he is going to accumulate enough seniority not to be peremptorily fired? That is what it amounts to.

I don't know of any labor union in the country which would stand for a system where after a person had accumulated 5 or 7 years of seniority he could be peremptorily fired.

Then Mr. Lester says on page 23, "civil rights rulemakers and compliance enforcers need to recognize that graduate study leading to a Ph. D. degree is not the qualifying experience for a tenured position at a major university. The testing period is usually in the first 5 to 6 years after completing the requirements for a Ph. D.

"It is in those years when one demonstrates whether he or she has the intellectual capacity, the ingenuity, the originality, discipline, and career dedication to make the outstanding contribution necessary to be a leading teacher-scholar in one's age group in a disciplinary field."

If we followed that kind of reasoning it wouldn't do any good to have these pools that Mr. Shanker and the other gentleman from San Jose who also talked in terms of establishing pools from which you could draw people who are capable of being qualified members of the faculties of these universities.

Such proposals are based on an elitist concept which is to say that if you are not a member of "the club," if you don't meet the standards set by the club members, then that is just too bad. We will not let you in as a faculty member.

Another interesting thing that is revealed in Mr. Lester's study is this. As those of us who are lawyers know, it is often possible to have a conflict between decisions in the various circuits of the U.S. judicial system.

Those conflicts are resolved when the matter reaches the Supreme Court. But until they are resolved the law of the circuit prevails.

Mr. Lester makes an attack on the HEW because there may be differences of interpretation in some regions as to what a given rule means; just as there are differences in judicial opinions between courts.

I would think in fairness if we want to be at all respectful of our system of government in this country you don't attack people because they have honest differences of opinion. You take those differences to the final source, which in this case I assume would be the Secretary of HEW or the Chairman of the Equal Employment Opportunity Commission to get those differences resolved. That is the way we do it in the judicial system of this country. I think this is the only sound way to get uniformity.

But what is worse, in Mr. Lester's own study he points out that there are variables in faculty selection among the universities of this country so that it would probably not be possible to write a single rule which would satisfy all of the different methods of selection.

It would seem to me that in many instances handling of affirmative action requires a case-by-case approach in order that on the basis of experience we can find whether there are ways of taking into consideration all these variables that apparently exist, as Mr. Lester says, in the academic system, and try to formulate a program which would deal fairly with persons who are subjected to those variables.

Our organization, meeting at its national convention in New Orleans, La., in July passed a resolution commending the University of Washington for its action of admitting black students to its law school. The text of the resolution is as follows:

"We commend the officials of the law school of the University of Washington for their courageous efforts to increase the number of qualified black students in that institution, thereby representing concerted efforts to end discrimination instead of empty rhetoric and meaningless theorizing.

"This action of the law school was challenged by a white student in the case of *De Funis* v. *Odegaard.*

"We condemn unfair tests and other biased methods that are widely used to cover up policies of excluding blacks and other minorities from admission to professional schools in general and law schools in particular.

"We assert that mere written tests alone are not reliable in projecting whether those taking such tests will be successful in professional schools or as members of a profession in later life. By including factors in addition to written tests the law school at the University of Washington performed an outstanding public service.

"We call upon those who believe in equal opportunity to follow the example of the University of Washington Law School and seek ways to accomplish positive results with affirmative action programs.

"We issue a stern rebuke to all who seek to short circuit positive programs to end discrimination in fact by raising the phony emotion-charged issue that the means to end 200 years of oppression is 'reverse discrimination.'"

I want to interject here again, Mr. Chairman, that your comment about making more places available is a thought that we share because, as the *De Funis* case illustrated, there were 1,700 people eligible for admission but they only had 200-and-some places.

We should not be required to choose among eligibles. This Nation should have means and money so that all 1,700 eligibles could get in. It was not a choice between white eligibles and black ineligibles. Everybody was eligible.

Those who talk loosely about the *De Funis* case try to say that black ineligibles replaced white eligibles. As a matter of fact when the rules of admission were clarified and made more realistic it was not only the black students who got in but some white students also got in who would not have been able to get in if the new rules had not been applied.

But those who attack the *De Funis* case don't bring that up. Anybody who doubts it, should read the Supreme Court of Washington's decision. It is crystal clear there.

Our organization was one of the groups that filed briefs in the defense of the university. I personally support the University of Washington for what it has done in trying to increase the number of black law students. I condemn unequivocally those who have dragged this matter into the courts and who by so doing have created a climate which undoubtedly will lead to a major confrontation between minorities if new cases of this kind are filed.

A great many of the black people of America believe that they are being denied access to faculty jobs and to student enrollment in many institutions because those already in such institutions operate on a concept of elitism and a philosophy of scarcity.

A great many of the black people in this Nation believe that there are groups of white people who falsely think that they alone can be trusted to carry out the responsibility of education in our colleges and universities.

There is a widespread belief among my people that the use of tests and other devices in the field of higher education are designed to screen out a majority of eligible blacks and to admit only a token few who meet the vague and unspecified personality requirements that have no relation to their ability or potential ability as scholars. As I have said, these are the views of many blacks in America and I say without qualification that they are my views also.

In the cities of Baltimore, Md., and Boston, Mass., we are now seeing the evil harvest of hate which has been stimulated by unfair attacks on the courts and government agencies that use the constitutionally sanctioned remedy of pupil transportation to end segregation in public schools.

If anyone wants to know what inspired the words of hate directed against Senator Edward Kennedy when he sought to talk with a voice of reason in his own State as Boston prepared to eliminate long-standing racial segregation in its public schools, it is only necessary to study the debates and the rhetoric that appear in the Congressional Record when the issue of pupil transportation has been before the House and Senate.

Out of the welter of words and emotion-triggering phrases there has emerged the code term of "forced busing."

To whites this has come to mean "we do not want black children in our schools or in our neighborhoods and we do not want white children sent to schools that are located in black neighborhoods."

In other words those who use the term "forced busing" are saying "we are against transportation of pupils in public schools even if it means maintaining unlawful and grossly unfair racial segregation in the public schools."

The mobs in Boston and the defiant white parents in Baltimore have taken their cue from the Congress. What Congress has stated in fierce words has been translated into clubs, bricks, vandalism, and violence in the streets of those cities that seek to achieve desegregation of the public schools.

I want to leave with this committee today a picture that is on the front page of the Baltimore Evening Sun of Tuesday, September 24, 1974. A little child is carrying a sign saying, "We are not going to Cherry Hill."

Cherry Hill is a black neighborhood. The signbearers are all white.

I would like also to submit the front page of the Baltimore Afro-American, which is a black newspaper, in which a white mother is shown transferring her child from the Booker T. Washington Junior High School.

I live in Baltimore, as some of you know. That school is one block from my home. I say if it was so bad that these white children aren't supposed to go there, why did I have to send my children to that school? Why is it that hundreds of black children are still going to that school?

If we really want to do equity in this country we ought to tear down the schools if they are unfit.

But if it is assumed that the black children can go to an inferior school then I don't see any reason why the whites should say, "oh, no, we don't want to go to it," because it is an inferior school or some other reason.

Mr. O'HARA. Without objection the newspapers to which the witness has referred will be included as exhibits before the committee.

Mr. MITCHELL. Thank you.

As we look at the chaos, anarchy, and hate that has been generated by unfair attacks on efforts to desegregate the public schools we are aware of the fact that there is arising a new form of destructive mischief in the field of higher education.

There has been coined a new term, innocent on its face, but deadly in its application. This new term is "reverse discrimination." It is a term used by those who wish to protect the status quo that we in the NAACP must face each time we seek to change the biased patterns in faculty selection or in admissions to colleges and universities.

We know from bitter experience that those who employ this term are no different from the framers of the so-called southern manifestoes against the 1954 school desegregation decision, the captains of so-called massive resistance to school desegregation and the propounders of numerous high-sounding but scoff-law phrases of "interposition" and "10th amendment guarantees."

It is my opinion that the atmosphere in the country at this time has been contaminated by phrases like "forced busing" and "reverse discrimination." Any efforts at this time to revise the laws that have been passed by Congress to protect blacks, other minorities, and women against discrimination would result in a long backward move into the laissez-faire period when the Government of the United States looked the other way as institutions of higher learning arrogantly maintained all white faculties, all white student bodies, all white teams in sports and at the same time shoveled Federal money collected from all of the taxpayers into their university treasuries.

I have a book here which, when I get another copy, I will present to you personally. It is written by Dr. Buell Gallagher who was the youngest college president in the Nation's history when he began as the president of a college in Alabama in 1932, at the age of 29.

He has a very distinguished academic career. He was president of City College of New York during the tumultuous days when all sorts of wild things were happening.

He points out on page 204 of his book, which is called "Campus in Crisis," that the high schools of this Nation have followed a so-called tracking system in which they have consigned blacks and other minorities to an inferior status.

He says the same danger exists in the proliferation of a tracking system at the postsecondary level. He points out that by using that system in California all or a great majority of upper-level people on the upper-level track get into the main part of the university whereas he says at the State colleges and the junior colleges—I don't know whether San Jose follows either one of those categories——

Mr. O'HARA. It is a State college.

Mr. MITCHELL. Blacks and other minorities get into the lower part of the spectrum. Then Dr. Gallagher points out that in the city of New York the same kind of system is now being applied which results in the blacks, Puerto Ricans, and others being shunted into the less desirable parts of the higher education system. Those who pass these tests or have some other kind of qualification get up into the higher levels.

I say that is wrong. I say it is snobbery. It is elitism. I am convinced after 30 or 40 years of dealing with American industry and with institutions of higher learning and even the Congress itself as well as the Federal Government, that tests are the best means of discriminating against people that I can think of.

We have either got to get rid of the tests or make some provision for having them fairer. I would not want to say that the whole Congress is guilty of extensive discrimination in employment, but the Washington Post came out the other day with a story about Members who are submitting discriminatory job orders.

I guess some thought that this was a new development. I knew that all along that Congress is one of the worst discriminators. But I always felt about Congress' practice that the people could get political redress in the districts from which Members of Congress come. I hoped the people would obtain that redress if their Members did not hire staffs on a nondiscriminatory basis.

I can't think of any kind of a test that would be devised that would introduce fair employment practices in the Congress of the United States with respect to staff and other personnel to be hired, because I am sure whatever test would be devised would come out in such a way as the same discriminatory pattern would continue.

Our organization fought the battle against this kind of unfairness that I have described in the universities from Maryland to Missouri, from Missouri to Oklahoma, from Oklahoma to Texas, from Texas to North Carolina, and in dozens of other places where we knew that blacks were being denied fair treatment.

We had one case where we had to go to court in Oklahoma just to get the black person who had been admitted the right not to sit behind a pillar that separated him from the rest of the class. Also, he was denied access to the cafeteria, except on a segregated basis. We corrected that, too.

I was present when we won the University of Maryland Law School case in 1935. Mr. Justice Marshall was then the plaintiff's lawyer in that case.

The suggestion was made after the case had been won that the black student sit two seats away from the other students. Needless to say, we didn't accept that.

But this is the kind of thinking which has existed in American universities and still exists.

The fight I refer to was a lonely, costly but exhilarating battle. Our opponents used the full arsenal of State power against us. We did not have the support of the Government of the United States when we fought that war.

It was almost as if an invading enemy had attacked the citizens of one part of our country and the Government of the United States had stood by while the embattled residents defended themselves against vastly superior forces.

It was only after we got title VI of the 1964 Civil Rights Act and more recently after we were able to get amendments giving the Equal Employment Opportunity Commission jurisdiction over discrimination of education institutions that we have been joined by the Government of the United States.

As I have read the questions addressed to Chairman Powell of the EEOC and as I have listened to the observations of some of the Members of the House, I detect the ominous implications that usually precede efforts to water down or destroy worthwhile legislation.

I would be dishonest and unfair to this committee if I did not say to you that I believe the end product of these hearings will be an effort to foreclose opportunities for black citizens in the field of higher education and to prevent them from becoming members of the faculties of institutions of higher learning.

Because I believe so strongly that efforts to restrict or exclude blacks from institutions of higher learning will be met with indignation and outright resistance on the part of some of the victims, I earnestly urge that this subcommittee work to make more funds and more places available for all Americans as students and faculty members at our institutions of higher learning.

Much of the current controversy about efforts to discriminate in higher education today is due to the lack of money with which to provide adequate opportunities for qualified people.

There is also a continuing effort of some in the academic field to place as many obstacles as possible in the paths of blacks and other minorities who seek to enter the areas of learning as students or wish to serve as faculty members.

Accordingly, even when there are resources to increase educational opportunities and chances to be employed, tests and so-called peer review standards are used to continue a kind of class discrimination in the field of higher education.

We must end these restrictions. We now have workable laws that can help and do the job. However many of these laws are so recent in origin that they have not yet made a real impact on the problem.

Let us provide a reasonable time period in which these statutes and regulations can be tested. I earnestly hope that this subcommittee, on top of whatever else it may do, does not seek to alter the language and implementation of statutes now in effect.

In a time when emotions are less dangerous and when sanity returns to the communities of our country we can then consider revisions that will improve and give additional protection to the rights of the victims of discrimination.

Hopefully that may be in the next Congress. But whatever else may be said, this year of 1974 is not the year in which the Congress should revise the laws that have made it possible for the disadvantaged to make some small progress in the field of higher education.

Mr. O'Hara. Thank you, Mr. Mitchell.

Mr. Mitchell, I was dismayed by your statement at the bottom of page 3 with regard to the *De Funis* case in which you assert that you condemn unequivocally those who have dragged this matter into the courts and who by so doing have created a climate which undoubtedly will lead to a major confrontation between minorities if new cases of this kind are filed.

I gather you are referring to Mr. De Funis and others who are similarly situated, and who believe that their rights have been violated on the basis of race or color.

You are suggesting that citizens who believe that their constitutional rights have been violated because of their race or color ought not to go to the courts because that would stir things up. Is that your position?

Mr. MITCHELL. No; that is not my position. I think you were there the day the *De Funis* case was argued. I know I was. The plain implication of those who were responsible for bringing that case to court was that even though the De Funis problem was then moot and he had been given redress, they were working to get other cases because they didn't like the system that the university had used to try to get fairness in the selection of students.

They were not alone, those who made that statement. There is even now a continuing effort to discredit affirmative action. That is what I am attacking.

Those who are interested in this kind of action pretend that there is a black inferior person versus a white superior person and this is what they are against.

Mr. O'HARA. Your statement seemed to be a little broader than that. I just wanted to clarify that you were not suggesting that someone who feels his rights have been violated ought to avoid the courts for fear of stirring up——

Mr. MITCHELL. No. I am talking about the kind of litigation which I think our judicial system is against.

I say that the issue in the *De Funis* case is in the nature of a frivolous, divisive issue.

The Washington minority is really making an effort to get a change in the admission practices so that they will be more realistic and not simply based upon tests.

If anyone reads the Washington Supreme Court decision in the *De Funis* case it will be clear that those who set the standards took into consideration the fact that Mr. De Funis and persons similarly situated had taken the entrance examination a number of times.

It was said that by repeating the process of taking that examination one improves one's grade. For that reason the grade of Mr. De Funis was weighted accordingly.

For all we know if you did that with the blacks who are supposed to be so dumb they too after taking the test a couple of times might have gotten better scores.

Mr. O'HARA. I wasn't present that day when they had the *De Funis* case. I am not familiar with all the facts. It was another day when I saw you over there. So I am not going to get into the *De Funis* case, particularly the facts in that case.

But this whole business of testing, what you are saying, "Well, at least with regard to law school admissions let us quit relying on such kinds of things as grade point averages, test grades, and let us use some personal judgment and subjective evaluation."

But when it comes to hiring faculty members I hear witnesses like yourself who think that the present method is all right and they say, "Well, we have a pool of Ph. D.'s and it contains *x* percent female and *y* percent black and therefore since more or less all Ph. D.'s are equal, a fair hiring system would produce exactly those percentages."

They say, "rely on the slip of paper and don't look beyond it."

Mr. Mitchell. I am not saying that. I am saying with respect to De Funis. I am agreeing with you that there is a pool of eligibles. As a matter of fact, 1,700 of them. Part of the means for becoming eligible was getting a certain score on the test.

The university considered that and found that these blacks had qualified by the test. But the minority didn't stop there. Other factors were added. For example, academic records at undergraduate school. Papers which had been written. Community service and matters related to the law, things of that sort. These were all taken into consideration.

I am not saying that the University of Washington performed a perfect job. But I am saying it performed a good-faith job which deserves commendation and we ought to build on that. If somebody can come up with something better we can consider it. On the matter of selection of faculty, this publication by Mr. Lester shows that they don't consider all Ph. D.'s equal.

They consider Ph. D.'s as a kind of cannon fodder to throw into the university battleground. Only the guys who meet the "old school ties" standard of writing books and other things, whatever it is that college professors do, these are the people who are retained.

The only thing about that is—and I am sure you know this, Mr. Chairman, from the University of Michigan and I know I know it from the University of Minnesota and the Maryland University—that they have these big-name professors and they are not the ones who teach in the classroom. It is a rare thing for a student to be exposed to inspirational comments from these big-name people.

And yet these academicians would have us believe that the reason they exclude a lot of these Ph. D.'s, the reason some of these blacks are not accepted is because they don't have the same eminence as these people who are listed as faculty members but really don't teach the classes.

Mr. O'Hara. Mr. Mitchell, this whole business of the testing, I notice you address in your statement the proposition that the use of tests and other devices in higher education is designed to screen out the majority of eligible blacks and unspecified personality requirements which have no relation to their ability as scholars.

I think that is a pretty vague and sweeping statement.

Mr. Mitchell. It is not vague. It is sweeping.

Mr. O'Hara. We have testimony from the law school aptitude examination fellow, had him go through all this material about validating their testing and so forth. As a matter of fact their tests are pretty reliable indicators of success in law school. Not perfect, but as indicators go, quite good.

I hear the allegation all the time that it is a phony, that it is a fraud, that it screens out minority kids.

I would like to see someone—and I think your organization is a prime candidate—produce a test that would predict success in law school that would not be.

Mr. Mitchell. My personal belief—and I am sure it is shared by many people in the law profession—is that it is almost impossible to devise a test which will fairly predict what a given individual will do.

In fact, Mr. Justice Douglas alluded to that when he was giving his opinion in the *De Funis* case. He referred to some eminent scholar saying that he thought the only way you could find out whether a person is going to be a good lawyer is to put him in school, teach him law, and see what he does. I don't think that is unfair. I don't imagine Abraham Lincoln would have been able to be a lawyer if he had been required ot take one of these tests that are given today.

But I don't agree with that experience in the area of testing. Right now pursuant to the provisions of the 1972 law with respect to equal employment I am sure there are various people who are trying to find a way of validating tests.

One of the things which emerged is this: That there is a test which is given in industry. That tests always showed that the black people who take it do about 10 percent below what the whites do.

But those who give the test in industry make allowance for that. Accordingly, if a white makes 70 and a black makes 60, they are rated as equal and both given a chance.

On the actual job the blacks are equal and often do better than the whites who have made higher grades on the test.

So my question is, Why give the test in the first place if it is that unreliable?

The answer given is, "We have got to have something. So we use the test even though it is not reliable."

I think that is the philosophy of most of the tests that are given. Those who give them know that they aren't always reliable. They know they can be misleading. But they have got to have something. So they give an unreliable test.

If we follow that practice in medicine and say, "well, the patient is sick. This medicine may kill him. But we have got to give him something," we would have a whole lot of business for undertakers in this country.

We are burying a whole lot of talent by these tests, which are really not reliable.

Mr. O'Hara. Mr. Mitchell, I agree there are some bad tests. But there are also some pretty good ones.

Mr. Mitchell. I just haven't seen any.

Mr. O'Hara. The results of which have been pretty well validated. I don't think they ever ought to be the exclusive determinant in admissions policy, for instance. But I think that when you have a test that has been validated there is nothing whatsoever wrong with the use of it.

Mr. Mitchell. In the hearing when Mr. Powell was here there was quite an exchange about hiring policemen. It so happens that in my lifetime when I was young I was interested in why the test given to members of the police force in Baltimore City always a large number of whites and no blacks. Blacks didn't pass.

This was supposedly a perfectly valid and indeed very simple test. Then we got a Governor who was a Republican, Governor Harry Nice, who met with some of us and said, "I will not appoint a police commissioner who will permit the continued exclusion of blacks from the police force."

I don't know what happened. But the blacks began to pass the test.

I had a more recent experience with the bar examination in the State of Maryland. I tried to assist some of the students who were having trouble with the bar examination. We had extensive meetings with the bar examiners.

One of the bar examiners was so moved that he resigned and a black bar examiner was appointed. Again, I don't know what happened. But quite a number of blacks passed the following year. The next year a number of blacks failed. It appeared that the black bar examiner and one of the white bar examiners seemed to be following a system of grading which apparently was producing an equal number of blacks and whites.

But there was one white member who was apparently following a system which resulted in a disproportionate number of blacks failing. That of course brought down the number of those who had passed the total test.

I state to you respectfully, Mr. Chairman, that I have not in all my years of contact with industry and schools, the merit system examinations, found an examination that I believe is really a valid measure of an individual's potential.

Mr. O'HARA. I think as a matter of fact that there are some tests, Mr. Mitchell, that are pretty good, depending on what you are aiming at.

The LSAT, to use an example again, is aiming at predicting success in completing law school. It is pretty good. It doesn't pretend to tell you who is going to be a good lawyer 20 years after they finish law school. But I don't think anyone could devise a test that would do that.

Mr. MITCHELL. You see? There is an important point. Are we trying in the professions to produce people who can finish a course? Or are we trying to produce people who will get out and serve after they graduate?

I think the present system is designed merely to get people through the professional schools but not consider whether they may be really worthwhile in service to the community which is what the real thing ought to be.

Mr. O'HARA. There are other points you made here that concern me.

At the bottom of page 4 and the top of page 5 you suggest that the violence in Boston and Baltimore would not have been present were it not for the arguments against busing by Members of Congress.

You come to the conclusion on page 5 that "the mobs in Boston and the defiant white parents in Baltimore have taken their cue from the Congress."

Do you really think that had it not been for congressional arguments against desegregation plans like the one in Boston that there would be no resentment?

Mr. MITCHELL. There might have been resentment. But there wouldn't have been the overt acts. In Baltimore the school board devised a plan. What gave dissident parents hope was the fact that there had been incorporated into the Elementary and Secondary Education Act language which is a modification of the Esch amendment.

Throughout the whole controversy people were saying, "what if they applied the standard of the Esch amendment?"

In other words the Esch amendment, which would have permitted the reopening of cases—indeed, there is a lady who is running for the U.S. Senate over there who said she thought her opponent, the incumbent Senator, was wrong and he should have voted for the Esch amendment.

She said, if she had been a Member of Congress, she would have voted for the Esch amendment, which, as you know, in its original form would have permitted the reopening of closed cases.

It can be documented that because of things which have been said over here, you hear them in rallies, you see them in the signs that are printed.

I think the people have gotten the impression that somehow or other if they make enough noise and create enough of a disturbance they won't have to obey the law.

Mr. O'Hara. I would disagree with your analysis of Congress as being way out in front of the people in this matter. Congress in fact is behind the people.

Mr. Mitchell. That is what is bad. You see, Mr. Chairman, what we are criticizing some of the White House occupants for is that they don't have enough vision to look ahead and lead the country on bold paths on economic matters. I think that is what people are elected to do, not to be behind the people or abreast of the people but in front, leading the people.

What has happened in this busing situation, it is true, Congress has gotten behind them.

Mr. O'Hara. You and I strongly disagree on that subject. I don't think the actions of the Congress really inspired the opposition. I think the opposition was there and would have been there no matter what the Congress did.

I finally would like to take a strong exception to the suggestion on page 5 that

> We know from bitter experience that those who employ the term "reverse discrimination" are no different from the framers of the so-called southern manifestoes against 1954 school desegregation decision.

Do you really believe that?

Mr. Mitchell. Yes, I do. We knew—and by "we" I mean you and I, Mr. Chairman—in those days what they were really after. They were really after trying to keep the Supreme Court decision from being implemented.

I say I see the same thing happening with respect to the term "forced busing" and "reverse discrimination," a catchword which, as I said, is innocent on its face but can be thrown around by irresponsible people and be defined in any way that they want to define it.

To some "reverse discrimination" means putting all the qualified whites out and putting all unqualified blacks in. This is the kind of thing which plays upon emotions and gets people in a position where they believe that they can turn back the clock.

Mr. O'Hara. Mr. Mitchell, I very strongly disagree with that. The decision was that students should be assigned to schools without regard to their race and should not be transported to a distant school because of their race.

Now if people take that same position today you say that they are in the same position as those who opposed integration back in 1954.

I really can't see how someone who has been consistent in their position all over the years has now become a racist.

Mr. MITCHELL. I read now from the *Swann* case of the Supreme Court, May 15, 1971. The Supreme Court says that,

> In the companion *Davis* case the Mobile School Board has argued that the Constitution requires that teachers be assigned on a color-blind basis. It also argues that the Constitution prohibits district courts from using their equity power to order assignments of teachers in order to achieve a particular degree of faculty desegregation.
>
> We reject that contention.

Then they say other things which would indicate that it is within the equity power of the courts to use transportation to correct discrimination.

In the second *Brown* decision, the Supreme Court said that if the assignment of teachers, if the pairing of schools, if a number of things will achieve a constitutional remedy, then all are acceptable.

Mr. O'HARA. Mr. Mitchell, there was quite a shift in the Court between *Brown* and *Swann* in terms of its position.

Some of us think the Court should have stayed with *Brown*. I don't think that that makes us segregationists. I just want to take exception to that, Mr. Mitchell.

We are going to celebrate the 200th anniversary of the convening of Congress in 2 minutes. I know you want to join with me in celebrating the fact that our Republic is strong enough to have survived 200 years of the Congress.

Mr. MITCHELL. As long as you and I are around we will help keep it surviving.

Mr. O'HARA. The subcommittee will stand adjourned.

[Whereupon, at 12:30 p.m., the subcommittee adjourned.]

[From Columbia Human Rights Law Review, vol. 5, no. 2, Fall, 1973, pp. 311 et seq.]

AN ADVOCATE'S VIEW OF THE 1972 AMENDMENTS TO TITLE VII

(By Clarence Mitchell[1])

Stories in the New York *Times*, the Washington *Post* and other daily papers on August 15, 1973, carried the historic news that the United States Department of Justice had filed anti-discrimination suits against the police departments of Chicago, Illinois, and Buffalo, New York. In both suits the police departments were charged with failing or refusing to recruit and hire blacks, Spanish-surnamed persons, and women on the equal basis with white men of non-Spanish origin. Both departments were also charged with using tests and establishing other qualifications for hiring and promotion that are discriminatory and have no demonstrated value to predict the ability of applicants to perform the required job. Earlier, in a news release dated July 9, 1973, Attorney General Elliot L. Richardson said the Department had filed "nine suits against municipal governments—four of these suits involve large urban fire departments in Boston,

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[1] Mr. Mitchell is the Director of the Washington Bureau of the NAACP and a member of the Maryland Bar and was a major force behind the passage of the 1972 amendments to Title VII of the Civil Rights Act of 1964.

Chicago, Dallas, and Los Angeles." [2] And on January 7, 1974, the Justice Department accepted a consent decree requiring the Maryland State Police force to hire women and more blacks as state troopers.

These actions of the Justice Department are based on the Attorney General's new authority to sue public employers. The 1972 Amendments to Title VII of the 1964 Civil Rights Act provide that the Federal Government now has jurisdiction to handle complaints of discrimination in federal, state and local government employment.[3] This power to attack discrimination in public employment, in itself is likely to have a dramatic impact on employment policies throughout the Nation. It will come as a surprise to many that in their own home communities their taxes are being used to help finance public departments and services that discriminate in their hiring practices. The new vulnerability of governments to suit under Title VII should do much to heighten public awareness of the extensive and insidious aspects of bias against women, blacks and other minorities in public employment.

It was reported in the New York *Times* of September 18, 1973 that the Equal Employment Opportunity Commission (EEOC), in what was described as the most extensive concerted action in its eight year history, had notified General Motors, Ford Motor Co., General Electric, Sears, the United Auto Workers, the International Union of Electrical, Radio and Machine Workers, the United Electrical Workers Union, and others in the auto and electrical industries that charges of job discrimination on a "national scale" had been filed against them. "The prime interest of the Equal Employment Opportunity Commission is to negotiate a voluntary settlement in each instance," stated then Commission Chairman William Brown. "If settlement cannot be reached, however, the commission will consider taking cases to court." [4] The authority to institute court proceedings against employers and unions discriminating in their employment and organizational practices considerably strengthens the ability of the EEOC to achieve compliance with the provisions of Title VII of the 1964 Civil Rights Act. This additional weapon with which the federal government may attack job discrimination was also contained in the 1972 Amendments to Title VII.[5]

Other significant changes in the fabric of Title VII made by the 1972 Amendments increase its effectiveness in remedying job discrimination. The most important of the recent changes will be dealt with in this article. First, however, it is useful to survey some of the background that led to the passage of this legislation.

I. The Historical Background

During World War II, in spite of severe manpower shorages, there was overwhelming discrimination against black, Spanish-ancestry, Indian and many other minority group job seekers. In Philadelphia, Pennsylvania, for example, it was necessary to use the army to operate public transportation when white operators staged a wild-cat strike because blacks were employed to run streetcars. Under the leadership of A. Phillip Randolph, president of the Brotherhood of Sleeping Car Porters, a national coalition of leaders and organizations threatened to march on Washington in 1941 if the government failed to act against employment discrimination. President Franklin D. Roosevelt issued Executive Order 8802 on June 25, 1941, establishing a National Fair Employment Practice Committee.[6]

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[2] Department of Justice press release, August 14, 1973. The release stated that the Chicago and Buffalo suits are the first filed by the Justice Department to enforce the employment discrimination section of the Equal Employment Opportunity Act against police departments. The Department also said that the Chicago suit is the first to be filed to enforce the equal employment opportunity regulations of the Law Enforcement Assistance Administration.

> "Since the passage of the March 1972 amendments to the Civil Rights Act of 1964, the Employment Section of the Civil Rights Division of the Department of Justice has filed seven lawsuits against municipal governments: the fire departments of Los Angeles, Boston, Chicago and Dallas; the police departments of Buffalo and Dallas; and the City of Montgomery for which a consent order has been entered. In addition, a motion to add parties was made and granted in the case captioned *United States v. Frazer, et al.*, 317 F. Supp. 1079 (M.D. Ala., 1970). This case, originally involving the Alabama Merit System and seven state departments, has now been expanded to cover all state agencies in Alabama. Under the 1972 amendments, the Education Section has also filed seven complaints against school districts regarding the employment of teachers."

Letter from J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to the Columbia Human Rights Law Review, Nov. 21, 1973. (Available upon request.)

[3] The Equal Employment Opportunity Act, 42 U.S.C. § 2000e *et seq.* (Supp. II, 1972). Suits against governmental units are permitted by 41 U.S.C. § 2000e–5 (Supp. II, 1972).

[4] N.Y. Times, Sept. 18, 1972, at 1.

[5] 42 U.S.C. § 2000e–6 ,Supp. II, 1972).

The Committee's authority was based on the President's war powers. The Committee had broad jurisdiction over war and war-supporting industries, as well as over complaints against federal agencies of employment discrimination based on racial, religious and national origin grounds. After the agency had been successfully operating for approximately four years, its existence was challenged on technical grounds by Southern members of Congress. These congressmen argued that the Committee should cease operation in 1946 unless a law granting it permanent status were enacted, since the war powers jurisdiction of the Committee's existence was ineffective after the war ended. A bill to keep the Committee alive died—what was to become a familiar death for civil rights legislation—bottled up in the House Rules Committee and filibustered on the floor of the Senate.[7] There then began a long and persistent series of efforts to enact legislation establishing a national fair employment committee. Simultaneously, civil rights advocates waged a successful campaign to keep the idea alive by encouraging the establishment by executive orders of agencies having jurisdiction over employment policies of government contractors and federal agencies. President Harry S Truman issued an order covering employment by government contractors.[8] This order was reaffirmed in the Eisenhower and Kennedy administrations.[9] The efforts to establish by legislation a fair employment commission were finally successful in 1964 when Title VII of the Civil Rights Act was passed, creating the Equal Employment Opportunity Commission.[10] The agency was given broad jurisdiction over private employers and labor unions, but not over federal, state and local government employment.[11] The Commission was authorized to make findings of fact and to attempt conciliation of disputes involving discrimination, but was not given any enforcement powers. As part of a compromise to avert a Senate filibuster, "the statute left enforcement of the act to the United States Department of Justice and private litigants.[12]

The effort to gain enforcement powers for the Commission itself and to broaden its jurisdiction continued in each Congress until 1972. In 1966, for example, the House passed H.R. 10065,[13] which included a provision empowering the Commission to issue cease and desist orders. Time pressures in the Senate, however, forced a choice between action on this bill and action on proposed fair housing legislation establishing for the first time the duty of the federal government to protect the right to rent or buy property without racial discrimination. It was felt by those who supported both pieces of legislation that the housing act was the more essential, and effort was concentrated on its passage at the expense of the employment law amendments. Four years later the Senate did pass S. 2453,[14] granting cease and desist enforcement powers to the EEOC, but a similar House bill died when the House Rules Committee blocked consideration of the bill.[15] The bill that became law in 1972 closely followed in most respects the language and objectives of H.R. 1746, introduced by Representative Augustus Hawkins (D-Calif.) and sixteen of his colleagues in the House.[16] S. 2515, a similar bill, was sponsored by Senators Harrison Williams (D-N.J.), Jacob Javits (R.-N.Y.), and thirty-two other Senators.[17]

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[6] J. Anderson, A. Phillip Randolph, A Biographical Portrait 259 (1948). *See also* Fair Employment Practice Committee, First Report, 1943–44 (1945).

[7] T. Emerson, D. Haber and N. Dorsen, Political and Civil Rights in the United States 1880 (2d ed. 1967).

[8] President Truman on July 26, 1948, issued Executive Order 9980 barring discrimination in federal agencies because of race, color, religion, or national origin. The order created a Fair Employment Board in the Civil Service Commission to implement the President's objectives in this field. Also, on December 3, 1951, Mr. Truman issued Executive Order 10308 forbidding discrimination by government contractors. Mr. Truman also established an eleven member Committee on Government Contract Compliance to study the "rules, procedures and practices of contracting agencies of government" in obtaining conformance with the non-discrimination clause in government contracts. The substance of these orders remained in effect, through executive orders and policy statements issued by Presidents Eisenhower, Kennedy, Johnson and Nixon and the passage of EEOC legislation by Congress in 1964 and 1972.

[9] On August 13, 1953, President Eisenhower issued Executive Order 10479. Executive Order 10925 was signed by President Kennedy on March 6, 1961.

[10] 42 U.S.C. § 2000e–4 (Supp. II, 1972).

[11] 42 U.S.C. § 2000e(b) (1970).

[12] 42 U.S.C. § 2000e–4(f) (Supp. II, 1972), *amending* 42 U.S.C. § 2000e–4(e) (1970).

[13] H.R. 10065, 89th Cong., 1st Sess. (1966).

[14] S. 2453, 91st Cong., 2d Sess. (1970).

[15] 27 Cong. Q. Almanac 664 (1971).

[16] Sponsors of H.R. 1746, 92d Cong., 1st Sess. (1972), were Mr. Hawkins (for himself), Mr. Reid of New York, Mr. Bingham, Mrs. Chisholm, Mr. Clay, Mr. Collins of Illinois, Mr. Conyers, Mr. Corman, Mr. Dellums, Mr. Dent, Mr. Diggs, Mr. Metcalf, Mrs. Mink, Mr. Mitchell, Mr. Nix, Mr. Rangel and Mr. Stokes.

II. THE CONTROVERSY OVER ENFORCEMENT POWER

The major dispute in the Senate affecting enactment of the 1972 Amendments concerned the mode of enforcement of Title VII: whether the agency should be given power to issue cease and desist orders, requiring affected parties to obey its decisions; or whether the EEOC should be required to take disputes into court if unable to get the desired results by conciliation. Civil rights groups, for the most part, supported the idea of giving the EEOC power to issue its own orders, as had the Johnson administration previously. The Nixon administration and other both pro and anti-fair employment groups supported court enforcement. In fairness it should be noted that, although the dispute was very bitter at the time the bill was under consideration, not all of those favored court enforcement were against the principle of federally enforced employment. Senator James Allen (D-Ala.), co-leader along with Senator Sam Ervin (D-N.C.) of the filibuster against the amending bill stated: "The EEOC has managed to get along without cease and desist authority for seven years. Why cannot it limp along without that authority now?"[18] This view was representaitve of those opposed to the very existence of the EEOC, much less to any extension of its enforcement power. On the other hand, Senator Peter Dominick (R-Col.), who led the forces favoring the court-enforcement approach, did not favor allowing the EEOC continuing to "limp along," but felt that the Commission was already clogged by a large backlog of complaints and that even more administrative delay would result.[19] He further objected that the Commission would be acting as judge, jury and prosecutor—and not on an impartial basis—if it were able to issue cease and desist orders without first seeking court approval. As to administrative delay, Senator Javits replied that the federal district courts had jammed calendars too. In response to Senator Dominick's second point, an amendment was adopted during debate on the floor of the Senate establishing an independent general counsel in the EEOC so that its prosecutorial arm would be separate from its judicial arm.[20] Senator Williams effectively summarized the viewpoint of those Senators who felt that enforcement of Title VII would be best served by granting cease and desist powers to the EEOC.

> In 1964 many believed that compulsory enforcement powers would only be necessary in those rare instances where recalcitrant and persistent violations were encountered. We did not anticipate the extent of discrimination which existed at the time we enacted the legislation, nor did we fully understand its nature. We permitted a fatal flaw to be passed into law. . . .
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> All of these agencies of government [*e.g.* NLRB, AEC, SEC], to be effective, had to have a machinery for decision. That is equally what seems to be questioned here. This is another area of the application of now proven methods and it is resisted.[21]

The National Labor Relations Board, the Atomic Energy Commission, the Securities and Exchange Commission, and many other federal agencies already have the authority to issue cease and desist orders. The overwhelming majority of state equal employment enforcement bodies also have this power. One problem which permeates all EEOC activities, the U.S. Commission on Civil Rights had reported, is its lack of enforcement powers.[22]

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[17] S. 2515, 92d Cong., 1st Sess. (1972), was introduced by Mr. Byrd of West Virginia (for Mr. Williams), Mr. Bayh, Mr. Brooke, Mr. Case, Mr. Church, Mr. Cranston, Mr. Eagleton, Mr. Gravel, Mr. Harris, Mr. Hart, Mr. Hartke, Mr. Hughes, Mr. Humphrey, Mr. Inouye, Mr. Jackson, Mr. Javits, Mr. Kennedy, Mr. McGovern, Mr. Magnuson, Mr. Metcalf, Mr. Mondale, Mr. Montoya, Mr. Moss, Mr. Muskie, Mr. Nelson, Mr. Pell, Mr. Percy, Mr. Proxmire, Mr. Ribicoff, Mr. Scott, Mr. Schweiker, Mr. Stevenson and Mr. Tunney.

[18] 118 Cong. Rec. 1813 (1972).

[19] Some of those who opposed giving the EEOC power to issue cease and desist orders were convinced that the administrative enforcement route would create delay and permit the agency itself to drag out the proceedings. Some lawyers experienced in the ways of administrative agencies and handling private equal employment suits at the time were among this group. During fiscal 1970 the EEOC determined that 16,348 cases warranted investigation but completed only 5,090 of them. *See* 188 Cong. Rec. S 1650 (daily ed. Feb. 14, 1972).

[20] The general counsel is to be appointed by the President for a term of four years with the advice and consent of the Senate. His responsibilities include those that the EEOC may prescribe and those provided by law. Under the new section 2000e–4(b), the general counsel conducts all litigation on behalf of the Commission authorized by sections 2000e–5 and 2000e–6. The chairman and general counsel must concur on the appointment and supervision of regional attorneys under subsection 2000e–4(b)(1).

[21] 118 Cong. Rec. S 1803 (daily ed. Feb. 15, 1972); 118 Cong. Rec. S 1896 (daily ed. Feb. 16, 1972).

Although the court enforcement approach had been decisively defeated in committee and lost twice by narrow margins on the floor of the Senate, it was not until Senator Dominick offered a compromise court-enforcement proposal that the Allen-Ervin filibuster was broken.[23] The Senate voted to invoke cloture, for only the eleventh time in fifty-five years, against the Southern filibuster in opposition to the bill. The cloture vote also reflected, in part, a growing desire on the part of most senators to show that the business of that body could be conducted in an orderly way and that obstruction for the purpose of delay would not be tolerated.

The new law provides that the EEOC must determine if reasonable cause exists to believe a charge of discrimination is true "so far as practicable," within one hundred and twenty days from the filing of the charge or the date on which the EEOC was authorized to act on the charge.[24] A suit can be brought by the Commission in federal district court if it is unable to secure "a conciliation agreement acceptable to the Commission."[25] (The House bill had provided for court enforcement if the EEOC has been "unable to obtain voluntary compliance.")[26] Cases are to be heard at the earliest practicable date and are to be expedited in every way. If a judge has not scheduled the case for trial within one hundred and twenty days after the case is filed he may appoint a master, similar to those in bankruptcy proceedings.[27] The bill's final version gave the EEOC the power to use its own staff lawyers in all cases except those before the Supreme Court or those involving state and local governments.[28] In the end, the bill's supporters agreed that this new power combined with greatly broadened coverage made Title VII a potent force against discrimination.[29]

III. THE LOSING BATTLE FOR CONSOLIDATION

Another important point that was lost, because of division among those who should have supported the bill, involved the Contract Compliance Committee established by Executive Order 10308 and successive orders.[30] The NAACP, which spearheaded the drive for the Truman order, had long argued that when a legislative fair employment agency came into being the functions of the Contract Compliance Committee and the enforcement of non-discrimination in federal employment should be under the new agency. This was in part because the Committee had not been highly successful. In the seven years of its existence the Contract Compliance Committee had issued only one debarment order—against a federal contractor with only ten employees.[31] An assessment of federal civil rights efforts by the Civil Rights Commission in the fall of 1971 had labeled the Contract Compliance Committee one of the worst civil rights operations in the federal government and recomended its transfer to the EEOC.[32] In addition, located as it was in the United States Department of Labor, the contract compliance function was necessarily treated as a low priority item by many Department of Labor policymakers. In 1973, the office of Contract Compliance Committee was relegated to the office of Assistant Secretary for Employment Standards, thereby depriving it of the direct access to the Secretary of Labor it had previously enjoyed.[33]

Employees of the contract compliance agency worked with great zeal directly and through their friends in Congress to maintain their independence. As often happens, the top level employees of the Contract Compliance Committee saw consolidation as a threat to their status. In addition, some officials in the Nixon administration insisted that transferring the function to the EEOC would aggravate that agency's backlog of cases. Actually, of course, the expertise of those who had served on the Committee and their staff would have been a strong asset to the EEOC.

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[22] 118 Cong. Rec. 2394 (1972) (remarks of Senator Williams).

[23] The court enforcement approach lost in committee by a vote of 15 to 2. On the Senate floor, the original Dominick court enforcement amendment lost, 41–43, on January 24 and, 46–48, on January 26. The cloture vote is recorded at 118 Cong. Rec. 1972 (1972).

[24] 118 Cong. Rec. S 3461 (daily ed. Mar. 6, 1972).

[25] 42 U.S.C. § 2000e–6 (Supp. II, 1972).

[26] 118 Cong. Rec. H 1698 (daily ed. Mar. 2, 1972).

[27] 118 Cong. Rec. S 3462 (daily ed. Mar. 6, 1972).

[28] 42 U.S.C. §§ 2000e–4(b)(2) and 2000e–5(f)(1) (Supp. II, 1972).

[29] "The passage of this act in this Congress will give new hope to millions of Americans who have been the victims of discrimination. Passage came after a long struggle involving extended debate in the Senate for several months. The bill that was finally enacted represents in some respects a compromise from the original proposals. However, the final product provides the Equal Employment Opportunity Commission, and the Civil Service Commission with respect to Federal employees, the tools needed to implement an effective enforcement program to secure equal employment opportunity for all our citizens."

Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Opportunity Act, Foreword (Comm. Print 1972).

[30] *Cf.* note 7 *supra.*

[31] 118 Cong. Rec. 582 (1972).

[32] 118 Cong. Rec. 1387 (1972).

[33] *Cf.* 1968 Congressional Directory 548 and 1973.

Likewise some employees of the Civil Service Commission waged an all out war against transferring the function of policing the federal government's fair employment practices to the EEOC. Chairman Robert E. Hampton and a few others in the Commission were less adamant. Mr. Hampton, after negotiations with Senators Peter Dominick (R-Colo.), Alan Cranston (D-Calif.), and civil rights groups supporting the bill, agreed to lend his support to what is now Section 717 of Title VII.[34] It should be noted that under this section, unlike the provisions affecting state and local governments, complaints against the federal government are filed with the Civil Service Commission or under procedures established by the Civil Service Commission. Also, the final administrative determinations of merit are controlled by the Civil Service Commission. Fortunately, however, those with grievances now have a clear channel to get redress in the courts if they are not satisfied with the administrative decisions.[35]

Finally, a compromise of sorts was worked out under which there was established an "Equal Employment Opportunity Coordinating Council." The statute provides that the council shall be "composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Rights Commission or their respective delegates." In theory this council is to have "the responsibility for developing and implementing agreements, policies and practices, designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal government responsible for the implementation and enforcement of equal employment opportunity, legislation, orders and policies."[36]

So far there is little evidence available to an outsider of coordination between the Labor Department and the Civil Rights Commission. As already noted, administrative changes in the Labor Department have downgraded the role of those working on contract compliance matters. The Civil Service Commission has made several proposals concerning procedures for handling discrimination in the federal government, apparently without awaiting agreement from the EEOC. The Civil Service Commission also helped to launch a "campaign of criticism" against Chairman Brown of the Equal Employment Opportunity Commission. This effort helped to bring about his ouster from office.

As nearly as can be ascertained, the Civil Service Commission does not have much enthusiasm for revising its testing procedures and requirements to eliminate those factors which have no real relationship to qualification for a particular job.[37] That a test, which must be passed before an applicant can be hired or an employee promoted, must be job-related is a requirement imposed on private industry under Title VII as the United States Supreme Court has held in *Griggs* v. *Duke Power Company*, 401 U.S. 424.[38] That a civil service exam should also be nondiscriminatory should be an important element in eliminating discrimination in federal, state and local government employment. Here a President strongly committed to civil rights could force the reluctant elements in the Civil Service Commission and in the Labor Department to participate effectively with the EEOC in a coordinated strategy.[39]

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[34] 42 U.S.C. § 2000e–16 (Supp. II, 1972).

[35] "The testimony of the Civil Service Commission notwithstanding, the Committee found than an aggrieved federal employee does not have access to the courts. In many cases, the employee must overcome a U.S. Government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies. Moreover the remedial authority of the Commission and the Courts has also been in doubt."

118 Cong. Rec. S 2281 (daily ed. Feb. 22, 1972). *See also* 42 U.S.C. § 2000e–16 (Supp. II, 1972).

[36] 42 U.S.C. § 2000e–14 (Supp. II, 1972) requires that on or before July 1 of each year, the Council shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable "to further promote the purpose of this section." Such reports, when available, should be useful to those who maintain a continuing interest in employment policies affecting women and minorities.

[37] This appraisal is based on the personal observations of the author.

[38] "Civil Service selection and promotion techniques and requirements are replete with artificial requirements that place a premium on 'paper' credentials. Similar requirements in the private sectors of business have often proven of questionable value in predicting job performance and have often resulted in perpetuating existing patterns of discrimination (*see, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971)). The inevitable consequence of this kind of a technique in federal employment, as it has been in the private sector, is that classes of persons who are socio-economically or educationally disadvantaged suffer a very heavy burden in trying to meet such artificial qualifications. It will be incumbent upon the Civil Service Commission to undertake a thorough re-examination of its entire testing and qualification program to ensure that the standards enunciated in the *Griggs* case are fully met."

118 Cong. Rec. S 2281 (daily ed. Feb. 22, 1972) (Senate analysis).

Even though the Justice Department retains a role in enforcement under so-called "pattern or practice" suits, the new law provides for the possibility of transferring that function to the EEOC.[40] The Assistant Attorney General in charge of the Civil Rights Division, J. Stanley Pottinger, has the advantage of personal knowledge and experience in civil rights problems. The number of "pattern or practice" suits filed under his and former Attorney General Richardson's leadership in the Department is impressive. Unfortunately, should future appointees possess no knowledge of or sympathy for enforcement of the equal employment statute, much of the present acceleration may be lost or entirely halted. This means that, as provided by the 1972 statute, the pattern or practice function should be transferred to the EEOC. This would still leave the tasks of taking court action against state and local governments and of handling matters before the Supreme Court in the Justice Department.[41]

IV. RESISTANCE TO COMPREHENSIVE COVERAGE

In addition to the troubles proponents of the bill had to face in pushing for a solution to the government contract and Civil Service Commission problems, they faced considerable resistance from a small number of Senators on extension of the coverage of Title VII to educational institutions, state and local governmental units, and hospitals.

Educational institutions were originally exempted from coverage under the 1964 Act.[42] The following excerpt from the Senate Committee Report underscores the importance of including the 4.3 million employees of such institutions within the protection of the Act:

> There are at present over 120,000 educational institutions, with approximately 2.8 million teachers and professional staff members and another 1.5 million non-professional staff members. Yet all of these employees are, in effect, without an affective federal remedy in the area of employment discrimination.
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> The presence of discrimination in the Nation's educational institutions is no secret. Many of the most famous and best remembered civil rights cases have involved discrimination in education. This discrimination, however, is not limited to the students alone. Discriminatory practices against faculty, staff and other employees are also common. The practices complained of parallel the same kinds of illegal actions which are encountered in other sectors of business, and include illegal hiring policies, testing provisions which

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[39] The author has elsewhere expressed strong criticism to agencies of the Equal Employment Opportunity Coordinating Council on proposed guidelines on testing and other employment selection procedures. In letters to the constituent agencies of the Council, he stated:

> "The NAACP is very concerned about what seems to be an intention to limit the effect of the proposed guidelines by incorporating the definition of "employer" set out in Section 701 of the Equal Employment Opportunity Act. On its face, at least, this would not be inclusive enough to cover Federal agencies. It is noted that, in Sec. 3(a) on page 9 of the draft there are the words. "Employers who are required by the United States Civil Service Commission to meet merit principles are expected to validate their employee selection standards in accord with these guidelines.
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> ". . . [W]e insist that the guidelines must make it crystal clear that Federal agencies are covered as a matter of law. It is not enough to say that they are "*expected* to validate their employment selection standards in accord with these guidelines." Discrimination is so extensive and enduring in Federal employment that soft or inconclusive statements about the duty of those operating under the merit system will not do."

[40] 42 U.S.C. § 2000e–6(e) provides that subsequent to "the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination." The new law also provides in subsections 2000e–6(c) and 2000e–6(d) for transfer of the entire pattern or practice function from Justice to EEOC "effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972." However, these subsections also provide that the President, with the Senate and House interposing no objection, can prevent the transfer with a reorganization plan.

[41] Referral of cases against a government, governmental agency or political subdivision to the Justice Department for court action is required by § 2000e–5(f)(1) of the 1972 Act. The requirement that the Attorney General "shall conduct all litigation to which the Commission is a party in the Supreme Court" appears in § 2000e–4(b)(2), which is a new subsection of Title VII.

[42] 42 U.S.C. § 2000e–1 (1970).

> tend to perpetuate racial imbalances, and discriminatory promotion and certification techniques.
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> As in other areas of employment, statistics for educational institutions indicated that minorities and women are precluded from the more prestigious and higher-paying positions, and are relegated to the more menial and lower-paying jobs. While in elementary and secondary school systems Negroes accounted for approximately 10% of the total number of positions, in the higher-paying and more prestigious positions in institutions of higher learning, blacks constituted only 2.2% of all positions, most of these being found in all-black or predominantly black institutions. Women are similarly subject to discriminatory patterns. Not only are they generally under-represented in institutions of higher learning, but those few that do obtain positions are generally paid less and advanced more slowly than their male counterparts. Similarly, while women constitute 67% of elementary and secondary school teachers, out of 778,000 elementary and secondary school principals, 78% of elementary school and 94% of secondary school principals are men.
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> The Committee believes that it is essential that these employees be given the same opportunity to redress their grievances as are available to other employees in the other sectors of business. Accordingly, the Committee has concluded that educational institutions, like other employers in the Nation, should report their activities to the Commission and should be subject to the Act. There is nothing in the legislative background of Title VII, nor does any national policy suggest itself, to support the present exemption. In fact, the Committee believes that the existence of discrimination in educational institutions is particularly critical. It is difficult to imagine a more sensitive area than educational institutions, where the youth of the Nation are exposed to a multitude of ideas and impressions that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote existing misconceptions and stereotypical categorizations which in turn would lead to future patterns of discrimination.[43]

Senator Allen, speaking in opposition to this expansion of coverage, labeled it an "attempt to subvert academic freedom and to violate the First Amendment prohibition guaranteeing free exercise of religion" of church-affiliated schools.[44] However, the strong support for coverage of educational institutions was evidenced by the fact that, when Senator Sam Ervin (D-N.C.) offered an amendment to remove teachers and faculty members of public schools from the bill, it was rejected by a voice vote. Later in the day another Ervin amendment, which would have removed from coverage all employment practices of all educational institutions, was rejected by a vote of 70 to 15.[45]

The inclusion of educational institutions gives women and displaced black educators and administrators a potent new weapon. In the case of black teachers and principals, who are dismissed because of unfair tactics of school boards and school officials acting purportedly to accomplish court ordered school desegregation, use of this provision of the new law should prove highly effective.[46]

The extension of Title VII to cover all governmental units is perhaps the most significant change in the scope of the Act. The Civil Rights Commission had noted that "state and local governments have failed to fulfill their obligation to assure equal job opportunity." [47] Senator Javits stated during debate that "discrimination was particularly acute in the government activities most visible to minority communities—notably education, law enforcement, and the administration of Justice." [48] Coverage under Title VII of state and local government employment, exasperated Senator Ervin however, who terms this expansion of coverage to the more than ten million affected employees "the most drastic assaults on the federal system ever proposed." [49] The Senate accepted one of his amendments for the purpose of clarifying the language of the bill, *i.e.*, to show that it did not apply to elected state and local officials or the persons that they choose as their legal and constitutional advisers. But, when the Senator joined with Senator Allen in another attempt to remove state and local government employees from the bill, the Senate voted 44 to 21 against the Ervin-Allen effort.[50]

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[43] S. Rep. No. 92-415, 92d Cong., 1st Sess. 11–12 (1971).

[44] 118 Cong. Rec. 1993 (1972).

[45] 118 Cong. Rec. S 2277 (daily ed. Feb. 22, 1972).

[46] Various legal actions have been instituted to protect the rights of displaced black teachers and administrators prior to passage of Public Law 92–261. The new statutory basis for such suits will greatly strengthen the hand of those unfairly displaced as well as help new job applicants and persons already employed but denied promotions, etc., because they are women or members of a minority group.

[47] United States Commission on Civil Rights, For All the People . . . By all the People (1969).

[48] 118 Cong. Rec. 581 (1972).

[49] 118 Cong. Rec. 1677 (1972).

Employment and access to professional staffs of hospitals have long been problems for minorities—especially black physicians. Senator Ervin also sought to remove hospitals from coverage. His amendment was specifically aimed at physicians and surgeons. The debate provided one of the highlights of the period during which the measure was on the Senate floor. These excerpts are worth remembering:

Senator Williams: "This amendment ... would be saying affirmatively that hospitals in their selection of physicians and surgeons can discriminate against a person because of race, color, religion, sex, or national origin. As I stand here leading the debate on this measure. I try to think as a young person would who has gone through that long, hard, and expensive trail to be the graduate of a medical school. ... I say that in this Nation, which so badly needs doctors, it would be a terrible crime if, because of ethnic backgrounds, sex, race or religion, the American people were denied the services of that new doctor. That is exactly what this amendment would do. It would take from a doctor the protection that the Constitution gives him and would protect him through this law. I think it would be against all that this country holds itself up to be."

Senator Javits: "My father was an immigrant from Middle Europe in about the late 1880's and I am old enough to know the discrimination which was practiced overtly and blatantly, through many of my adult years in respect to employment.

"One of the things that those discriminated against have resented the most is that they are relegated to the position of the sawers of wood and the drawers of water; that only the blue collar jobs and the ditch digging jobs were reserved for them; and that though they built America, and certainly helped build it enormously in the days of its basic construction, they cannot ascend the high rungs in professional and other life. ... This amendment would look in and fortify the idea that being a doctor or a surgeon is just too good for members of a minority. . . . I hope very much, almost in self respect, that the Senate will decisively reject this amendment."

> *Senator Pastore* (D-R.I.): "I remember in my own state when individuals of certain racial extraction could not gain internship in some of our hospitals. Today they accept them freely. But it was a hard road to recognition. I know the experience of one individual in particular. Today he is one of the great surgeons in this country. At the time I speak of, he was refused an internship in a certain hospital. Later, that very hospital begged him to come there to lecture—but by then he had become world renowned in his profession of medicine.
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> "All we are saying is that where all qualifications are met, please do not put certain groups under the burden of proving that they are twice as good in order to be considered equal. Equality is equality under any standard, and that is the one test that should be used in America. If you used any other test you violate the very spirit of the Declaration of Independence."

Of course, the written words of this article cannot capture the eloquence of the speakers nor the mood of the occasion on which they were delivered. Suffice it to say that when the three Senators finished speaking there were no further words said by the supporters of the amendment. A brief silence intervened in the galleries and on the Senate floor. Then the amendment was rejected on a voice vote.[51]

V. THE NEW LAW AND RELIGION

Another distinct improvement found in the new law is its definition of "religion," dealt with in a new subsection of the 1972 Act. In giving an analysis of the final action of Senate and House conferees, Senators Williams and Javits said:

> Section 701(j), which is new, defines religion to include all aspects of religious observance, practice and belief, so as to require employers to make reasonable accommodations for employees whose 'religion' may include observances, practices and beliefs such as sabbath observance which differ from the employer's or potential employer's requirements regarding standards, schedules or other business related conditions.
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> Failure to make such accommodations would be unlawful unless an

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[50] 118 Cong. Rec. S 2058 (daily ed. Feb. 17, 1972).

[51] 118 Cong. Rec. 1646–1648 (daily ed. Feb. 14, 1972).

> employer can demonstrate that he cannot reasonably accommodate such beliefs, practices or observances without undue hardship on the conduct of his business. The purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in *Dewey v. Reynolds Metals Company*, 429 F. 2d 325 (6th Cir. 1970), *affirmed by an equally divided court*, 402 U.S. 689 (1971).[52]

This tightening of the law with respect to religion apparently would not permit a company acting alone or acting pursuant to agreement with an appropriate bargaining agent to require an employee to work on the employee's sabbath, unless it can be demonstrated that there is no reasonable way for the employer to accommodate the employee or that refusal by an employee to work on his or her sabbath would create "an undue hardship in the conduct of business." Although this aspect of employment problems is often associated with the Jewish faith or such groups as the Seventh Day Adventists, other faiths have similar difficulties, and this addition to the law should be a source of relief to many efficient and valuable employees. One of the revisions presents a problem, however, in that religious institutions may seek to use it to discriminate against members of other faiths or against persons who do not profess any religious faith. Section 702 of the 1972 Act exempts a "religious corporation, association, educational institution, or society with respect to employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[53] The contrasting viewpoints on this exemption are exemplified by Senator Ervin's remark that the 1964 Act constituted a "laying of the political hands of Caesar on the employment practices of the church of God."[54] Senator Williams, meanwhile, contended that "of all the institutions in this country who should be setting the example of equal employment opportunity, or equal opportunity for that matter in all aspects of life, it is America's religious institutions."[55]

The 1964 law limited this exemption to the carrying on of religious activities of the institutions affected. Arguably, this change may make it possible for a religious group to limit employees of a bank it owns or a building project it has under construction to members of that faith, provided there is no discrimination against employees because of race, color, sex or national origin. On the other hand, there is a danger that the new language may tempt some of the institutions covered by it to exclude blacks, persons of Spanish ancestry or women on the grounds that they are not identified with the faith or the entity controlling employment. It would seem to be difficult for religious institutions to stretch beyond the plain language of the law. Nevertheless, civil rights groups will be watching the effect of this amendment of the statute and will seek appropriate remedial legislation in Congress if the need for such legislation is determined by concrete evidence of impermissible discrimination based on this amendment.

VI. A NOTE ON LABOR PROBLEMS

Problems with respect to membership in labor organizations and with respect to joint labor-management apprenticeship committees also received attention. In commenting on these issues Senators Williams and Javits said of sections 8(a), 8(b), and 8(c)(2):[56]

> These subsections would amend sections 703(a) and 703(c)(2) of the present statute to make it clear that discrimination against applicants for employment and applicants for membership in labor organizations is an unlawful practice. This subsection is merely declaratory of present laws as contained in the decisions of *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971) [An employer may not, in the absence of business necessity, refuse to hire women with pre-school-age children while hiring men with such children.]; *U.S. v. Sheet Metal Workers International Association, Local 36*, 416 F.2d 123 (8th Cir. 1969) [Employment referral systems established under collective bargaining agreements whereby locals accord priority for work referrals on basis of four priority groups requiring experience which blacks were unable to obtain prior to Civil Rights Act resulted in present and future discrimination and constituted an unlawful employment

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[52] Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act 1844–1845 (Comm. Print 1972).

[53] 42 U.S.C. § 2000e-1 (Supp. II, 1972) *amending* 42 U.S.C. § 2000e-1 (1970).

[54] 118 Cong. Rec. 1981 (1972).

[55] 118 Cong. Rec. 1992 (1972).

[56] 42 U.S.C. § 2000e-2(a) (Supp. II, 1972); 42 U.S.C. § 2000e-2(c) (Supp. II, 1972).

> practice.]; and *Asbestos Workers, Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969) *[Union's refusal to refer nine individuals for employment as asbestos helpers amounted to unlawful discrimination.]*.
>
> These subsections 8(c)(1) and (2) amend section 704(a) and (b) of the present statute to make clear that joint labor-management apprentice committees are covered by those provisions which relate to discriminatory advertising and retaliation against individuals participating in Commission proceedings.[57]

Importantly, President George Meany and Andrew Biemiller of the AFL-CIO, and President Leonard Woodcock and William Oliver of the United Auto Workers along with other top leaders of the labor movement gave strong and consistent support to the amending provisions of S. 2515 and the Hawkins bill as reported by the House Labor and Education Committee.

VII. Litigation and Remedies Under the New Title VII

In its approach to enforcement of the Equal Employment law, Congress clearly intended to write constructive case law into the new legislation and, thereby, strengthen the impact of such decisions. This is illustrated by the Williams-Javits comment on class action lawsuits. In analyzing the final report of House and Senate conferees, they said:

> In establishing the enforcement provisions under this subsection (706(e)) and subsection 706(f) generally, it is not intended that any of the provisions contained therein shall affect the present use of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure. The courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any action under the Act involves considerations beyond those raised by the individual claimant. As a consequence, the leading cases in this area to date have recognized that many Title VII claims are necessarily class action complaints and, accordingly, it is not necessary that each individual entitled to relief be named in the original charge or in the claim for relief. *A provision limiting class action was contained in the House bill and specifically rejected by the conference committee.* (Emphasis supplied.)[58]

Senators Williams and Javits also emphasized that the conferees wanted to be sure that bona fide claims would not be lost on mere technicalities involving filing deadlines or because of a lack of diligence or discernment on the part of the agencies designated to enforce the law. Speaking of the 1972 Act's changes in the filing time requirements they said:

> It is intended by expanding the time period for filing charges in this subsection 706(e) that aggrieved individuals, who frequently are untrained laymen and who are not always aware of the discrimination that is practiced against them, should be given greater opportunity to prepare their charges and file their complaints and that existent but undiscovered acts of discrimination should not escape the effect of the law through a procedural oversight. Moreover, wide latitude should be given individuals in such cases to avoid any prejudice to their rights as a result of government inadvertence, delay or error.[59]

Some controversy had developed over whether complainants should have the right to enter private lawsuits under the new law. Senator Roman Hruska (R-Nebr.) alleged that the effect of permitting a multiplicity of actions to be instituted against a respondent before a number of separate and distinct forums for the same alleged offense would be blackmailing the respondent into a settlement.[60] Nevertheless, this right was retained, and speaking in justification of the retention, Senators Williams and Javits said:

> The retention of the private right of action, as amended, is intended to make clear that an individual aggrieved by a violation of Title VII should

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[57] 118 Cong. Rec. S. 3461 (daily ed. Mar. 6, 1972).

[58] *See* note 50 *supra*, at 1847.

[59] *Id.* at 1846. Under the 1964 Act charges had to be filed within 90 days after an alleged unlawful employment practice. In cases where the Commission defers to a state agency it was required that charges be filed within 30 days after the aggrieved person received notice that the state or local agency terminated proceedings or within 210 days after the alleged unlawful employment practice occurred, whichever was earlier. 42 U.S.C. § 2000e-5(e) (1970). Under the 1972 amendments charges may be filed within 180 days after the alleged unlawful act. In cases where there is deferral to state or local agencies the time is 300 days after the alleged unlawful act of the party charged or 30 days after termination under state or local proceedings whichever is earlier. 42 U.S.C. § 2000e-5(e) and 5(f) (Supp. II, 1972), *amending* 42 U.S.C. § 2000e-5(e) (1970).

[60] 118 Cong. Rec. S 1458 (daily ed. Feb. 8, 1972).

> not be forced to abandon the claim merely because of a decision by the Commission or the Attorney General as the case may be, that there are insufficient grounds for the Government to file a complaint. Moreover, it is designed to make sure that the person aggrieved does not have to endure lengthy delays if the Commission or Attorney General does not act with due diligence and speed. Accordingly, the provisions described above allow the person aggrieved to elect to pursue his or her own remedy under this title in the courts where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution.
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> It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC or the Attorney General, as appropriate. However, as the individual's rights to redress are paramount under provisions of Title VII it is necessary that all avenues be left open for quick and effective relief.[61]

Some of the forces opposed to bringing fair employment actions into court under such statutes as the National Labor Relations Act, 42 U.S.C. § 1981, and 42 U.S.C. § 1983, succeeded in getting an amendment in the House bill providing suits under Title VII of the Equal Employment statute would be the exclusive remedy for unlawful employment practices. This was not included in the bill passed by the Senate and was stricken in the House-Senate Conference on the bill.[62]

The new law carefully preserves the rights of attorneys appearing in a private capacity to recover court awarded fees. In all cases, including those involving federal, state and local government complaints, the new law provides that sections 706(f) through 706(k) continue to be applicable. Section 706(k) provides that:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

With respect to federal employment problems, 706(f) through (k) of the 1964 Act are incorporated by reference under section 717(d) of the 1972 Act.

When the respondent is not a federal, state or local government agency, if the Equal Employment Opportunity Commission is unable to secure a conciliation agreement within thirty days from the filing of the charge (or within thirty days after expiration of any period of reference under 706(c) or 706(d)), it may thereafter, as discussed earlier, bring a civil action under section 706(f) against the respondent in an appropriate district court. The Equal Employment Opportunity Commission may process cases to the conciliation stage where state and local government agencies are the parties charged. However, as previously noted, court action in state and local government agency cases must be handled by the United States Department of Justice.[63] Under 706(f) the aggrieved party may intervene in any case brought by the EEOC or the Attorney General.[64] The new law also provides for appointment of counsel.[65] The Williams-Javits analysis of the conference committee action emphasizes the intention of Congress to give wide remedial powers to the courts. The following excerpt from the analysis is on point:

> The provisions of this subsection 706(g) are intended to give the courts wide discretion in exercising their equitable powers to fashion the most complete relief possible. In dealing with the present 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.[66]

In this connection it should be observed that there was some effort, during consideration of the bill, to amend it in such a manner as to prevent courts from establishing goals and affirmative action plans of employment.[67] These efforts were unsuccessful and, in this respect, courts are still free to take such action in this area as equity may require.[68] The fate of companies operating under a court- or agency-imposed affirmative action plan was also considered. Under setcion 718, which is new, the 1972 Act providse that:

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[61] 118 Cong. Rec. S 3462 (daily ed. Mar. 6, 1972).

[62] *Id.*

[63] *See* note 4 *supra.*

[64] 42 U.S.C. § 2000e–5(f)(1) (Supp. II, 1972).

[65] 42 U.S.C. § 2000e–5(f)(1) (Supp. II, 1972) states that "Upon application by complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs or security."

[66] 118 Cong. Rec. S 3462 (daily ed. Mar. 6, 1972).

> No government contract or portion thereof can be denied, withheld, terminated or superseded by a government agency under Executive Order 11246 or any other order or law without according the respective employer a full hearing and adjudication pursuant to 5 U.S.C. § 554 *et seq.* where such employer has an affirmative action program for the same facility which has been accepted by the Government within the previous twelve months. Such plan shall be deemed to be accepted by the Government if the appropriate compliance agency has accepted such plan and the Office of Federal Contract Compliance has not disapproved of such plan within 45 days. However, an employer who substantially deviates from any such previously accepted plan is excluded from the protection afforded by this section.[69]

Procedures under Executive Order 11246 are handled by the Office of Contract Compliance in the U.S. Department of Labor.[70] The amendment was urged by those who contended that some safeguard was needed to protect those who undertake a plan approved by one agency of government in good faith and then find that the plan is not acceptable to another agency of government.

Another important change involves the availability of injunctive relief. In matters where it is required by the circumstances of the case and the nature of a possible remedy, subsection 706(f)(2)[71] authorizes the Commission or the Attorney General, as the case may be, based upon a preliminary investigation of a charge filed, to bring an action for appropriate temporary or preliminary relief, pending the final disposition of the charge. This will be especially helpful where discriminatory acts result in removal without pay, pending a final decision, as is often the case with employees of government agencies. It will also be valuable in cases where the aggrieved person wins his case only to find that the job or promotion has gone to some other individual during the interim period.[72]

VIII. A NOTE ON LEGISLATIVE STRATEGY

The passage of the 1972 amendments to the Equal Employment Opportunity Act is a monumental achievement for its sponsors. Obviously the measure could not have become law without the skillful handling in the House which made it possible to bring the measure to the floor.

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[67] 118 Cong. Rec. 1658–1676 (1972).

[68] 42 U.S.C. § 2000e–5(g) (Supp. II, 1972) *amending* 42 U.S.C. § 2000e–5(g) (1970).

[69] 42 U.S.C. § 2000e–17 (Supp. II, 1972).

[70] Exec. Order No. 11,246, 3 C.F.R. 339 (1965).

[71] 42 U.S.C. § 2000e–5(f)(2) (Supp. II, 1972).

[72] The following changes in the law are noted but not discussed in detail in this article:

(1) 42 U.S.C. § 2000e–6 coverage of the Act to employers of fifteen or more persons and labor unions with fifteen or more members from the previous cutoff point of 25 persons.

(2) 42 U.S.C. § 2000e–8(b) of the Civil Rights Act of 1964 is amended to permit EEOC, within the limitations of funds appropriated specifically for the purpose, to contribute funds for research and other projects carried on by state and local equal employment agencies.

(3) 42 U.S.C. § 2000e–8(c) is amended so that, before going to court to seek exemption from record-keeping (because of undue hardship) as they could under the 1964 Act, employers and labor unions must first seek exemption from EEOC. If exemption is denied they may then go into court. This section also permits exchange of information between Federal and state and local agencies. Information from the Federal government is furnished under the condition that it not be made public prior to the instituting of state or local action involving such information.

(4) 42 U.S.C. § 2000e–9. Subpoena power of the EEOC is broadened to permit designated Commission agents, agencies or members to issue subpoenas as necessary for the conduct of an investigation and to take testimony under oath.

(5) 42 U.S.C. § 2000e–4 gives the Chairman the power to appoint staff, except in those instances where he must do so in concurrence with the general counsel. A member of the Commission is permitted to serve until his successor is appointed, but not for more than 60 days when Congress is in session unless the successor has been nominated and his nomination submitted to the Senate, or after adjournment *sine die* of the session of the Senate in which such nomination was submitted.

(6) 42 U.S.C. § 2000e–5(f)(1) permits the EEOC, upon timely application and with permission of the court, to intervene in cases brought by private litigants. Under the 1964 statute the EEOC had no request permission from the Attorney General before seeking to intervene in such cases.

(7) Section 14 of Public Law 92–261 provides that "amendments by this Act to 42 U.S.C. § 2000e–5 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of the enactment of this act and all charges filed thereafter."

In the House there were numerous forces working against the bill and for particular weakening provisions. These combined forces enabled Representative John N. Erlenborn (R-Ill.) to succeed by a vote of 202 to 197 in substituting the language of a weak bill, which he had introduced, for the language in the bill reported out by the House Education and Labor Committee.[73]

At this point, Representative Hawkins, his colleagues in the House, and civil rights groups supporting the bill reported by the Education and Labor Committee had to make an important decision. They had to decide whether to urge that the bill, as revised by the Erlenborn language, be recommitted or that the measure be passed by the House with the expectation of Senate help in passing a stronger bill. Labor, religious and other pro-civil rights groups urged Representative Hawkins to adopt he strategy of passing the bill, even though it lacked many needed revisions and contained a number of harmful amendments. Those familiar with the workings of Congress knew that recommital would end any prospects for obtaining strengthening amendments. On the other hand, past experience had taught the proponents of civil rights that if a good bill can be gotten through the Senate its best features can be preserved in a conference committee with subsequent approval by both bodies of Congress. Representative Hawkins and the vast majority of Democrats and Republicans who generally support civil rights legislation accepted the strategy of passing the bill with the Erlenborn language so that the measure might be kept alive. The bill was then passed by a vote of 285 to 106.[74] Pro-civil rights members of the Senate Labor and Public Welfare Committee moved rapidly to repair the damage done in the Erlenborn substitute, and the bill reported out by that committee was similar in most respects to the Hawkins bill. Without that strategy, agreed upon by House supporers and outside groups, the 1972 amendments would not have passed.

As the above account indicates, the extensive work of members of the Senate defeated many attempts to emasculate the measure. A great part of the work on details was carefully handled by staff members of the Senate Sub-Committee on Labor of the Labor and Welfare Committee, Gerry Feder, counsel, and Donald Elisburg, professional staff member, for the majority and Eugene Mittleman, counsel for the minority. They were joined in the effort by Stephen Blakeslee, Jr., who was then handling Congressional Affairs for the EEOC, but is now on the staff of Senator Richard Schweiker (R-Pa.). It is interesting to note that the Administration maintained a kind of hand-off attitude during the period when the bill was under consideration—especially in the Senate. Mr. Blakeslee's participation was largely on his own initiative with the blessing of William H. Brown, Chairman of the EEOC. Mr. Blakeslee's role was important because, in spite of an aloof attitude at the White House, it was still possible to get the necessary interaction between the executive and legislative branches of government on a day to day basis.

There is every indication that, under the leadership of Chairman Brown, the new provisions of the law have been diligently put into practice. That was an especially difficult task because the Chairman's tenure was very uncertain during and immediately after the 1972 Presidential election.[75] In spite of the efforts of those who were working for his replacement, Chairman Brown worked diligently to implement the new statute. Approximately 150 court cases were filed by the agency during the 1972–1973 period. In an Administration move that has come as a surprise to many, Chairman Brown was replaced. It remains to be seen whether this action on the part of the White House will put a brake on the Commission's work.[76] Vigorous enforcement of the 1972 amendments is essential if their passage is to effectuate a significant advance in the fight for equal employment opportunity. "It is not our purpose to reaffirm existing loopholes," said Senator Williams during the debate. "The basic goal which we are trying to achieve here is the giving of additional meaning to the Civil Rights Act of 1964." [77]

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[73] 117 Cong. Rec. 32111–32112 (1971).

[74] 117 Cong. Rec. 32113 (1971).

[75] It is difficult for an agency such as EEOC to function in a presidential election year. This was true during 1972. In addition, the Chairman and other high government officials were required to submit their resignation when Mr. Nixon won. The most reliable account of what happened to Chairman Brown is that a number of White House and other government functionaries had combined to get his resignation accepted. Apparently, these plans were unknown to Mr. Nixon because when he learned that there were rumors about Mr. Brown's being dropped, the Chief Executive immediately rejected the resignation.

As the expiration of Chairman Brown's term approached in the summer of 1973, a new combination of White House, Civil Service Commission and political operators began working against his reappointment. Apparently distracted by Watergate, the President bowed to their wishes in what appears to be an offhand manner. Actually, the word about the appointment of a successor chairman was on the wires of the Associated Press even before Mr. Brown knew of it officially.

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[76] President Nixon nominated John Powell, formerly of the United States Commission on Civil Rights, to be the new Chairman of the Equal Employment Opportunity Commission. After a meeting on December 6, 1973 between the author of this article, Messrs. Melvin Laird and Bryce Harlow, assistants to the President, and Senators Williams and Javits, the Administration promised high level attention for EEOC. In a letter dated December 7, 1973, sent to Senators Williams and Javits, General Alexander M. Haig, Jr., assistant to the President, stated that the President had met with Chairman Powell and had assured him "of this Administration's support of the causes of equal employment and the work of the Equal Employment Opportunity Commission."

[77] 118 Cong. Rec. 1992 (1972).

FEDERAL HIGHER EDUCATION PROGRAMS
INSTITUTIONAL ELIGIBILITY

HEARINGS

BEFORE THE

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OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

SECOND SESSION

PART 2B

APPENDIX

CIVIL RIGHTS OBLIGATIONS

HEARINGS HELD IN WASHINGTON, D.C.
AUGUST 8, 9, 12, 14, 15; SEPTEMBER 17, 19, 20, 23, AND 25, 1974

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APPENDIX

[Public Law 88-352, 88th Congress, H.R. 7152, July 2, 1964]

TITLE VI—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

SEC. 601. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

SEC. 602. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objects of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

SEC. 603. Any department or agency action taken pursuant to section 602 shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 602, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 10 of the Administrative Procedure Act, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section.

SEC. 604. Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

SEC. 605. Nothing in this title shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

Part 80—Nondiscrimination Under Programs Receiving Federal Assistance Through the Department of Health, Education, and Welfare Effectuation of Title VI of the Civil Rights Act of 1964[1]

Sec.

80.1 Purpose.
80.2 Application of this regulation.
80.3 Discrimination prohibited.
80.4 Assurances required.
80.5 Illustrative applications.
80.6 Compliance information.
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80.12 Effect on other regulations; forms and instructions.
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Appendix A: Federal financial assistance to which these regulations apply.

Authority: The provisions of this Part 80 issued under sec. 602, 78 Stat. 252; 42 U.S.C. 2000d-1, unless otherwise noted.

Source: The provisions of this Part 80 appear at 29 F.R. 16298, Dec. 4, 1964; 29 F.R. 16988, Dec. 11, 1964; 30 F.R. 35, Jan. 5, 1965, unless otherwise noted.

§ 80.1 PURPOSE

The purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964 (hereafter referred to as the "Act") to the end that no person in the United States shall; on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Health, Education, and Welfare.

(Sec. 601, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d) [29 FR 16298, Dec. 4, 1964, as amended at 38 FR 17982, July 5, 1973]

§ 80.2 APPLICATION OF THIS REGULATION

This regulation applies to any program for which Federal financial assistance is authorized to be extended to a recipient under a law administered by the Department, including the Federal assisted programs and activities listed in Appendix A of this regulation. It applies to money paid, property transferred, or other Federal financial assistance extended after the effective date of the regulation pursuant to an application approved prior to such effective date. This regulation does not apply to (a) any Federal financial assistance by way of insurance or guaranty contracts, (b) money paid, property transferred, or other assistance extended before the effective date of this regulation, (c) the use of any assistance by any individual who is the ultimate beneficiary under any such program, or (d) any employment practice, under any such program, or any employer, employment agency, or labor organization, except to the extent described in § 80.3. The fact that a type of Federal assistance is not listed in Appendix A shall not mean, if Title VI of the Act is otherwise applicable, that a program is not covered. Federal financial assistance under statutes now in force or hereinafter enacted may be added to this list by notice published in the Federal Register.

(Secs. 602, 604, Civil Rights Act of 1964; 78 Stat. 252, 253; 42 U.S.C. 2000d-1, 2000d-3)

[38 FR 17979, July 5, 1973]

§ 80.3 DISCRIMINATION PROHIBITED

(a) *General.*—No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.

---

[1] 38 FR 17979, July 5, 1973.

(b) *Specific discriminatory actions prohibited.*—(1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin:

(i) Deny an individual any service, financial aid, or other benefit provided under the program;

(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section);

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

(3) In determining the site or location of a facilities, an applicant or recipient may not make selections with the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any programs to which this regulation applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this regulation.

(4) As used in this section, the services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in this paragraph and paragraph (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(6)(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

(c) *Employment practices.*—(1) Where a primary objective of the Federal financial assistance to a program to which this regulation applies is to provide employment, a recipient may not (directly or through contractual or other arrangements) subject an individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities), including programs where a primary objective of the Federal financial assistance is (i) to reduce the employment of such individuals or to help them through employment to meet subsistence needs, (ii) to assist such individuals through employment to meet expenses incident to the commencement or continuation of their education or training, (iii) to provide work experience which contributes to the education or training of such individuals, or (iv) to provide remunerative activity to such individuals who because of handcaps cannot be readily absorbed in the competitive labor market. The following, under existing laws, have one of the above objectives as a primary objective:

(*a*) Projects under the Public Works Acceleration Act, Public Law 87–658, 42 U.S.C. 2641–2643.

(*b*) Work-study under the Vocational Education Act of 1963, as amended, 20 U.S.C. 1371–1374.

(*c*) Programs assisted under laws listed in Appendix A as respects employment opportunities provided thereunder, or in facilities provided thereunder, which are limited, or for which preference is given, to students, fellows, or other persons in training for the same or related employments.

(*d*) Assistance to rehabilitation facilities under the Vocational Rehabilitation Act, 29 U.S.C. 32–34, 41a and 41b.

(2) The requirements applicable to construction employment under any such program shall be those specified in or pursuant to Part III of Executive Order 11246 or any Executive order which supersedes it.

(3) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

(d) *Indian Health and Cuban Refugee Services.*—An individual shall not be deemed subjected to discrimination by reason of his exclusion from the benefits of a program limited by Federal law to individuals of a particular race, color, or national origin different from his.

(e) *Medical emergencies.*—Notwithstanding the foregoing provisions of this section, a recipient of Federal financial assistance shall not be deemed to have failed to comply with paragraph (a) of this section if immediate provision of a service or other benefit to an individual is necessary to prevent his death or serious impairment of his health, and such service or other benefit cannot be provided except by or through a medical institution which refuses or fails to comply with paragraphs (a) of this section. (Sec. 601, 602, 604, Civil Rights Act of 1964; 78 Stat. 252, 253, 42 U.S.C. 2000d, 2000d–1. 2000d–3) [29 FR 16298, Dec. 4, 1964, as amended at 38 FR 17979, 17982, July 5, 1973]

§ 80.4 ASSURANCES REQUIRED

(a) *General.* (1) Every application for Federal financial assistance to carry out a program to which this part applies, except a program to which paragraph (b) of this section applies, and every application for Federal financial assistance to provide a facility shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part. In the case of an application for Federal financial assistance to provide real property or structures thereon, the assurance shall obligate the recipient, or, in the case of a subsequent transfer, the transferee, of the period during which the real property or structures are used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. In the case of personal property the assurance shall obligate the recipient for the period during which he retains ownership or possession of the property. In all other cases the assurance shall obligate the recipient for the period during which Federal financial assistance is extended pursuant to the application. The responsible Department official shall specify the form of the foregoing assurances for each program, and the extent to which like assurances will be required of subgrantees, contractors and subcontractors, transferees, successors in interest, and other participants in the program. Any such assurance shall include provisions which give the United States a right to seek its judicial enforcement.

(2) Where Federal financial assistance is provided in the form of a transfer of real property or interest therein from the Federal Government the instrument effecting or recording the transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. Where no transfer of property is involved but property is improved with Federal financial assistance, the recipient shall agree to include such a covenant to any subsequent transfer of the property. Where the property is obtained from the Federal Government, such covenant may also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant where, in the discretion of the responsible Department official, such a condition and right of reverter is appropriate to the statute under which the real property is obtained and to the nature of the grant and the grantee. In the event a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on such property for the purposes for which the property was transferred, the responsible Department official may agree, upon request of the transferee and if necessary to accomplish such financing, and upon such conditions as he deems appropriate, to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

(b) *Continuing State programs.*—Every application by a State or a State agency to carry out a program involving continuing Federal financial assistance to which this regulation applies (including the Federal financial assistance listed in Part 2 of Appendix A) shall as a condition to its approval and the extension of any Federal financial assistance pursuant to the application (1) contain or be accompanied by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this regulation, and (2) provide or be accompanied by provision for such methods of administration for the program as are found by the responsible Department official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this regulation.

(c) *Elementary and secondary schools.*—The requirements of paragraph (a) or (b) of this section with respect to any elementary or secondary school or school system shall be deemed to be satisfied if such school or school system (1) is subject to a final order of a court of the United States for the desegregation of such school or school system, and provides an assurance that it will comply with such order, including any future modification of such order, or (2) submits a plan for the desegregation of such school or school system which the responsible Department official determines is adequate to accomplish the purposes of the Act and this part, at the earliest practicable time, and provides reasonable assurance that it will carry out such plan; in any case of continuing Federal financial assistance the responsible Department official may reserve the right to redetermine, after such period as may be specified by him, the adequacy of the plan to accomplish the purposes of the Act and the regulations in this part. In any case in which a final order of a court of the United States for the desegregation of such school or school system is entered after submission of such a plan, such plan shall be revised to conform to such final order, including any future modification of such order.

(d) *Assurance from institutions.*—(1) In the case of any application for Federal financial assistance to an institution of higher education (including assistance for construction, for research, for special training project, for student loans or for any other purpose), the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.

(2) The assurance required with respect to an institution of higher education, hospital, or any other institution, insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students, patients, or clients of the institution or to the opportunity to participate in the provision of services or other benefits to such individuals, shall be applicable to the entire institution unless the applicant establishes, to the satisfaction of the responsible Department official, that the institution's prac-

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tices in the program of the institution for which Federal financial assistance is sought, or the beneficiaries of or participants in such program. If in any such case the assistance sought is for the construction of a facility or part of a facility, the assurance shall in any event extend to the entire facility and to facilities operated in connection therewith.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1. Sec. 182; 80 Stat. 1209; 42 U.S.C. 2000d-5) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17980, 17982, July 5, 1975]

§ 80.5 ILLUSTRATIVE APPLICATION

The following examples will illustrate the programs aided by Federal financial assistance of the Department. (In all cases the discrimination prohibited is discrimination on the ground of race, color, or national origin prohibited by Title VI of the Act and this regulation, as a condition of the receipt of Federal assistance).

(a) In Federally assisted programs for the provision of health or welfare services, discrimination in the selection or eligibility of individuals to receive the services, and segregation or other discriminatory practices in the manner of providing them, are prohibited. This prohibition extends to all facilities and services provided by the grantee under the program or, if the grantee is a State, by a political subdivision of the State. It extends also to services purchased or otherwise obtained by the grantee (or political subdivision) from hospitals, nursing homes, schools, and similar institutions for beneficiaries of the program, and to the facilities in which such services are provided, subject, however, to the provisions of § 80.3(e).

(b) In federally-affected area assistance (P.L. 815 and P.L. 874) for construction aid and for general support of the operation of elementary or secondary schools, or in more limited support to such schools such as for the acquisition of equipment, the provision of vocational education, or the provision of guidance and counseling services, discrimination by the recipient school district in any of its elementary or secondary schools in the admission of students, or in the treatment of its students in any aspect of the educational process, is prohibited. In this and the following illustrations the prohibition of discrimination in the treatment of students or other trainees includes the prohibition of discrimination among the students or trainees in the availability or use of any academic, dormitory, eating, recreational, or other facilities of the grantee or other recipient.

(c) In a research, training, demonstration, or other grant to a university for activities to be conducted in a graduate school, discrimination in the admission and treatment of students in the graduate school is prohibited, and the prohibition extends to the entire university unless it satisfies the responsible Department official that practices with respect to other parts or programs of the university will not interfere, directly or indirectly, with fulfillment of the assurance required with respect to the graduate school.

(d) In a training grant to hospital or other nonacademic institution, discrimination is prohibited in the selection of individuals to be trained and in their treatment by the grantee during their training. In a research or demonstration is prohibited with respect to any educational activity and any provision of medical or other services and any financial aid to individuals incident to the program.

(e) In grants to assist in the construction of facilities for the provision of health, educational or welfare services, assurances will be required that services will be provided without discrimination, to the same extent that discrimination would be prohibited as a condition of Federal operating grants for the support of such services. Thus, as a condition of grants for the construction of academic, research, or other facilities at institutions of higher education, assurances will be required that there will be no discrimination in the admission or treatment of students. In case of hospital construction grants the assurance will apply to patients, to interns, residents, student nurses, and other trainees, and to the privilege of physicians, dentists, and other professionally qualified persons to practice in the hospital, and will apply to the entire facility for which, or for a part of which, the grant is made, and to facilities operated in connection therewith. In other construction grants the assurances required will similarly be adapted to the nature of the activities to be conducted in the facilities for construction of which the grants have been authorized by Congress.

(f) Upon transfers of real or personal surplus property for health or educational uses, discrimination is prohibited to the same extent as in the case of grants for the construction of facilities or the provision of equipment for like purposes.

(g) Each applicant for a grant for the construction of educational television facilities is required to provide an assurance that it will, in its broadcast services, give due consideration to the interests of all significant racial or ethnic groups within the population to be served by the applicant.

(h) A recipient may not take action that is calculated to bring about indirectly what this regulation forbids it to accomplish directly. Thus, a State, in selecting or approving projects or sites for the construction of public libraries which will receive Federal financial assistance, may not base its selections or approvals on criteria which have the effect of defeating or of substantially impairing accomplishments of the objectives of the Federal assistance as respects individuals of a particular race, color or national origin.

(i) In some situations, even though past discriminatory practices attributable to a recipient or applicant have been abandoned, the consequences of such practices continue to impede the full availability of a benefit. If the efforts required of the applicant or recipient under § 80.6(d), to provide information as to the availability of the program or activity and the rights of beneficiaries under this regulation, have failed to overcome these consequences, it will become necessary under the requirement stated in (i) of § 80.3(b)(6) for such applicant or recipient to take additional steps to make the benefits fully available to racial and nationality groups previously subject to discrimination. This action might take the form, for example, of special arrangements for obtaining referrals or making selections which will insure that groups previously subjected to discrimination are adequately served.

(j) Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 38 FR 17980, 17982, July 5, 1973]

§ 80.6 COMPLIANCE INFORMATION

(a) *Cooperation and assistance.*—The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.*—Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of land participants in federally-assisted programs. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) *Access to sources of information.*—Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this Part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law.

(d) *Information to beneficiaries and participants.*—Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this regulation.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000-1) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

§ 80.7 CONDUCT OF INVESTIGATION

(a) *Periodic compliance reviews.*—The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.

(gb) *Complaints.*—Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

(c) *Investigations.*—The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) *Resolution of matters.*—(1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 80.8.

(2) If an investigation does not warrant action pursuant to subparagraph (1) of this paragraph the responsible Department official or his designee will so inform the recipient and the complainant, if any, in writing.

(e) *Intimidatory or retaliatory acts prohibited.*—No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 38 FR 17981, 17982, July 5, 1973].

§ 80.8 PROCEDURE FOR EFFECTING COMPLIANCE

(a) *General.*—If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) *Noncompliance with § 80.4.*—If an applicant fails or refuses to furnish an assurance required under § 80.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that the Department shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.*—No order suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) *Other means authorized by law.*—No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1. Sec. 182, 80 Stat. 1209; 42 U.S.C. 2000-5) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14556, Oct. 19, 1967; 38 FR 17982, July 5, 1973]

§ 80.9 HEARINGS

(a) *Opportunity for hearing.*—Whenever an opportunity for a hearing is required by § 80.8(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the responsible Department official that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the Act and § 80.8(c) of this regulation and consent to the making of a decision on the basis of such information as may be filed as the record.

(b) *Time and place of hearing.*—Hearings shall be held at the offices of the Department in Washington, D.C., at a time fixed by the responsible Department official unless he determines that the convenience of the applicant or recipient or of the Department requires that another place be selected. Hearings shall be held before a hearing examiner designated in accordance with 5 U.S.C. 3105 and 3344 (section 11 of the Administrative Procedure Act).

(c) *Right to counsel.*—In all proceedings under this section, the applicant or recipient and the Department shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.*—(1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with sections 5-8 of the Administrative Procedure Act, and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing. Any person (other than a Government employee considered to be on official business) who, having been invited or requested to appear and testify as a witness on the Government's behalf, attends at a time and place scheduled for a hearing provided for by this part, may be reimbursed for his travel and actual expenses of attendance in an amount not to exceed the amount payable under the standardized travel regulations to a Government employee traveling on official business.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) *Consolidated or Joint Hearings.*—In cases in which the same or related facts are asserted to constitute noncompliance with this regulation with respect to two or more programs to which this part applies, or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued under Title VI of the Act, the responsible Department official may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedures not inconsistent with this part. Final decisions in such cases, insofar as this regulation is concerned, shall be made in accordance with § 80.10.

(Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555 Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

§ 80.10 DECISIONS AND NOTICES

(a) *Decisions by hearing examiners.* After a hearing is held by a hearing examiner such hearing examiner shall either make an initial decision, if so authorized, or certify the entire record including his recommended findings and proposed decision to the reviewing authority for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient and to the complainant, if any. Where the initial decision referred to in this paragraph or in paragraph (c) of this section is made by the hearing examiner, the applicant or recipient or the counsel for the Department may, within the period provided for in the rules of procedure issued by the responsible Department official, file with the reviewing authority exceptions to the initial decision, with his reasons therefor. Upon the filing of such exceptions the reviewing authority shall review the initial decision and issue its own decision thereof including the reasons therefor. In the absence of exceptions the initial decision shall constitute the final decision, subject to the provisions of paragraph (e) of this section.

(b) *Decisions on record or review by the reviewing authority:* Whenever a record is certified to the reviewing authority for decision or it reviews the decision of a hearing examiner pursuant to paragraph (a) or (c) of this section, the applicant or recipient shall be given reasonable opportunity to file with it briefs or other written statements of its contentions, and a copy of the final decision of the reviewing authority shall be given in writing to the applicant or recipient and to the complainant, if any.

(c) *Decisions on record where a hearing is waived.*—Whenever a hearing is waived pursuant to § 80.9(a) the reviewing authority shall make its final decision on the record or refer the matter to a hearing examiner for an initial decision to be made on the record. A copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required.*—Each decision of a hearing examiner or reviewing authority shall set forth a ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) *Review in certain cases by the Secretary.*—If the Secretary has not personally made the final decision referred to in paragraphs (a), (b), or (c) of this section, a recipient or applicant or the counsel for the Department may request the Secretary to review a decision of the Reviewing Authority in accordance with rules of procedure issued by the responsible Department official. Such review is not a matter of right and shall be granted only where the Secretary determines there are special and important reasons therefor. The Secretary may grant or deny such request, in whole or in part. He may also review a decision upon his own motion in accordance with rules of procedure issued by the responsible Department official. In the absence of a review under this paragraph, a final decision referred to in paragraphs (a), (b), (c) of this section shall become the final decision of the Department when the Secretary transmits it as such to Congressional committees with the report required under section 602 of the Act. Failure of an applicant or recipient to file an exception with the Reviewing Authority or to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

(f) *Content of orders.*—The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, to which this regulation applies, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this regulation, including provisions designed to assure that no Federal financial assistance to which this regulation applies will thereafter be extended under such law or laws to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this regulation, or to have otherwise failed to comply with this regulation unless and until it corrects its noncompliance and satisfies the responsible Department official that it will fully comply with this regulation.

(g) *Post-termination proceedings.*—(1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonble assurance that it will fully comply with this part. An elementary or secondary school or school system which is unable to file an assurance of compliance with § 80.3 shall be restored to full eligibility to receive Federal financial assistance, if it files a court order or a plan for desegregation which meets the requirements of § 80.4(c), and provides reasonable assurance that it will comply with the court order or plan.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (f) of this section may at any time request the responsible Department official to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of subparagraph (1) of this paragraph. If the responsible Department official determines that those requirements have been satisfied, he shall restore such eligibility.

(3) If the responsible Department official denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes such official to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record, in accordance with rules of procedure issued by the responsible Department official. The applicant or recipient will be restored to such eligibility if it proves at such hearng that it satisfied the requirements of subparagraph (1) of this paragraph. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

(Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

§ 80.11 JUDICIAL REVIEW

Action taken pursuant to section 602 of the Act is subject to judicial review as provided in section 603 of the Act.

(Sec. 603, 78 Stat. 253; 42 U.S.C. 2000d-2) [29 F.R. 16298, Dec. 4, 1964, as amended at 82 F.R. 14555, Oct. 19, 1967]

§ 80.12 EFFECT ON OTHER REGULATIONS, FORMS AND INSTRUCTIONS

(a) *Effect on other regulations.*—All regulations, orders, or like directions heretofore issued by any officer of the Department which impose requirements designed to prohibit any discrimination against individuals on the ground of race, color, or national origin under any program to which this regulation applies, and which authorize the suspension or termination of or refusal to grant or to continue Federal financial assistance to any applicant for or recipient of assistance for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this regulation, except that nothing in this regulation shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction, or like direction prior to the effective date of this regulation. Nothing in this regulation, however, shall be deemed to supersede any of the following (including future amendments thereof): (1) The "Standards for a Merit System of Personnel Administration," issued jointly by the Secretaries of Defense, of Health, Education and Welfare, and of Labor, 45 CFR Part 70; (2) Executive Order 11063 and regulations issued thereunder, or any other regulations or instructions, insofar as such Order, regulations, or instructions prohibit discrimination on the ground of race, color, or national origin in any program or situation to which this regulation is inapplicable, or prohibit discrimination on any other ground; or (3) requirements for Emergency School Assistance as published in 35 FR 13442 and codified as 45 CFR Part 181.

(b) *Forms and instructions.*—The responsible Department official shall issue and promptly make available to interested persons forms and detailed instructions and procedures for effectuating this part.

(c) *Supervision and coordination.*—The responsible Department official may from time to time assign to officials of the Department, or to officials of other departments or agencies of the Government with the consent of such departments or agencies, responsibilities in connection with the effectuation of the purposes of Title VI of the Act and this regulation (other than responsibility for review as provided in § 80.10(e)), including the achievements of effective coordination and maximum uniformity within the Department and within the Executive Branch of the Government in the application of Title VI and this regulation to similar programs and in similar situations. Any action taken, determination made, or requirement imposed by an official of another Department or Agency acting pursuant to an assignment of responsibility under this subsection shall have the same effect as though such action had been taken by the responsible official of this Department.

(Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

§ 80.13 DEFINITIONS

As used in this part—

(a) The term "Department" means the Department of Health, Education, and Welfare, and includes each of its operating agencies and other organizational units.

(b) The term "Secretary" means the Secretary of Health, Education, and Welfare.

(c) The term "responsible Department official" means the Secretary or to the extent of any delegation by the Secretary of authority to act in his stead under any one or more provisions of this part, any person or persons to whom the Secretary has heretofore delegated, or to whom the Secretary may hereafter delegate such authority.

(d) The term "reviewing authority" means the Secretary, or any person or persons (including a board or other body specially created for that purpose and also including the responsible Department official) acting pursuant to authority delegated by the Secretary to carry out responsibilities under § 80.10 (a)-(d).

(e) The term "United States" means the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and the territories and possessions of the United States, and the term "State" means any one of the foregoing.

(f) The term "Federal financial assistance" includes (1) grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(g) The term "program" includes any program, project, or activity for the provision of services, financial aid, or other benefits to individuals (including education or training, health, welfare, rehabilitation, housing, or other services, whether provided through employees of the recipient of Federal financial assistance or provided by others through contracts or other arrangements with the recipient, and including work opportunities and cash or loan or other assistance to individuals), or for the provision of facilities for furnishing services, financial aid or other benefits to individuals. The services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any services, financial aid, or other benefits provided with the aid of Federal financial assistance or with the aid of any non-Federal funds, property, or other resources required to be expended or made available for the program to meet matching requirements or other conditions which must be met in order to receive the Federal financial assistance, and to include any services, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance or such non-Federal resources.

(h) The term "facility" includes all or any portion of structures, equipment, or other real or personal property or interests therein, and the provision of facilities includes the construction, expansion, renovation, remodeling, alteration or acquisition of facilities.

(i) The term "recipient" means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program.

(j) The term "primary recipient" means any recipient which is authorized or required to extend Federal financial assistance to another recipient for the purpose of carrying out a program.

(k) The term "applicant" means one who submits an application, request, or plan required to be approved by a Department official, or by a primary recipient, as a condition to eligibility for Federal financial assistance, and the term "application" means such an application, request, or pain.

(Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17982, July 5, 1973]

APPENDIX A

FEDERAL FINANCIAL ASSISTANCE TO WHICH THESE REGULATIONS APPLY

Part 1. Assistance other than for State-Administered Continuing Programs

1. Loans for acquisition of equipment for academic subjects, and for minor remodeling (20 U.S.C. 445).

2. Construction of facilities for institutions of higher education (20 U.S.C. 701-758).

3. School Construction in federally-affected and in major disaster areas (20 U.S.C. 631-647).

4. Construction of educational broadcast facilities (47 U.S.C. 390-399).

5. Loan service of captioned films and educational media; research on, and production and distribution of, educational media for the handicapped, and training of persons in the use of such media for the handicapped (20 U.S.C. 1452).

6. Demonstration residential vocational education schools (20 U.S.C. 1321).

7. Research and related activities in education of handicapped children (20 U.S.C. 1441).

8. Educational research, dissemination and demonstration projects; research training; and construction under the Cooperation Research Act (20 U.S.C. 331-332(b)).

9. Research in teaching modern foreign languages (20 U.S.C. 512).

10. Training projects for manpower development and training (42 U.S.C. 2601, 2602, 2610a-2610c).

11. Research and training projects in Vocational Education (20 U.S.C. 1281 (a), 1282-1284).

12. Allowances to institutions training NDEA graduate fellows (20 U.S.C. 461–465).

13. Grants for training in librarianship (20 U.S.C. 1031–1063).

14. Grants for training personnel for the education of handicapped children (20 U.S.C. 1431).

15. Allowances for institutions training teachers and related educational personnel in elementary and secondary education, or post-secondary vocational education (20 U.S.C. 1111–1118).

16. Recruitment, enrollment, training and assignment of Teacher Corps personnel (20 U.S.C. 1101–1107a).

17. Operation and maintenance of schools in Federally-affected and in major disaster areas (20 U.S.C. 236–241; 241–1; 242–244).

18. Grants or contracts for the operation of training institutes for elementary or secondary school personnel to deal with special education problems occasioned by desegregation (42 U.S.C. 2000c–3).

19. Grants for in-service training of teachers and other schools personnel and employment of specialists in desegregation problems (42 U.S.C. 2000c–4).

20. Higher education students loan program (Title II, National Defense Education Act, 20 U.S.C. 421–429).

21. Educational Opportunity grants and assistance for State and private programs of low-interest insured loans and State loans to students in institutions of higher education (Title IV, Higher Education Act of 1965, 20 U.S.C. 1061–1087).

22. Grants and contracts for the conduct of Talent Search, Upward Bound, and Special Services Programs (20 U.S.C. 1068).

23. Land-grant college aid (7 U.S.C. 301–308; 321–326; 328–331).

24. Language and area centers (Title VI, National Defense Education Act, 20 U.S.C. 511).

25. American Printing House for the Blind (20 U.S.C. 101–105).

26. Future Farmers of America (36 U.S.C. 271–391) and similar programs.

27. Science clubs (P.L. 85–875, 20 U.S.C. 2, note).

28. Howard University (20 U.S.C. 121–129).

29. Gallaudet College (31 D.C. Code, Ch. 10).

30. Establishment and operation of a model secondary school for the deaf by Gallaudet College (31 D.C. Code 1051–1053; 80 Stat. 1027–1028).

31. Faculty development programs, workshops and institutes (20 U.S.C. 1131–1132).

32. National Technical Institute for the Deaf (20 U.S.C. 681–685).

33. Institutes and other programs for training educational personnel (Parts D, E & F, Title V, Higher Education Act of 1965) (20 U.S.C. 1119–1119c–4).

34. Grants and contracts for research and demonstration projects in librarianship (20 U.S.C. 1034).

35. Acquisition of college library resources (20 U.S.C. 1021–1028).

36. Grants for strengthening developing institutions of higher education (20 U.S.C. 1051–1054); National Fellowships for teaching at developing institutions (20 U.S.C. 1055), and grants to retired professors to teach at developing institutions (20 U.S.C. 1056).

37. College Work-Study Program (42 U.S.C. 2751–2757).

38. Financial assistance for acquisition of higher education equipment, and minor remodeling (20 U.S.C. 1121–1129).

39. Grants for special experimental demonstration projects and teacher training in adult education (20 U.S.C. 1208).

40. Grant programs for advanced and undergraduate international studies (20 U.S.C. 1171–1176; 22 U.S.C. 2452(b)).

41. Experimental projects for developing State leadership or establishment of special services (20 U.S.C. 865).

42. Grants to and arrangements with State educational and other agencies to meet special educational needs of migratory children of migratory agricultural workers (20 U.S.C. 241e(c)).

43. Grants by the Commissioner of Education to local educational agencies for supplementary educational centers and services; guidance, counseling, and testing (20 U.S.C. 841–844; 844b).

44. Resource centers for improvement of education of handicapped children (20 U.S.C. 1421) and centers and services for deaf-blind children (20 U.S.C. 1422).

45. Recruitment of personnel and dissemination of information on education of handicapped (20 U.S.C. 1433).

46. Grants for research and demonstrations relating to physical education or recreation for handicapped children (20 U.S.C. 1442) and training of physical educators and recreation personnel (20 U.S.C. 1434).

47. Dropout prevention projects (20 U.S.C. 887).

48. Bilingual education programs (20 U.S.C. 880b–880b–6).

49. Grants to agencies and organizations for Cuban refugees (22) U.S.C. 2601(b)(4).

50. Grants and contracts for special programs for children with specific learning disabilities including research and related activities, training and operating model centers (20 U.S.C. 1461).

51. Curriculum development in vocational and technical education (20 U.S.C. 1391).

52. Establishment, including construction, and operation of a National Center on Educational Media and Materials for the Handicapped (20 U.S.C. 1453).

53. Grants and contracts for the development and operation of experimental preschool and early education programs for handicapped (20 U.S.C. 1423).

54. Grants to public or private non-profit agencies to carry on the Follow Through Program in kindergarten and elementary schools (42 U.S.C. 2809(a)(2)).

55. Grants for programs of cooperative education and grants and contracts for training and research in cooperative education (20 U.S.C. 1087a–1087c).

56. Grants and contracts to encourage the sharing of college facilities and resources (network for knowledge) (20 U.S.C. 1133–1133b).

57. Grants, contracts, and fellowships to improve programs preparing persons for public service and to attract students to public service (20 U.S.C. 1134–1134b).

58. Grants for the improvement of graduate programs (20 U.S.C. 1135–1135c).

59. Contracts for expanding and improving law school clinical experience programs (20 U.S.C. 1136–1136b).

60. Exemplary programs and projects in vocational education (20 U.S.C. 1301–1305).

61. Grants to reduce borrowing cost for construction of residential schools and dormitories (20 U.S.C. 1323).

62. Project grants and contracts for research and demonstration relating to new or improved health facilities and services (sec. 304, PHS Act, 42 U.S.C. 242b).

63. Grants for construction or modernization of emergency rooms of general hospitals (Title VI, Part C, PHS Act, 42 U.S.C. 291j).

64. Institutional and special projects grants to schools of nursing (sections 805–808, PHS Act, 42 U.S.C. 296d–296g).

65. Grants for construction and initial staffing of facilities for prevention and treatment of alcoholism (sec. 241–2, Community Mental Health Centers Act (42 U.S.C. 2688 f and g).

66. Grants for construction and initial staffing of specialized facilities for the treatment of alcoholics requiring care in such facilities (sec. 243, Community Mental Health Centers Act, 42 U.S.C. 2688h).

67. Special project grants for training programs, evaluation of existing treatment programs, and conduct of significant programs relating to treatment of alcoholics (sec. 246, Community Mental Health Centers Act, 42 U.S.C. 2688j–1).

68. Grants for construction and initial staff of treatment facilities for narcotic addicts (sec. 251, Community Mental Health Centers Act, 42 U.S.C. 2688m).

69. Special project grants for training programs, evaluation of existing treatment programs, and conduct of significant programs relating to treatment of narcotics addicts (sec. 252, Community Mental Health Centers Act, 42 U.S.C. 2688n–1).

70. Grants for consultation services for Community Mental Health Centers, alcoholism prevention and treatment facilities for narcotic addicts, and facilities for mental health of children (sec. 264, Community Mental Health Centers Act, 42 U.S.C. 2688r).

71. Grants for construction and initial staff of facilities for mental health of children (sec. 271, Community Mental Health Centers Act, 42 U.S.C. 2688u).

72. Special project grants for training programs and evaluation of existing treatment program relating to mental health of children (sec. 272, Community Mental Health Centers Act, 42 U.S.C. 2688x).

73. Grants and loans for construction and modernization of medical facilities in the District of Columbia (P.L. 90–457; 82 Stat. 631–3).

74. Teaching facilities for nurse training (secs. 801–804, Public Health Service Act, 42 U.S.C. 296–296c).

75. Teaching facilities for allied health professions personnel (sec. 791, Public Health Service Act, 42 U.S.C. 295h).

76. Mental retardation research facilities (Title VI, Part D, Public Health Service Act, 42 U.S.C. 295–395e).

77. George Washington University Hospital construction (76 Stat. 83, P.L. 87–460, May 31, 1962).

78. Research projects, including conferences, communication activities and primate or other center grants (sec. 301, 303, 304, and 308, Public Health Service Act, 42 U.S.C. 241, 242a, 242b, and 242f).

79. General research support (sec. 301(d), Public Health Service Act, 42 U.S.C. 241).

80. Mental health demonstrations and administrative studies (sec. 303(a)(2), Public Health Service Act, 42 U.S.C. 242a).

81. Migratory workers health services (sec. 310, Public Health Service Act, 42 U.S.C. 242h).

82. Immunization programs (sec. 317, Public Health Service Act, 42 U.S.C. 247b).

83. Health research training projects and fellowship grants (secs. 301, 433, Public Health Service Act, 42 U.S.C. 242, 289c).

84. Categorical (heart, cancer, etc.) grants for training, traineeship or fellowships (secs. 303, 433, etc., Public Health Service Act, 42 U.S.C. 242a, 289c, etc.).

85. Advanced professional nurse traineeships (sec. 821, Public Health Service Act, 42 U.S.C. 297).

86. Department projects under Appalachian Regional Development Act (40 U.S.C. App. A).

87. Grants to institutions for traineeships for professional public health personnel (sec. 306, Public Health Service Act, 42 U.S.C. 242d).

88. Grants for graduates or specialized training in public health (sec. 309, Public Health Service Act, 42 U.S.C. 242g).

89. Health professions school student loan program (Title VII, Part C, Public Health Service Act, 52 U.S.C. 294–294(k)).

90. Grants for provision in schools of public health of training, consultation and technical assistance in the field of public health and in the administration of state or local public health programs (sec. 309(c)), Public Health Service Act, 42 U.S.C. 242(g)(c)).

91. Project grants for training, studies, or demonstrations looking metropolitan area, or other local area plans for health services (sec. 314(c), Public Health Service Act, 42 U.S.C. 246(c)).

92. Project grants for training, studies, or demonstrations looking toward the development of improved comprehensive health planning (sec. 314(c), Public Health Service Act, 42 U.S.C. 246(c)).

93. Project grants for health services development (sec. 314(e), Public Health Service Act, 42 U.S.C. 246(e)).

94. Institutional and special grants to health professions schools (Title VII, Part E, Public Health Service Act, 42 U.S.C. 295f–295f–4.

95. Improvement grants to centers for allied health professions (sec. 792, Public Health Service Act, 42 U.S.C. 295h–1).

96. Scholarship grants to health professions schools (Title VII, Part F, Public Health Service Act, 42 U.S.C. 295h–1).

97. Scholarship grants to schools of nursing (Title VIII, Part D, Public Health Service Act, 42 U.S.C. 298c–298c–6).

98. Traineeships for advanced training of allied health professions personnel (sec. 793, Public Health Service Act, 42 U.S.C. 295h–2).

99. Contracts to encourage full utilization of nursing educational talent (sec. 868, Public Health Service Act, 42 U.S.C. 298c–7).

100. Grants to community mental health centers for the compensation of professional and technical personnel for the initial operation of new centers or of new services in centers (Community Mental Health Centers Act, Part B, 42 U.S.C. 2688–2688d).

101. Grants for the planning, construction, equipment and operation of multi-county demonstration health projects in the Appalachian region (sec. 202 of Appalachian Regional Development Act, P.L. 89-4, as amended, P.L. 90-103 40 U.S.C. App. 202).

102. Education, research, training, and demonstrations in the fields of heart disease, cancer, stroke and related diseases (secs. 900-10, Public Health Service Act, 42 U.S.C. 299a-j).

103. Assistance to medical libraries (secs. 390-399, Public Health Service Act, 42 U.S.C. 280b-280b-9).

104. Nursing student loans (secs. 822-828, Public Health Service Act, 42 U.S.C. 297a-g).

105. Hawaii leprosy payments (sec. 331, Public Health Service Act, 42 U.S.C. 255).

106. Heart disease laboratories and related facilities for patient care (sec. 412(d), Public Health Service Act, 42 U.S.C. 287a(d)).

107. Grants for construction of hospitals serving Indians (P.L. 85-151, 42 U.S.C. 2005).

108. Indian Sanitation Facilities (P.L. 86-121, 42 U.S.C. 2004a).

109. Research projects relating to maternal and child health services and crippled children's services (42 U.S.C. 712).

110. Maternal and child health special project grants to State agencies and institutions of higher learning (42 U.S.C. 703(2)).

111. Maternity and infant care and family planning services; special project grants to local health agencies and other organizations (42 U.S.C. 708).

112. Special project grants to State agencies and institutions of higher learning for crippled children's services (42 U.S.C. 704(2)).

113. Special project grants for health of school and preschool children (42 U.S.C. 709) and for dental health of children (42 U.S.C. 710).

114. Grants to institutions of higher learning for training personnel for health care and related services for mothers and children (42 U.S.C. 711).

115. Grants and contracts for the conduct of research, experiments, or demonstrations relating to the development, utilization, quality, organization, and financing of services, facilities, and resources of hospitals long-term care facilities, or other medical facilities (sec. 304, Public Health Service Act, as amended by P.L. 90-174, 42 U.S.C. 242b).

116. Health research facilities (Title VII, Part A, Public Health Service Act, 42 U.S.C. 292-292j).

117. Teaching facilities for health professions personnel (Title VII, Part B, Public Health Service Act, 42 U.S.C. 293-293h).

118. Project grants and contracts for research, development, training, and studies in the field of electronic product radiation (sec. 356, Public Health Service Act, 42 U.S.C. 263d).

119. Project grants and contracts for research, studies, demonstrations, training, and education relating to coal mine health (sec. 501, Federal Coal Mine Health and Safety Act of 1969, Public Law 91-173).

120. Surplus real and related personal property disposal (40 U.S.C. 484(k)).

121. Supplementary medical insurance benefits for the aged (Title XXIII, Part B, Social Security Act, 42 U.S.C. 1395j-1395w).

122. Issuance of rent-free permits for vending stands, credit unions, employee associations, etc. (20 U.S.C. 107-107f; 45 C.F.R. Part 20; sec. 25, 12 U.S.C. 1770).

123. Grants for special vocational rehabilitation projects (29 U.S.C. 34(a)(1)).

124. Experimental, pilot or demonstration projects to promote the objectives of Title I, X, XIV, XVI, or XIX or Part A of Title IV of the Social Security Act (42 U.S.C. 1315).

125. Social Security and welfare cooperative research or demonstration projects (42 U.S.C. 1310).

126. Child welfare research, training, or demonstration projects (42 U.S.C. 626).

127. Training projects (Title VI, Older Americans Act, 42 U.S.C. 3041-3042).

128. Grants for expansion of vocational rehabilitation services (29 U.S.C. 34(a)(2)(A)).

129. Grants for construction of rehabilitation facilities (29 U.S.C. 41a(a)–(e)) and for initial staffing of rehabilitation facilities (29 U.S.C. 41a(f)).

130. Project development grants for rehabilitation facilities (29 U.S.C. 41a(g)(2)).

131. Rehabilitation Facility improvement grants (29 U.S.C. 41b(b)).

132. Agreement for the establishment and operation of a national center for deaf-blind youths and adults (29 U.S.C. 42a).

133. Project grants for services for migratory agricultural workers (29 U.S.C. 42b).

134. Grants for initial staffing of community mental retardation facilities (42 U.S.C. 2678–2678d).

135. Grants for training welfare personnel and for expansion and development of undergraduate and graduate social work programs (42 U.S.C. 906, 908).

136. Research and development projects concerning older Americans (42 U.S.C. 3031–3032).

137. Grants to States for training of nursing home administrators (42 U.S.C. 1396g(e)).

138. Contracts or jointly financed. cooperative arrangements with industry (29 U.S.C. 34(a)(2)(B)).

139. Project grants for new careers in rehabilitation (29 U.S.C. 34(a)(2)(C)).

140. Children of low-income families (20 U.S.C. 241a–241m).

141. Grants for training (29 U.S.C. 37(a)(2)).

142. Grants for projects for training services (29 U.S.C. 41b(a)).

143. Grants for comprehensive juvenile delinquency planning (42 U.S.C. 3811).

144. Grants for project planning in juvenile delinquency (42 U.S.C. 3812).

145. Grants for juvenile delinquency rehabilitative services projects (42 U.S.C. 3822, 3842).

146. Grants for juvenile delinquency preventive service projects (42 U.S.C. 3861).

147. Grants for training projects in juvenile delinquency fields (42 U.S.C. 3861).

148. Grants for development of improved techniques and practices in juvenile delinquency services (42 U.S.C. 3871).

149. Grants for technical assistance in juvenile delinquency services (42 U.S.C. 3872).

150. Grants for State technical assistance to local units in juvenile delinquency services (42 U.S.C. 3873).

151. Grants for public service centers projects (42 U.S.C. 2744).

152. Grants to public or private non-profit agencies to carry on the Project Headstart Program (42 U.S.C. 2809(a)(1)).

153. Project grants for new careers for the handicapped (29 U.S.C. 34(a)(2)(D)).

154. Construction, demonstration, and training grants for university-affiliated facilities for persons with developmental disabilities (42 U.S.C. 2661–2666).

Part 2. Continuing Assistance to State Administered Programs

1. Grants to States for public library services and construction, interlibrary cooperation and specialized State library services for certain State institutions and the physically handicapped (20 U.S.C. 851–855).

2. Grants to States for strengthening instruction in academic subjects (20 U.S.C. 441–444).

3. Grants to States for vocational education (20 U.S.C. 1241–1264).

4. Arrangements with State education agencies for training under the Manpower Development and Training Act (42 U.S.C. 2601–2602, 2610a).

5. Grants to States to assist in the elementary and secondary education of children of low-income families (20 U.S.C. 241a–241m).

6. Grants to States to provide for school library resources, textbooks and other instructional materials for pupils and teachers in elementary and secondary schools (20 U.S.C. 821–827).

7. Grants to States to strengthen State departments of education (20 U.S.C. 861–870).

8. Grants to States for community service programs (20 U.S.C. 1001–1011).

9. Grants to States for adult basic education and related research, teacher training and special projects (20 U.S.C. 1201–1211).

10. Grants to State educational agencies for supplementary educational centers and services, and guidance, counseling and testing (20 U.S.C. 841–847).

11. Grants to States for research and training in vocational education (20 U.S.C. 1281(b)).

12. Grants to States for exemplary programs and projects in vocational education (20 U.S.C. 1301–1305).

13. Grants to States for residential vocational education schools (20 U.S.C. 1321).

14. Grants to States for consumer and homemaking education (20 U.S.C. 1341).

15. Grants to States for cooperative vocational education program (20 U.S.C. 1351–1355).

16. Grants to States for vocational work-study programs (20 U.S.C. 1371–1374).

17. Grants to States to attract and qualify teachers to meet critical teaching shortages (20 U.S.C. 1108–1110c).

18. Grants to States for education of handicapped children (20 U.S.C. 1411–1414).

19. Grants for administration of State plans and for comprehensive planning to determine construction needs of institutions of higher education (20 U.S.C. 715(b)).

20. Grants to States for comprehensive health planning (sec. 314(a), Public Health Service Act, 42 U.S.C. 246(a)).

21. Grants to States for establishing and maintaining adequate public health services (sec. 314(d), Public Heath Service Act, 42 U.S.C. 246(d)).

22. Grants, loans, and loan guarantees with interest subsidies for hospital and medical facilities (Title VI, Public Health Service Act, 42 U.S.C. 291 et seq.).

23. Grants to States for community mental health centers construction (Community Mental Health Centers Act, Part A, 42 U.S.C. 2681–2687).

24. Cost of rehabilitation services (Title II, Social Security Act sec. 222(d); 42 U.S.C. 422(d)).

25. Surplus personal property disposal donations for health and educational purposes through State agencies (40 U.S.C. 484(j)).

26. Grants for State and community programs on aging (Title III, Older Americans Act, 42 U.S.C. 3021–3025).

27. Grants to States for panning, provision of services, and construction and operation of facilities for persons with developmental disabilities (42 U.S.C. 2670–2677c).

28. Grants to States for vocational rehabilitation services (29 U.S.C. 32): for innovation of vocational rehabilitation services (29 U.S.C. 33); and for rehabilitation facilities planning (29 U.S.C. 41a(g)(1)).

29. Designation of State licensing agency for blind operators of vending stands (20 U.S.C. 107–107f).

30. Grants to States for old-age assistance (42 U.S.C. 301 et seq.); aid to families with dependent children (42 U.S.C. 601 et seq.); child-welfare services 42 U.S.C. 620 et seq.); aid to the blind (42 U.S.C. 1201 et seq.); aid to the permanently and totally disabled (42 U.S.C. 1351 et seq.); aid to the aged, blind, or disabled (42 U.S.C. 1381 et seq.); medical assistance (42 U.S.C. 1396 et seq.).

31. Grants to States for maternal and child health and crippled children's services (42 U.S.C. 701–707); for special projects for maternal and infant care (42 U.S.C. 708).

32. Grants to States for juvenile delinquency preventive and rehabilitative services (42 U.S.C. 3841).

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Authority: The provisions of this Part 81 are issued under 5 U.S.C.. 301 and 45 CFR 80.9(d).

Source: The provisions of this Part 81 appear at 32 F.R. 15156, Nov. 2, 1967, unless otherwise noted.

Subpart A—General Information

§ 81.1 SCOPE OF RULES

The rules of procedure in this part supplement §§ 80.9 and 80.10 of this subtitle and govern the practice for hearings, decisions, and administrative review Title VI of the Civil Rights Act of 1964 (sec. 602, 78 Stat. 252) and Part 80 of conducted by the Department of Health, Education, and Welfare, pursuant to this subtitle.

§ 81.2 RECORDS TO BE PUBLIC

All pleadings, correspondence, exhibits, transcripts of testimony, exceptions, briefs, decisions, and other documents filed in the docket in any proceeding may be inspected and copied in the office of the Civil Rights hearing clerk. Inquiries may be made at the Central Information Center, Department of Health, Education, and Welfare, 330 Independence Avenue SW., Washington, D.C. 20201.

§ 81.3 USE OF GENDER AND NUMBER

As used in this part, words importing the singular number may extend and be applied to several persons or things, and vice versa. Words importing the masculine gender may be applied to females or organizations.

§ 81.4 SUSPENSION OF RULES

Upon notice to all parties, the reviewing authority or the presiding officer, with respect to matters pending before them, may modify or waive any rule in this part upon determination that no party will be unduly prejudiced and the ends of justice will thereby be served.

Subpart B—Appearance and Practice

§ 81.11 APPEARANCE

A party may appear in person or by counsel and participate fully in any proceeding. A State agency or a corporation may appear by any of its officers or by any employee it authorizes to appear on its behalf. Counsel must be members in good standing of the bar of a State, Territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico.

§ 81.12 AUTHORITY FOR REPRESENTATION

Any individual acting in a representative capacity in any proceeding may be required to show his authority to act in such capacity.

§ 81.13 EXCLUSION FROM HEARING FOR MISCONDUCT

Disrespectful, disorderly, or contumacious language or contemptuous conduct, refusal to comply with directions, or continued use of dilatory tactics by any person at any hearing before a presiding officer shall constitute grounds for immediate exclusion of such person from the hearing by the presiding officer.

Subpart C—Parties

§ 81.21 PARTIES: GENERAL COUNSEL DEEMED A PARTY

(a) The term party shall include an applicant or recipient or other person to whom a notice of hearing or opportunity for hearing has been mailed naming him as respondent.

(b) The General Counsel of the Department of Health, Education, and Welfare shall be deemed a party to all proceedings.

§ 81.22 AMICI CURIAE

(a) Any interested person or organization may file a petition to participate in a proceeding as an amicus curiae. Such petition shall be filed prior to the prehearing conference, or if none is held, before the commencement of the hearing, unless the petitioner shows good cause for filing the petition later. The presiding officer may grant the petition if he finds that the petitioner has a legitimate interest in the proceedings, that such participation will not unduly delay the outcome, and may contribute materially to the proper disposition thereof. An amicus curiae is not a party and may not introduce evidence at a hearing.

(b) An amicus curiae may submit a statement of position to the presiding officer prior to the beginning of a hearing, and shall serve a copy on each party. The amicus curiae may submit a brief on each occasion a decision is to be made or a prior decision is subject to review. His brief shall be filed and served on each party within the time limits applicable to the party whose position he deems himself to support; or if he does not deem himself to support the position of any party, within the longest time limit applicable to any party at that particular stage of the proceedings.

(c) When all parties have completed their initial examination of a witness, any amicus curiae may request the presiding officer to propound specific questions to the witness. The presiding officer, in his discretion, may grant any such request if he believes the proposed additional testimony may assist materially in elucidating factual matters at issue between the parties and will not expand the issues.

§ 81.23 COMPLAINANTS NOT PARTIES

A person submitting a complaint pursuant to § 80.7(b) of this title is not a party to the proceedings governed by this part, but may petition, after proceedings are initiated, to become an amicus curiae.

Subpart D—Form, Execution, Service, and Filing of Documents

§ 81.31 FORM OF DOCUMENTS TO BE FILED

Documents to be filed under the rules in this part shall be dated, the original signed in ink, shall show the docket description and title of the proceeding, and shall show the title, if any, and address of the signatory. Copies need not be signed but the name of the person signing the original shall be reproduced. Documents shall be legible and shall not be more than 8½ inches wide and 12 inches long.

§ 81.32 SIGNATURE OF DOCUMENTS

The signature of a party, authorized officer, employee or attorney constitutes a certificate that he has read the document, that to the best of his knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the proceeding may proceed as though the document had not been filed. Similar action may be taken if scandalous or indecent matter is inserted.

§ 81.33 FILING AND SERVICE

All notices by a Department official, and all written motions, requests, petitions, memoranda, pleadings, exceptions, briefs, decisions, and correspondence to a Department official from a party, or vice versa, relating to a proceeding after its commencement shall be filed and served on all parties. Parties shall supply the original and two copies of documents submitted for filing. Filings shall be made with the Civil Rights hearing clerk at the address stated in the notice of hearing or notice of opportunity for hearing, during regular business hours. Regular business hours are every Monday through Friday (legal holidays in the District of Columbia excepted) from 9 a.m. to 5:30 p.m., eastern standard or daylight saving time, whichever is effective in the District of Columbia at the time. Originals only of exhibits and transcripts of testimony need be filed. For requirements of service on amici curiae, see § 81.107.

§ 81.34 SERVICE—HOW MADE

Service shall be made by personal delivery of one copy to each person to be served or by mailing by first-class mail, properly addressed with postage prepaid. When a party or amicus has appeared by attorney or other representative, service upon such attorney or representative will be deemed service upon the party or amicus. Documents served by mail preferably should be mailed in sufficient time to reach the addressee by the date on which the original is due to be filed, and should be air mailed if the addressee is more than 300 miles distant.

§ 81.35 DATE OF SERVICE

The date of service shall be the day when the matter is deposited in the U.S. mail or is delivered in person, except that the date of service of the initial notice of hearing or opportunity for hearing shall be the date of its delivery, or of its attempted delivery if refused.

§ 81.36 CERTIFICATE OF SERVICE

The original of every document filed and required to be served upon parties to a proceeding shall be endorsed with a certificate of service signed by the party making service or by his attorney or representative, stating that such service has been made, the date of service, and the manner of service, whether by mail or personal delivery.

Subpart E—Time

§ 81.41 COMPUTATION

In computing any period of time under the rules in this part or in an order issued hereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed in the District of Columbia, in which event it includes the next following business day. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation.

§ 81.42 EXTENSION OF TIME OR POSTPONEMENT

Requests for extension of time should be served on all parties and should set forth the reasons for the application. Applications may be granted upon a showing of good cause by the applicant. From the designation of a presiding officer until the issuance of his decision such requests should be addressed to him. Answers to such requests are permitted, if made promptly.

§ 81.43 REDUCTION OF TIME TO FILE DOCUMENTS

For good cause, the reviewing authority or the presiding officer, with respect to matters pending before them, may reduce any time limit prescribed by the rules in this part, except as provided by law or in Part 80 of this title.

Subpart F—Proceedings Prior to Hearing

§ 81.51 NOTICE OF HEARING OR OPPORTUNITY FOR HEARING

Proceedings are commenced by mailing a notice of hearing or opportunity for hearing to an affected applicant or recipient, pursuant to § 80.9 of this title.

§ 81.52 ANSWER TO NOTICE

The respondent, applicant or recipient may file an answer to the notice within 20 days after service thereof. Answers shall admit or deny specifically and in detail each allegation of the notice, unless the respondent party is without knowledge, in which case his answer should so state, and the statement will be deemed a denial. Allegations of fact in the notice not denied or controverted by answer shall be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered. Failure of the respondent to file an answer within the 20-day period following service of the notice may be deemed an admission of all matters of fact recited in the notice.

§ 81.53 AMENDMENT OF NOTICE OR ANSWER

The General Counsel may amend the notice of hearing or opportunity for hearing once as a matter of course before an answer thereto is served, and each

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respondent may amend his answer once as a matter of course not later than 10 days before the date fixed for hearing but in no event later than 20 days from the date of service of his original answer. Otherwise a notice or answer may be amended only by leave of the presiding officer. A respondent shall file his answer to an amended notice within the time remaining for filing the answer to the original notice or within 10 days after service of the amended notice, whichever period may be the longer, unless the presiding officer otherwise orders.

§ 81.54 REQUEST FOR HEARING

Within 20 days after service of a notice of opportunity for hearing which does not fix a date for hearing the respondent, either in his answer or in a separate document, may request a hearing. Failure of the respondent to request a hearing shall be deemed a waiver of the right to a hearing and to constitute his consent to the making of a decision on the basis of such information as is available.

§ 81.55 CONSOLIDATION

The responsible Department official may provide for proceedings in the Department to be joined or consolidated for hearing with proceedings in other Federal departments or agencies, by agreement with such other departments or agencies. All parties to any proceeding consolidated subsequently to service of the notice of hearing or opportunity for hearing shall be promptly served with notice of such consolidation.

§ 81.56 MOTIONS

Motions and petitions shall state the relief sought, the authority relied upon, and the facts alleged. If made before or after the hearing, these matters shall be in writing. If made at the hearing, they may be stated orally; but the presiding officer may require that they be reduced to writing and filed and served on all parties in the same manner as a formal motion. Motions, answers, and replies shall be addressed to the presiding officer, if the case is pending before him. A repetitious motion will not be entertained.

§ 81.57 RESPONSES TO MOTIONS AND PETITIONS

Within 8 days after a written motion or petition is served, or such other period as the reviewing authority or the presiding officer may fix, any party may file a response thereto. An immediate oral response may be made to an oral motion.

§ 81.58 DISPOSITION OF MOTIONS AND PETITIONS

The reviewing authority or the presiding officer may not sustain or grant a written motion or petition prior to expiration of the time for filing responses thereto, but may overrule or deny such motion or petition without awaiting response: *Provided, however,* That prehearing conferences, hearings and decisions need not be delayed pending disposition of motions or petitions. Oral motions and petitions may be ruled on immediately. Motions and petitions submitted to the reviewing authority or the presiding officer, respectively, and not disposed of in separate rulings or in their respective decisions will be deemed denied. Oral arguments shall not be held on written motions or petitions unless the presiding officer in his discretion expressly so orders.

Subpart G—Responsibilities and Duties of Presiding Officer

§ 81.61 WHO PRESIDES

A hearing examiner assigned under 5 U.S.C. 3105 or 3344 (formerly sec. 11 of the Administrative Procedure Act) shall preside over the taking of evidence in any hearing to which these rules of procedure apply.

§ 81.62 DESIGNATION OF HEARING EXAMINER

The designation of the hearing examiner as presiding officer shall be in writing, and shall specify whether the examiner is to make an initial decision or to certify the entire record including his recommended findings and proposed decision to the reviewing authority, and may also fix the time and place of hearing. A copy of such order shall be served on all parties. After service of an order designating a hearing examiner to preside, and until such examiner makes his decision, motions and petitions shall be submitted to him. In the case of the death, illness, disqualification or unavailability of the designated hearing examiner, another hearing examiner may be designated to take his place.

§ 81.63 AUTHORITY OF PRESIDING OFFICER

The presiding officer shall have the duty to conduct a fair hearing, to take all necessary action to avoid delay, and to maintain order. He shall have all powers necessary to these ends, including (but not limited to) the power to:

(a) Arrange and issue notice of the date, time, and place of hearings, or, upon due notice to the parties, to change the date, time, and place of hearings previously set.

(b) Hold conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding.

(c) Require parties and amici curiae to state their position with respect to the various issues in the proceeding.

(d) Administer oaths and affirmations.

(e) Rule on motions, and other procedural items on matters pending before him.

(f) Regulate the course of the hearing and conduct of counsel therein.

(g) Examine witnesses and direct witnesses to testify.

(h) Receive, rule on, exclude or limit evidence

(i) Fix the time for filing motions, petitions, briefs, or other items in matters pending before him.

(j) Issue initial or recommended decisions.

(k) Take any action authorized by the rules in this part or in conformance with the provisions of 5 U.S.C. 551–559 (the Administrative Procedure Act).

Subpart H—Hearing Procedure

§ 81.71 STATEMENT OF POSITION AND TRIAL BRIEFS

The presiding officer may require parties and amici curiae to file written statements of position prior to the beginning of a hearing. The presiding officer may also require the parties to submit trial briefs.

§ 81.72 EVIDENTIARY PURPOSE

(a) The hearing is directed to receiving factual evidence and expert opinion testimony related to the issues in the proceeding. Argument will not be received in evidence; rather it should be presented in statements, memoranda, or briefs, as determined by the presiding officer. Brief opening statements, which shall be limited to statement of the party's position and what he intends to prove, may be made at hearings.

(b) Hearings for the reception of evidence will be held only in cases where issues of fact must be resolved in order to determine whether the respondent has failed to comply with one or more applicable requirements of Part 80 of this title. In any case where it appears from the respondent's answer to the notice of hearing or opportunity for hearing, from his failure timely to answer, or from his admissions or stipulations in the record, that there are no matters of material fact in dispute, the reviewing authority or presiding officer may enter an order so finding, vacating the hearing date if one has been set, and fixing the time for filing briefs under § 81.101. Thereafter the proceedings shall go to conclusion in accordance with Subpart J of this part. The presiding officer may allow an appeal from such order in accordance with § 81.86.

§ 81.73 TESTIMONY

Testimony shall be given orally under oath or affirmation by witnesses at the hearing; but the presiding officer, in his discretion, may require or permit that the direct testimony of any witness be prepared in writing and served on all parties in advance of the hearing. Such testimony may be adopted by the witness at the hearing, and filed as part of the record thereof. Unless authorized by the presiding officer, witnesses will not be permitted to read prepared testimony into the record. Except as provided in §§ 81.75 and 81.76, witnesses shall be available at the hearing for cross-examination.

§ 81.74 EXHIBITS

Proposed exhibits shall be exchanged at the prehearing conference, or otherwise prior to the hearing if the presiding officer so requires. Proposed exhibits not so exchanged may be denied admission as evidence. The authenticity of all proposed exhibits exchanged prior to hearing will be deemed admitted unless written objection thereto is filed prior to the hearing or unless good cause is shown at the hearing for failure to file such written objection.

§ 81.75 AFFIDAVITS

An affidavit is not inadmissible as such. Unless the presiding officer fixes other time periods affidavits shall be filed and served on the parties not later than 15 days prior to the hearings; and not less than 7 days prior to hearing a party may file and serve written objection to any affidavit on the ground that he believes it necessary to test the truth of assertions therein at hearing. In such event the assertions objected to will not be received in evidence unless the affiant is made available for cross-examination, or the presiding officer determines that cross-examination is not necessary for the full and true disclosure of facts referred to in such assertions. Notwithstanding any objection, however, affidavits may be considered in the case of any respondent who waives a hearing.

§ 81.76 DEPOSITIONS

Upon such terms as may be just, for the convenience of the parties or of the Department, the presiding officer may authorize or direct the testimony of any witness to be taken by deposition.

§ 81.77 ADMISSIONS AS TO FACTS AND DOCUMENTS

Not later than 15 days prior to the scheduled date of the hearing except for good cause shown, or prior to such earlier date as the presiding officer may order, any party may serve upon an opposing party a written request for the admission of the genuineness and authenticity of any relevant documents described in and exhibited with the request, or for the admission of the truth of any relevant matters of fact stated in the request. Each of the matters of which an admission is requested shall be deemed admitted, unless within a period designated in the request (not less than 10 days after service thereof, or within such further time as the presiding officer or the reviewing authority if no presiding officer has yet been designated may allow upon motion and notice) the party to whom the request is directed serves upon the requesting party a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny such matters. Copies of requests for admission and answers thereto shall be served on all parties. Any admission made by a party to such request is only for the purposes of the pending proceeding for the enforcement of any order entered therein, and shall not constitute an admission by him for any other purpose or be used against him in any other proceeding or action.

§ 81.78 EVIDENCE

Irrelevant, immaterial, unreliable, and unduly repetitious evidence will be excluded.

§ 81.79 CROSS-EXAMINATION

A witness may be cross-examined on any matter material to the proceeding without regard to the scope of his direct examination.

§ 81.80 UNSPONSORED WRITTEN MATERIAL

Letters expressing views or urging action and other unsponsored written material regarding matters in issue in a hearing will be placed in the correspondence section of the docket of the proceeding. These data are not deemed part of the evidence or record in the hearing.

§ 81.81 OBJECTIONS

Objections to evidence shall be timely and briefly state the ground relied upon.

§ 81.82 EXCEPTIONS TO RULINGS OF PRESIDING OFFICER UNNECESSARY

Exceptions to rulings of the presiding officer are unnecessary. It is sufficient that a party, at the time the ruling of the presiding officer is sought, makes known the action which he desires the presiding officer to take, or his objection to an action taken, and his grounds therefor.

§ 81.83 OFFICIAL NOTICE

Where official notice is taken or is to be taken of a material fact not appearing in the evidence of record, any party, on timely request, shall be afforded an opportunity to show the contrary.

§ 81.84 PUBLIC DOCUMENT ITEMS

Whenever there is offered (in whole or in part) a public document, such as an official report, decision, opinion, or published scientific or economic statistical data issued by any of the executive departments (or their subdivisions), legislative agencies or committees, or administrative agencies of the Federal Government (including Government-owned corporations), or a similar document issued by a State or its agencies, and such document (or part thereof) has been shown by the offeror to be reasonably available to the public, such document need not be produced or marked for identification, but may be offered for official notice, as a public document item by specifying the document or relevant part thereof.

§ 81.85 OFFER OF PROOF

An offer of proof made in connection with an objection taken to any ruling of the presiding officer rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and, if the excluded evidence consists of evidence in documentary or written form or of reference to documents or records, a copy of such evidence shall be marked for identification and shall accompany the record as the offer of proof.

§ 81.86 APPEALS FROM RULING OF PRESIDING OFFICER

Rulings of the presiding officer may not be appealed to the reviewing authority prior to his consideration of the entire proceeding except with the consent of the presiding officer and where he certifies on the record or in writing that the allowance of an interlocutory appeal is clearly necessary to prevent exceptional delay, expense, or prejudice to any party, or substantial detriment to the public interest. If an appeal is allowed, any party may file a brief with the reviewing authority within such period as the presiding officer directs. No oral argument will be heard unless the reviewing authority directs otherwise. At any time prior to submission of the proceeding to it for decision, the reviewing authority may direct the presiding officer to certify any question or the entire record to it for decision. Where the entire record is so certified, the presiding officer shall recommend a decision.

Subpart I—The Record

§ 81.91 OFFICIAL TRANSCRIPT

The Department will designate the official reporter for all hearings. The official transcripts of testimony taken, together with any exhibits, briefs, or memoranda of law filed therewith shall be filed with the Department. Transcripts of testimony in hearings may be obtained from the official reporter by the parties and the public at rates not to exceed the maximum rates fixed by the contract between the Department and the reporter. Upon notice to all parties, the presiding officer may authorize corrections to the transcript which involve matters of substance.

§ 81.92 RECORD FOR DECISION

The transcript of testimony, exhibits, and all papers and requests filed in the proceedings, except the correspondence section of the docket, including rulings and any recommended or initial decision shall constitute the exclusive record for decision.

Subpart J—Posthearing Procedures, Decisions

§ 81.101 POSTHEARING BRIEFS: PROPOSED FINDINGS AND CONCLUSION

(a) The presiding officer shall fix the time for filing posthearing briefs, which may contain proposed findings of fact and conclusions of law, and, if permitted, reply briefs.

(b) Briefs should include a summary of the evidence relied upon together with references to exhibit numbers and pages of the transcript, with citations of the authorities relied upon.

§ 81.102 DECISIONS FOLLOWING HEARING

When the time for submission of posthearing briefs has expired, the presiding officer shall certify the entire record, including his recommended findings and proposed decision, to the responsible Department official; or if so authorized he shall make an initial decision. A copy of the recommended findings and proposed decision, or of the initial decision, shall be served upon all parties, and amici, if any.

§ 81.103 EXCEPTIONS TO INITIAL OR RECOMMENDED DECISIONS

Within 20 days after the mailing of an initial or recommended decision, any party may file exceptions to the decision, stating reasons therefor, with the reviewing authority. Any other party may file a response thereto within 30 days after the mailing of the decision. Upon the filing of such exceptions, the reviewing authority shall review the decision and issue its own decision thereon.

§ 81.104 FINAL DECISIONS

(a) Where the hearing is conducted by a hearing examiner who makes an initial decision, if no exceptions thereto are filed within the 20-day period specified in § 81.103, such decision shall become the final decision of the Department, and shall constitute "final agency action" within the meaning of 5 U.S.C. 704 (formerly section 10(c) of the Administrative Procedure Act), subject to the provisions of § 81.106.

(b) Where the hearing is conducted by a hearing examiner who makes a recommended decision, or upon the filing of exceptions to a hearing examiner's decision, the reviewing authority shall review the recommended or initial decision and shall issue its own decision thereon, which shall become the final decision of the Department, and shall constitute "final agency action" within the meaning of 5 U.S.C. 704 (formerly section 10(c) of the Administrative Procedure Act) subject to the provisions of § 81.106.

(c) All final decisions shall be promptly served on all parties, and amici, if any.

§ 81.105 ORAL ARGUMENT TO THE REVIEWING AUTHORITY

(a) If any party desires to argue a case orally on exceptions or replies to exceptions to an initial or recommended decision, he shall make such request in writing. The reviewing authority may grant or deny such requests in its discretion. If granted, it will serve notice of oral argument on all parties. The notice will set forth the order of presentation, the amount of time allotted, and the time and place for argument. The names of persons who will argue should be filed with the Department hearing clerk not later than 7 days before the date set for oral argument.

(b) The purpose of oral argument is to emphasize and clarify the written argument in the briefs. Reading at length from the brief or other texts is not favored. Participants should confine their arguments to points of controlling importance and to points upon which exceptions have been filed. Consolidations of appearances at oral argument by parties taking the same side will permit the parties' interests to be presented more effectively in the time allotted.

(c) Pamphlets, charts, and other written material may be presented at oral argument only if such material is limited to facts already in the record and is served on all parties and filed with the Department hearing clerk at least 7 days before the argument.

§ 81.106 REVIEW BY THE SECRETARY

Within 20 days after an initial decision becomes a final decision pursuant to § 81.104(a) or within 20 days of the mailing of a final decision referred to in

§ 81.104(b), as the case may be, a party may request the Secretary to review the final decision. The Secretary may grant or deny such request, in whole or in part, or serve notice of his intent to review the decision in whole or in part upon his own motion. If the Secretary grants the requested review, or if he serves notice of intent to review upon his own motion, each party to the decision shall have 20 days following notice of the Secretary's proposed action within which to file exceptions to the decision and supporting briefs and memoranda, or briefs and memoranda in support of the decision. Failure of a party to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

§ 81.107 SERVICE ON AMICI CURIAE

All briefs, exceptions, memoranda, requests, and decisions referred to in this subpart J shall be served upon amici curiae at the same times and in the same manner required for service on parties. Any written statements of position and trial briefs required of parties under § 81.71 shall be served on amici.

Subpart K—Judicial Standards of Practice

§ 81.111 CONDUCT

Parties and their representatives are expected to conduct themselves with honor and dignity and observe judicial standards of practice and ethics in a proceedings. They should not indulge in offensive personalities, unseemly wrangling, or intemperate accusations or characterizations. A representative of any party whether or not a lawyer shall observe the traditional responsibilities of lawyers as officers of the court and use his best efforts to restrain his client from improprieties in connection with this proceeding.

§ 81.112 IMPORT CONDUCT

With respect to any proceeding it is improper for any interested person to attempt to sway the judgment of the reviewing authority by undertaking to bring pressure or influence to bear upon any officer having a responsibility for a decision in the proceeding, or his decisional staff. It is improper that such interested persons or any members of the Department's staff or the presiding officer give statements to communications media, by paid advertisement or otherwise, designed to influence the judgment of any officer having a responsibility for a decision in the proceeding, or his decisional staff. It is improper for any person to solicit communications to any such officer, or his decisional staff, other than proper communications by parties or amici curiae.

§ 81.113 EX PARTE COMMUNICATIONS

Only persons employed by or assigned to work with the reviewing authority who perform no investigative or prosecuting function in connection with a proceeding shall communicate ex parte with the reviewing authority, or the presiding officer, or any employee or person involved in the decisional process in such proceedings with respect to the merits of that or a factually related proceeding. The reviewing authority, the presiding officer or any employee or person involved in the decisional process of a proceeding shall communicate ex parte with respect to the merits of that or a factually related proceeding only with persons employed by or assigned to work with them and who perform no investigative or prosecuting function in connection with the proceeding.

§ 81.114 EXPEDITIOUS TREATMENT

Requests for expeditious treatment of matters pending before the responsible Department official or the presiding officer are deemed communications on the merits, and are improper except when forwarded from parties to a proceeding and served upon all other parties thereto. Such communications should be in the form of a motion.

§ 81.115 MATTERS NOT PROHIBITED

A request for information which merely inquires about the status of a proceeding without discussing issues or expressing points of view is not deemed an ex parte communication. Such requests should be directed to the Civil Rights hearing clerk. Communications with respect to minor procedural matters or inquiries or emergency requests for extensions of time are not deemed ex parte communications prohibited by § 81.113. Where feasible, however, such communications should be by letter with copies to all parties. Ex parte communications between a respondent and the responsible Department official or the Secretary with respect to securing such respondent's voluntary compliance with any requirement of Part 80 of this title are not prohibited.

§ 81.116 FILING OF EX PARTE COMMUNICATIONS

A prohibited communication in writing received by the Secretary, the reviewing authority, or by the presiding officer, shall be made public by placing it in the correspondence file of the docket in the case and will not be considered as part of the record for decision. If the prohibited communication is received orally, a memorandum setting forth its substance shall be made and filed in the correspondence section of the docket in the case. A person referred to in such memorandum may file a comment for inclusion in the docket if he considers the memorandum to be incorrect.

Subpart L—Posttermination Proceedings

§ 81.121 POSTTERMINATION PROCEEDINGS

(a) An applicant or recipient adversely affected by the order terminating, discontinuing, or refusing Federal financial assistance in consequence of proceedings pursuant to this title may request the responsible Department official for an order authorizing payment, or permitting resumption, of Federal financial assistance. Such request shall be in writing and shall affirmatively show that since entry of the order, it has brought its program or activity into compliance with the requirements of the Act, and with the Regulation thereunder, and shall set forth specifically, and in detail, the steps which it has taken to achieve such compliance. If the responsible Department official denies such request the applicant or recipient shall be given an expeditious hearing if it so requests in writing and specifies why it believes the responsible Department official to have been in error. The request for such a hearing shall be addressed to the responsible Department official and shall be made within 30 days after the applicant or recipient is informed that the responsible Department official has refused to authorize payment or permit resumption of Federal financial assistance.

(b) In the event that a hearing shall be requested pursuant to subparagraph (a) of this section, the hearing procedures established by this part shall be applicable to the proceedings, except as otherwise provided in this section.

Subpart M—Definitions

§ 81.131 DEFINITIONS

The definitions contained in § 80.13 of this subtitle apply to this part, unless the context otherwise requires, and the term "reviewing authority" as used herein includes the Secretary of Health, Education, and Welfare, with respect to action by that official under § 81.106.

Transition provisions: (a) The amendments herein shall become effective upon publication in the FEDERAL REGISTER.

(b) These rules shall apply to any proceeding or part thereof to which Part 80 of this title as amended effective October 19, 1967 (published in the FEDERAL REGISTER for Oct. 19, 1967), and as the same may be hereafter amended, applies. In the case of any proceeding or part thereof governed by the provisions of Part 80 as that part existed prior to such amendment, the rules in this Part 81 shall apply as if these amendments were not in effect.

PART 82—PROCEDURAL RULES FOR PROCEEDINGS CONDUCTED PURSUANT TO ENFORCEMENT OF EXECUTIVE ORDER 11246, AND RULES, REGULATIONS, AND ORDERS THEREUNDER

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Authority: The provisions of this Part 82 issued under sec. 209(a) (1), (5), and (6) of the Executive Order 11246.

Source: The provisions of this Part 82 appear at 37 F.R. 7323, Apr. 13, 1972, unless otherwise noted.

General Information

§ 82.1 AUTHORITY

These rules of procedure supplement, and are established pursuant to, the provisions of 41 CFR 60–1.26(b).

§ 82.2 SCOPE OF RULES

These rules govern the practice and procedure for proceedings conducted by the Department precedent to the imposition of sanctions under section 209(a) (5) and (6) of Executive Order 11246, for violations of Executive Order 11246, and rules, regulations, and orders thereunder.
[38 FR 997, Jan. 8, 1973]

§ 82.3 WAIVER, MODIFICATION

Upon notice to all parties, the hearing officer, the reviewing authority, or the Secretary may, with respect to matters pending before him (or them, in the case of the reviewing authority), modify or waive any rule herein upon a determination that no party will be prejudiced and that the ends of justice will thereby be served.

§ 82.4 DEFINITIONS

(a) "Department" means the Department of Health, Education, and Welfare.

(b) "Notice" means notice of proposed cancellation, termination, or ineligibility.

(c) "Party" means a respondent; the General Counsel of the Department of Health, Education, and Welfare; and any person or organization participating in a proceeding pursuant to section 6(a) of these rules.

(d) "Respondent" means a person or organization against whom sanctions are proposed because of alleged violations of Executive Order 11246, and rules, regulations, and orders thereunder.

(e) "Reviewing Authority" means the Reviewing Authority (Civil Rights) of the Department of Health, Education, and Welfare.

(f) "Secretary" means Secretary of the Department of Health, Education, and Welfare.

[37 FR 7323, Apr. 13, 1972, as amended at 38 FR 997, Jan. 8, 1973]

Appearance and Practice

§ 82.5 PARTICIPATION BY A PARTY

A party may appear in person, or by counsel, and participate fully, pursuant to the procedures set forth in these rules, in any proceeding held pursuant to these rules.

§ 82.6 PARTICIPATION BY INTERESTED PERSONS

(a)(1) To the extent that proceedings hereunder involve employment of persons covered by a collective bargaining agreement, and compliance may necessitate a revision of such agreement, any labor organization which is a signatory to the agreement shall have the right to participate as a party.

(2) Other persons or organizations shall have the right to participate as parties if the final decision could directly and adversely affect them or the class they represent.

(3) Any person or organization wishing to participate as a party under this paragraph shall file and serve upon the hearing officer and all parties a petition within 14 days after the notice has been filed. Such petition shall concisely state: (i) Petitioner's interest in the proceeding, (ii) who will appear for petitioner, (iii) the issues on which petitioner wishes to partcipate, and (iv) whether petitioner intends to present witnesses.

(4) The hearing officer shall promptly determine whether there are objections to the petition. He shall then determine whether each petitioner has the requisite interest in the proceedings, as defined in subparagraphs (1) and (2) of this paragraph, and shall permit or deny participation accordingly. Where petitions to participate as parties are made by individuals or groups with common interests, the hearing officer may request all such petitioners to designate a single representative, or he may recognize one or more of such petitioners to represent all such petitioners; provided that the representative of a labor organization qualifying to participate under subparagraph (1) of this paragraph must be permitted to participate as a party. The hearing officer shall give each petitioner written notice of the decision on his petition, and shall serve such notice on each party. Notice of denials of party participation shall be served on the reviewing authority. If the petition is denied, he shall briefly state the grounds for denial and shall then treat the petition as a request for participation as amicus curiae.

(5) A person or organization whose petition for party participation is denied may appeal the decision to the reviewing authority within 7 days of receipt of the notice of denial. The reviewing authority will make the final decision to grant or deny the petition within 20 days of the date of receipt of the appeal.

(b) (1) Any other interested person or organization wishing to participate as amicus curiae shall file a petition before the commencement of the hearing. Such petition shall concisely state (i) the petitioner's interest in the hearing, (ii) who will represent the petitioner, and (iii) the issues on which petitioner intends to present argument. The hearing officer shall grant the petition if he finds that the petitioner has a legitimate interest in the proceedings, and that such participation will not unduly delay the outcome and may contribute materially to the proper disposition of the issues. The hearing officer shall give the petitioner written notice of his decision on the petition, and shall serve such notice on each party. If the petition is denied, the hearing officer shall briefly state the grounds for such denial.

(2) An amicus curiae is not a party but may participate as provided in this paragraph. An amicus curiae may present a brief oral statement at the hearing, at the point in the proceeding specified by the hearing officer He may submit written statement at such time as the parties submit briefs and exceptions, and hearing, and shall serve a copy on each party. He may also submit a brief or written statement at such time as the parties submits briefs and exceptions, and shall serve a copy on each party.

[37 FR 7323, Apr. 13, 1972, as amended at 38 FR 997, Jan. 8, 1973]

§ 82.7 MISCONDUCT DURING PROCEEDINGS

Disrespectful, disorderly, or contumacious language or contemptuous conduct, refusal to comply with directions, or continued use of dilatory tactics by any person during any part of proceedings before a hearing officer, the reviewing authority, or the Secretary shall constitute grounds for immediate exclusion of such person from the remainder of the proceedings, or for other actions reasonably determined to prevent the future possibility of the proceedings being interrupted, delayed, or disrupted.

Form and Filing of Documents

§ 82.8 FORM

Documents filed pursuant to a proceeding herein shall be dated, the original signed in ink, shall show the docket description and title of the proceeding, and shall indicate the party or amicus filing, and the title, if any, and address of the signatory. Copies need not be signed, but the name of the person signing the original shall be reproduced.

§ 82.9 FILING, SERVICE

All documents submitted in a proceeding shall be filed, and served on all parties. The original and two copies of each document shall be submitted for filing. Filings shall be made with the hearing clerk at the address stated in the notice, during regular business hours. With respect to exhibits and transcripts of testimony, only originals need be filed.

§ 82.10 SERVICE—HOW MADE

Service shall be made by personal delivery of one copy to each person to be served, or by mailing by first-class mail, properly addressed with postage pre-paid. The notice shall be served upon the last known address of the respondent by registered mail, return receipt requested.

[38 FR 997, Jan. 8, 1973]

§ 82.11 DATE OF SERVICE

The date of filing or of service shall be the day when the matter is deposited in the U.S. mail or is delivered in person.

§ 82.12 CERTIFICATE OF SERVICE

The original of every document filed and required to be served upon parties shall be endorsed with a certificate of service signed by the party or amicus curiae making service or by his attorney or representative, stating the persons upon whom service has been made, date of service, and manner of service.

TIME

§ 82.13 COMPUTATION

In computing any period of time under these rules or in an order issued hereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed in the District of Columbia, in which event it includes the next following business day. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation.

Prehearing Procedures

§ 82.14 NOTICE OF PROPOSED CANCELLATION, TERMINATION OF INELIGIBILITY

Proceedings are commenced by the mailing of a written notice of proposed cancellation, termination, or ineligibility to the last known address of the respondent by registered mail, return receipt requested. The notice shall contain a concise jurisdictional statement, a short and plain statement of the matters furnishing a basis for the imposition of sanctions, an enumeration of the sanctions being requested, and a citation of the provisions of the order and regulations pursuant to which the requested action may be taken. The notice shall also indicate that respondent may request a hearing on the matters alleged.

[38 FR 997, Jan 8, 1973]

§ 82.15 ANSWER TO NOTICE

(a) Within fourteen (14) days from receipt of the notice, respondent may file with the hearing officer, or if no hearing officer has been designated, with the Reviewing Authority, an answer to the notice and may request a hearing. The request for a hearing shall be included as a separate paragraph of the answer.

(b) The answer shall admit or deny specifically and in detail the matters set forth in each allegation of the notice unless respondent is without knowledge, in which case the answer shall so state, and the statement shall be deemed a denial. Matters alleged as affirmative defenses shall be separately stated and numbered.

(c) If respondent fails to file an answer, request a hearing, or otherwise formally contest the allegations in the notice within the 14-day period following receipt of the notice, the matters alleged in the notice are deemed admitted and respondent's opportunity for hearing is deemed waived. The Director, Office for Civil Rights, may then cancel, suspend or terminate any one or more contracts or subcontracts, or parts thereof, held by respondent, or enter an order declaring such contractor or subcontractor ineligible for further contracts, subcontracts, or extensions or other modification of existing contracts, until the contractor or subcontractor has satisfied the Secretary of Labor that it has established and has established and will carry out personnel and employment policies and practices in compliance with the order.

(d) In response to respondent's request for a hearing, respondent shall be advised by the reviewing authority that a hearing officer has been designated and that the matter has been set down for hearing at a stated time and place. The time and place so fixed shall be reasonable and shall be subject to change for cause.

[38 FR 997, Jan. 8, 1973]

§ 82.16 AMENDMENTS

The Department may amend its notice once as a matter of course before an answer is filed, and respondent may amend its answer once as a matter of course not later than 15 days after it is filed. Other amendments of the notice or of the answer to the notice shall be made only by leave of the hearing officer. An amended notice shall be answered within 10 days of its service, or within the time for filing an answer to the original notice, whichever period is longer, unless the hearing officer orders otherwise.

§ 82.17 MOTIONS

Motions and petitions shall state the relief sought, the authority relied upon, and the facts alleged. If made before or after the hearing itself, these matters shall be in writing. If made at the hearing, they may be stated orally; but the hearing officer may require that they be reduced to writing and filed and served on all parties in the same manner as a formal motion. Within 8 days after a written motion or petition is served, or such other time period as the hearing officer, reviewing authority, or Secretary, may fix, any party may file a response to a motion or petition. An immediate oral response may be made to an oral motion.

§ 82.18 DISPOSITION OF MOTIONS

The hearing officer, reviewing authority, or Secretary, may not grant a written motion or petition prior to expiration of the time for filing responses thereto, but may overrule or deny such motion or petition without awaiting response: *Provided, however,* That prehearing conferences hearings and decisions need not be delayed pending disposition of motions or petitions. Oral motions and petitions may be ruled on immediately.

§ 82.19 DEPOSITIONS

Upon such terms as may be just, for the convenience of the parties, or where the ends of justice will be served, the hearing officer may authorize or direct the testimony of any witness to be taken by deposition. Depositions shall be recorded by the official reporter designated for hearings. The party seeking to take a deposition should serve copies of the application on the parties to the proceeding, who should be given an opportunity, along with the deponent, to notify the hearing officer of any objections to the taking of the deposition.

Designation and Responsibilities of Hearing Officer

§ 82.20 DESIGNATION

Hearings shall be held before a hearing officer designated by the reviewing authority. After service of a notice designating a hearing officer to preside, and until such officer makes his decision, motions and petitions shall be submitted to him. In the case of the death, illness, disqualification, or unavailability of the designated hearing officer, another hearing officer may be designated to take his place. Until such replacement has been designated, all motions and petitions shall be submitted to the reviewing authority.

§ 82.21 AUTHORITY AND RESPONSIBILITIES

The hearing officer shall propose findings and conclusions to the reviewing authority on the basis of the record before him. In order to do so, he shall have the duty to conduct a fair and impartial hearing, to take all necessary action to avoid delay, and to maintain order. He shall have all powers necessary to those ends, including, but not limited to, the power to:

(a) Hold conferences, including prehearing conferences, to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding.

(b) Require parties to state their position with respect to the various issues in the proceeding.

(c) Direct the parties to exchange their evidentiary exhibits, witness lists, and a narrative summary of their expected testimony prior to the hearing. Where good cause exists, the parties should be afforded the right at any time to amend, by deletion or supplementation, their evidentiary exhibit and witness lists.

(d) Rule on motions, and other procedural items on matters pending before him.

(e) Regulate the course of the hearing and conduct of counsel therein.

(f) Establish rules for media coverage of the proceedings.

(g) Examine witnesses.

(h) Receive, rule on, exclude, or limit evidence at any stage of the proceeding.

(i) Fix time limits for submission of written documents in matters before him.

(j) Take any action authorized by these rules.

Hearing Procedures

§ 82.22 EVIDENTIARY PURPOSE

The hearing is directed to receiving factual evidence and expert opinion testimony related to the issues in the proceeding. A hearing for the reception of evidence will be held only in case issues of fact must be resolved in order to determine whether respondent has failed to comply with one or more applicable requirements of Executive Order 11246, and rules, regulations, and orders thereunder. In case it appears from respondent's answer to the notice of hearing, from his failure timely to answer, or from his admissions or stipulations, that there are no matters of material fact in dispute, the hearing officer or the reviewing authority may enter an order so finding, vacating the hearing date, and fixing the time for filing briefs under § 82.35. Thereafter the proceedings shall go to conclusion in accordance with §§ 82.35 through 82.43. Within 10 days of its issuance, an order vacating the hearing date may be appealed to the reviewing authority, and the reviewing authority shall affirm, modify, or set aside such order within 28 days thereafter.

[38 FR 998, Jan. 8, 1973]

§ 82.23 EVIDENCE

Irrelevant, immaterial, unreliable, and unduly repetitious evidence will be excluded from the record of a hearing. Hearsay evidence shall not be inadmissible as such.

§ 82.24 TESTIMONY

Testimony shall be given orally by witnesses at the hearing, but may, in the discretion of the hearing officer, be prepared in writing and served on all parties to the hearing. A witness shall be available for cross-examination, and, at the discretion of the hearing officer, may be cross-examined without regard to the scope of direct examination as to any matter which is material to the proceeding.

§ 82.25 EXHIBITS

Proposed exhibits shall be exchanged at a prehearing conference, or otherwise prior to the hearing, if the hearing officer so requires. Proposed exhibits not so exchanged may be denied admission as evidence. The authenticity of all proposed exhibits will be deemed admitted unless written objection thereto is filed, or unless good cause is shown for failure to file such written objection.

§ 82.26 ADMISSIONS AS TO FACTS AND DOCUMENTS

Not later than 15 days prior to the date of the hearing except for good cause shown, or not later than 15 days prior to such earlier date as the hearing officer may order, any party may serve upon an opposing party a written request for the admission of the genuineness and authenticity of any relevant documents described in, and exhibited with, the request, or for the admission of the truth of any relevant matters of fact stated in the request. Each of the matters as to which an admission is requested shall be deemed admitted, unless within a period designated in the request (not less than 10 days after service thereof) the party to whom the request is directed serves upon the requesting party a sworn statement either (a) denying specifically the matters as to which an admission is requested or (b) setting forth in detail the reasons why he cannot truthfully either admit or deny such matters.

§ 82.27 OBJECTIONS

Objections to evidence shall be timely, and shall briefly state the ground relied upon.

§ 82.28 EXCEPTIONS TO RULINGS OF HEARING OFFICER NOT NECESSARY

Exceptions to rulings of the hearing officer are unnecessary. It is sufficient that a party, at the time the ruling of the hearing officer is sought, makes know the action which he desires the hearing officer to take, or his objection to an action taken, and the grounds therefor.

§ 82.29 OFFICIAL NOTICE

Whenever a party offers a public document, or part thereof, in evidence, and such document, or part thereof, has been shown by the offeror to be reasonably available to the public, such document need not be produced or marked for identification, but may be offered for official notice as a public document item by specifying the document or relevant part thereof. Official notice may also be taken of other matters, at the discretion of the hearing officer; provided that where official notice is taken or requested to be taken of a fact not appearing in the evidence of record, any party, on timely request, shall be permitted to show the contrary.

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§ 82.30 OFFER OF PROOF

An offer of proof made in connection with an objection taken to any ruling of the hearing officer excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and, if the excluded evidence consists of evidence in written form or consists of reference to documents, a copy of such evidence shall be marked for identification and shall accompany the record as the offer of proof.

§ 82.31 INTERLOCUTORY APPEALS

Except as specifically provided in these rules, appeals shall not be made of any ruling of the hearing officer except following the entire hearing and the hearing officer's recommended findings, conclusions, and decision.

§ 82.32 EX PARTE COMMUNICATIONS

The hearing officer shall not consult any person, or party, on any fact in issue unless upon notice and opportunity for all parties to participate. No employee or agent of the Federal Government engaged in the investigation and prosecution of this case shall participate or advise in the rendering of the recommended or final decision, except as witness or counsel in the proceeding.

The Record

§ 82.33 OFFICIAL TRANSCRIPT

The Department will designate the official reporter for all hearings. The official transcripts of testimony and argument, together with any exhibits, briefs, or memoranda of law filed therewith, shall be filed with the hearing clerk. Transcripts may be obtained from the official reporter by the parties and the public at rates not to exceed the applicable rates fixed by the contract between the Department and the reporter. Upon notice to all parties, the hearing officer may authorize such corrections to the transcript as are necessary to accurately reflect the testimony.

§ 82.34 RECORD FOR DECISION

The transcript of testimony, exhibits, and all papers, documents, and requests filed in the proceedings, except the correspondence section of the docket, including rulings and the recommended findings, conclusions, and decision, shall constitute the record for decision.

Posthearing Procedures

§82.35 PROPOSED FINDINGS OF FACT AND CONCLUSIONS

Within 20 days after receipt of the transcript of the testimony, and such additional time as the hearing officer may allow, each party may file proposed findings of fact and conclusions of law, and a proposed order, together with a supporting brief expressing the reasons for such proposals. Such proposals and briefs shall be filed and served on all parties and *amici curiae*. Reply briefs may be submitted within 10 days after receipt of the initial briefs and proposals, and shall be filed and served in like manner.

§ 82.36 RECOMMENDED DECISION OF HEARING OFFICER

Within 30 days after the time for filing reply briefs or, if the parties elect not to file briefs, within 30 days after the receipt of the hearing transcript, the hearing officer shall recommend findings of fact, conclusions of law, and a decision based on the record for decision. These recommendations shall be certified, together with the record for decision, to the reviewing authority for its decision. The recommended findings, conclusions, and decision of the hearing officer shall be served on all parties and amici curiae to the proceeding.

§ 82.37 REVIEWING AUTHORITY JURISDICTION

Following the issuance of the hearing officer's recommended decision, all motions and petitions in the matter should be addressed to the reviewing authority, which shall have the authority to act on them consistent with these regulations, Executive Order 11246, and rules, regulations, and orders thereunder. Such jurisdiction shall continue until the Secretary is requested to review the reviewing authority's decision, the Secretary decides to review such decision on his own motion, or the decision becomes the decision of the Department, whichever comes first.

§ 82.38 EXCEPTIONS TO RECOMMENDED DECISION

Within 20 days after receipt of the hearing officer's recommended decision, all parties to the proceeding shall have an opportunity to submit to the reviewing authority briefs in support of, or in exception to, the recommended findings, conclusions, and decision of the hearing officer. These briefs may be responded to by other parties, within 10 days of their receipt by such parties. Such briefs or exceptions and reply briefs shall be filed and served on all parties and amici curiae to the proceding.

§ 82.39 ORAL ARGUMENT BEFORE THE REVIEWING AUTHORITY

(a) The reviewing authority shall have discretion, at its own initiative and within the limits described in this section, to direct the parties to argue a case orally. Oral argument shall not be directed, or received, except as necessary to clarify the written arguments in briefs in support or exceptions, and replies to these documents (see § 82.38). The reviewing authority shall, within these limits, define the scope and subject matter of the scope and subject matter of oral argument in each case. Where the reviewing authority directs oral argument, it shall have the discretion to extend, up to 30 days, the time for rendering its decision under § 82.40.

(b) Pamphlets, charts, and other written material may be presented at oral argument only if such material is limited to facts already in the record and is served on all parties and filed with the hearing clerk at least 7 days before the argument.

§ 82.40 REVIEWING AUTHORITY'S DECISION

Within 60 days after the time for filing of reply briefs to support briefs and exception briefs, or 90 days from the date of the hearing officers decision if no briefs are filed, the reviewing authority shall render its own decision. This decision may affirm, modify, or set aside, in whole or in part, the recommended findings, conclusions and decision of the hearing officer and shall be based on the record for decision.

§ 82.41 APPEAL TO SECRETARY

(a) Within 20 days of the date of the reviewing authority's decision, any party to the proceeding may request the Secretary to review that decision. Such review is not a matter of right, and may be granted by the Secretary only where he determines that the decision of the reviewing authority raises significant issues of law or public policy. The Secretary may grant or deny such request in whole or in part. The Secretary shall also have discretion to review any decision of the reviewing authority on his own motion. If the Secretary grants the requested review, or if he serves notice of intent to review upon his own motion, each party to the proceeding shall have 20 days, following notice of the Secretary's decision to review, within which to file briefs in exception to the decision of the reviewing authority, or briefs in support of the reviewing authority's decision. The Secretary shall thereafter render the Department's decision. Failure of a party to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

(b) After the Secretary has been requested to review a matter under paragraph (a) of this section, or has given notice of his intent to review a matter on his own motion, whichever comes first, all motions and petitions shall be addressed to him. He shall act on them consistent with these regulations, Executive Order 11246, and rules, regulations and orders thereunder. Such jurisdiction shall continue until the Secretary issues the decision of the Department.

§ 82.42 FINAL DECISION

The decision of the reviewing authority shall become the decision of the Department in the event no appeal is made by any party within 20 days after the date of the reviewing authority's decision and the Secretary does not notify the parties within 35 days after the date of the reviewing authority's decision that he will otherwise review the decision.

§ 82.43 APPROVAL OF DEPARTMENT DECISION BY DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE

No decision of the Department shall become final without the approval of the Director of the Office of Federal Contract Compliance.

PART 83—NONDISCRIMINATION ON THE BASIS OF SEX IN TRAINING PROGRAMS IN ENTITIES FUNDED UNDER TITLES VII AND VIII OF THE PUBLIC HEALTH SERVICE ACT

§ 83.1 ASSURANCES REQUIRED

No grant, loan guarantee, or interest subsidy payment under titles VII or VIII of the Public Health Service Act shall be made to or for the benefit of any entity, and no contract under titles VII or VIII of the Public Health Service Act shall be made with any entity unless the entity furnishes assurances satisfactory to the Director, Office for Civil Rights, that the entity will not discriminate on the basis of sex in the admission of individuals to its training programs.

(Public Health Service Act sec. 215, 58 Stat. 690, as amended, 42 U.S.C. 216) [37 F.R. 10938, June 1, 1972; 37 F.R. 11577, June 9, 1972]

* * * * * * *

TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY[1]

DEFINITIONS

SEC. 701. For the purposes of this title—

(a) The term "person" includes one or more individuals, *governments, governmental agencies, political subdivisions*, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has *fifteen* or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or *any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), or* (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, *except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972*, persons having fewer than *twenty-five* employees (and their agents) shall not be considered *employers*.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

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[1] Includes 1972 amendments made by P.L. 92-261 printed in italic.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) *twenty-five* or more during the first year after the *date of enactment of the Equal Employment Opportunity Act of 1972, or (B) fifteen* or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, *except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.*

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, *and further includes any governmental industry, business, or activity.*

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) *The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's, religious observance or practice without undue hardship on the conduct of the employer's business.*

EXEMPTION

SEC. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, *educational institution*, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, *educational institution*, or society of its *activities*.

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

SEC. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employee *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, *or applicants for membership* or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employmnt practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversion Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

SEC. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, *or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,* to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization, employment *agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,* to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment *agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee* indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 705. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. *Members of the Commission* shall be appointed by the President by and with the advice and consent of the *Senate* for a term of five *years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.* The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and *except as provided in subsection (b)*, shall appoint, in accordance with the *provisions of title 5, United States Code, governing appointments in the competitive service, such officers, agents, attorneys, hearing examiners, and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: Provided, That assignment, removal, and compensation of hearing examiners shall be in accordance with sections 3105, 3344, 5362, and 7521 of title 5, United States Code.*

(b)(1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 706 and 707 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this title.

(c) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

(d) The Commission shall have an official seal which shall be judicially noticed.

(e) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken; the names, salaries, and duties of all individuals in its employ and the moneys it has disbursed; and shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

(f) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this title.

(g) The Commission shall have power—

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public;

(6) to *intervene* in a civil action brought *under section 706* by an aggrieved party *against a respondent other than a government, governmental agency, or political subdivision.*

(*h*) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

(*i*) All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 9 of the Act of August 2, 1939, as amended (the Hatch Act), notwithstanding any exemption contained in such section.

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

SEC. 706. (*a*) *The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.*

(*b*) Whenever *a charge is filed by or on behalf of a* person claiming to be aggrieved, or by a member of the Commission, *alleging* that an employer, employment agency, labor *organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,* has engaged in an unlawful employment practice, the Commission shall *serve a notice of the charge* (*including the date, place and circumstances of the alleged unlawful employment practice*) *on* such employer, employment agency, labor *organization, or joint labor-management committee* (hereinafter referred to as the "respondent") *within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges* shall not be made public by the Commission. If the Commission *determines* after such investigation that there is *not* reasonable cause to believe that the charge is true, *it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections* (c) *and* (*d*). *If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true,* the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such *informal* endeavors may be made public by the *Commission, its officers or employees, or used as evidence in a subsequent proceeding* without the written consent of the *persons concerned.* Any *person* who *makes* public information in violation of this subsection shall be fined not more than $1,000 or imprisoned *for* not more than one *year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under section* (*c*) *or* (*d*) *from the date upon which the Commission is authorized to take action with respect to the charge.*

(*c*) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(*d*) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective *date* of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(*e*) A charge under *this section* shall be filed within *one hundred and eighty* days after the alleged unlawful employment practice *occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter*, except that in *a* case of an unlawful employment practice with respect to which the person aggrieved has *initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof*, such charge shall be filed by *or on behalf of* the person aggrieved within *three hundred* days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(*f*)(*1*) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (*c*) *or* (*d*), the Commission has been unable to *secure from the respondent a conciliation agreement acceptable to the Commission*, the Commission *may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has notified a civil action in a case involving a government, a governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may* be brought against the respondent named in the charge (A) by the person claiming to be aggrieved, or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the *Commission*, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action *upon certification* that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination, stay further proceedings for not more than sixty days pending the termina*section or further* efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

(h) The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 101–115), shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under *this section*, the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under *this section* and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

SEC. 707. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9, of title 5, United States Code, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on be-

half of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act.

EFFECT ON STATE LAWS

SEC. 708. Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

INVESTIGATIONS, INSPECTIONS, RECORDS, STATE AGENCIES

SEC. 709. (a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, *engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and* utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, *pay by advance or reimbursement* such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

(c) *Every* employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purpose of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and *to* furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, *and, if such application for an exemption is denied,* bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. *If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.*

(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

INVESTIGATORY POWERS

SEC. 710. For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 11 of the National Labor Relations Act (49 Stat. 455; 29 U.S.C. 161) shall apply.

NOTICES TO BE POSTED

SEC. 711. (a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from, or summaries of, the pertinent provisions of this title and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

VETERANS' PREFERENCE

SEC. 712. Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

RULES AND REGULATIONS

SEC. 713. (a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under the section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title.

FORCIBLY RESISTING THE COMMISSION OR ITS REPRESENTATIVES

SEC. 714. The provisions of *sections 111 and 1114*, title 18, United States Code, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. *Notwithstanding the provisions of sections 111 and*

1114 of title 18, United States Code, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official functions under this Act shall be punished by imprisonment for any term of years or for life.

EQUAL EMPLOYMENT OPPORTUNITY COORDINATING COUNCIL

Sec. 715. There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council) composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates. The Council shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before July 1 of each year, the Council shall transmit to the President and to the Congress a report of its activities together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section.

EFFECTIVE DATE

Sec. 716. (a) This title shall become effective one year after the date of its enactment.

(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.

(c) The President shall, as soon as feasible after the enactment of this title, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this title to become familiar with the rights afforded and obligations imposed by its provisions, and for the making plans which will result in the fair and effective administration of this title when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this title.

NONDISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

Sec. 717. *(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.*

(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Library of Congress.

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder.

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

SPECIAL PROVISIONS WITH RESPECT TO DENIAL, TERMINATION, AND SUSPENSION OF GOVERNMENT CONTRACTS

SEC. 718. No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of title 5, United States Code, section 554, and the following pertinent sections: Provided, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: Provided further, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.

PROVISIONS OF EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 WHICH RELATE TO BUT DO NOT AMEND THE CIVIL RIGHTS ACT OF 1964

SEC. 9. (a) Section 5314 of title 5 of the United States Code is amended by adding at the end thereof the following new clause:

"(58) Chairman, Equal Employment Opportunity Commission."

(b) Clause (72) of section 5315 of such title is amended to read as follows:
"(72) Members, Equal Employment Opportunity Commission (4)."

(c) Clause (111) of section 5316 of such title is repealed.

(d) Section 5316 of such title is amended by adding at the end thereof the following new clause:

"(131) General Counsel of the Equal Employment Opportunity Commission."

SEC. 12. Section 5108(c) of title 5, United States Code, is amended by—

(1) striking out the word "and" at the end of paragraph (9);

(2) striking out the period at the end of paragraph (10) and inserting in lieu thereof a semicolon and the word "and"; and

(3) by adding immediately after paragraph (10) the last time it appears therein in the following new paragraph:

"(11) the Chairman of the Equal Employment Opportunity Commission, subject to the standards and procedures prescribed by this chapter, may place an additional ten positions in the Equal Employment Opportunity Commission in GS-16, GS-17, and GS-18 for the purposes of carrying out title VII of the Civil Rights Act of 1964."

SEC. 14. The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter.

CODE OF FEDERAL REGULATIONS TITLE 29, CHAPTER XIV—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Part
1600 Employee responsibilities and conduct.
1601 Procedural regulations.
1602 Records and reports.
1604 Guidelines on discrimination because of sex.
1605 Guidelines on discrimination because of religion.
1606 Guidelines on discrimination because of national origin.
1607 Guidelines on employee selection procedures.
1610 Availability of records.

PART 1600—EMPLOYEE RESPONSIBILITIES AND CONDUCT

Subpart A—General

Sec.
1600.735-101 Purpose and policy.
1600.735-102 Definitions.
1600.735-103 Interpretations and Counseling.
1600.735-104 Disciplinary and other remedial action.
1600.735-105 Appeal.

Subpart B—Limitations on Conduct and Responsibilities of Employees

1600.735-201 Proscribed actions.
1600.735-202 Gifts, entertainment, and favors.
1600.735-203 Outside employment and other activity.
1600.735-204 Financial interests.
1600.735-205 Other standards of conduct.

Subpart C—Conduct and Responsibilities of Special Government Employees

1600.735-301 Limitations.

Subpart D—Statement of Employment and Financial Interests

1600.735-402 Time and place for submission of employee statement.
1600.735-403 Review of statement of employment and financial interests.
1600.735-404 Supplementary statements.
1600.735-405 Interests of employees' relatives.
1600.735-406 Information not known by employees.
1600.735-407 Information not required
1600.735-408 Confidentiality of employees' statements.
1600.735-409 Effect of employees' statements on other requirements.
1600.735-401 Employees required to submit statements.

Authority: The provision of this Part 1600 issued under E.O. 11222, 30 F.R. 6469, 3 CFR 1965 Supp.; 5 CFR 735.101 et seq.

Source: The provisions of this Part 1600 appear at 33 FR 4329, Mar. 8, 1968, unless otherwise noted.

SUBPART A—GENERAL

SECTION 1600.735-101. PURPOSE AND POLICY

(a) *Purpose.*—The purpose of this part is to implement Executive Order 11222, May 8, 1965 (3 CFR 1964-1965 Comp., p. 306; 30 FR 6469) and Part 735 of the Civil Service Commission Regulations adopted pursuant thereto (5 CFR Part 735) by defining standards of conduct and related procedures for employees and special Government employees of the EEOC.

(b) *Policy.*—The maintenance of high standards of ethical conduct by Government employees and special Government employees is essential to assure the proper performance of the Government's business and the maintenance of confidence and respect of the citizens in their Government. No public officer can lawfully engage in business activities which are incompatible with the duties of his office.

SECTION 1600.735-102. DEFINITIONS

(a) "Agency" means the Equal Employment Opportunity Commission.

(b) "Employee" means an officer or employee of the Equal Employment Opportunity Commission, but does not include a special Government employee.

(c) "Executive order" means Executive Order 11222 of May 8, 1965.

(d) "Person" means an individual, corporation, company association, firm, partnership, society, joint stock company, or any other organization or institution.

(e) "Special Government employee" means a temporary employee, with or without compensation, appointed to perform for not to exceed 130 days during any period of 365 consecutive days duties on either a full-time or intermittent basis. Such employees are generally consultants or experts.

SECTION 1600.735-103. INTERPRETATIONS AND COUNSELING

The General Counsel shall provide any needed counsel and assistance to all EEOC employees concerning the policy and procedures contained in this part. Field Office Directors shall serve as deputy counselors in their jurisdictions, referring any controversial problems of interpretation to the General Counsel.

SECTION 1600.735-104. DISCIPLINARY AND OTHER REMEDIAL ACTION

An employee or special Government employee of the agency who violates any of the regulations in this part may be disciplined. The disciplinary action may be in addition to any penalty prescribed by law for the violation. In addition to or in lieu of disciplinary action, remedial action to end conflicts or appearance of conflicts of interest may include but is not limited to:

(a) Changes in assigned duties;

(b) Divestment by the employee or special Government employee of his conflicting interest; or

(c) Disqualification for a particular assignment.

SECTION 1600.735-105. APPEAL

Any employee or group of employees who disagree with the provisions of this part have the right to request a review of their complaint through Commission Order 571, August 7, 1972.

SUBPART B—LIMITATIONS ON CONDUCT AND RESPONSIBILITIES OF EMPLOYEES

SECTION 1600.735-201. PROSCRIBED ACTIONS

An employee shall avoid any action, whether or not specifically prohibited by this part which might result in, or create the appearance of:

(a) Using public office for private gain;

(b) Giving preferential treatment to any person;

(c) Impeding Government efficiency or economy;

(d) Losing complete independence or impartiality;

(e) Making a Government decision outside official channels; or

(f) Affecting adversely the confidence of the public in the integrity of the Government.

SECTION 1600.735-202. GIFTS, ENTERTAINMENT, AND FAVORS

(a) *General limitations.*—Employees shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from a person who:

(1) Has, or is seeking to obtain, contractual or other business or financial relations with this agency;

(2) Conducts operations or activities that are regulated by this agency;

(3) Has interests that may be substantially affected by the performance or nonperformance of his official duty.

(b) *Exceptions.*—Section 1600.735—202 (a) does not preclude:

(1) Acceptance of a gift, gratuity, favor, entertainment, loan, payment of expenses, fee, compensation, or other things of monetary value incident to obvious family or personal relationships (such as those between the employee and the parents, children, or spouse of the employee) when the circumstances make it clear that it is the family relationship rather than the business of the persons concerned which are the motivating factors;

(2) Acceptance of food and refreshments of nominal value on infrequent occasions in the ordinary course of a luncheon or dinner meeting or other meeting or on an inspection tour where an employee may properly be in attendance;

(3) Acceptance of loans from banks of other financial institutions on customary terms to finance proper and usual activities of employees such as home mortgage loans;

(4) Acceptance of unsolicited advertising or promotional material, such as pens, pencils, note pads, calendars, and other items of nominal intrinsic value, and

(5) Receipt of bona fide reimbursement, unless prohibited by law, for expenses for travel and such other necessary subsistence as is compatible with this part for which no Government payment or reimbursement is made, However, an employee may not be reimbursed, and payment may not be made on his behalf, for excessive personal living expenses, gifts, entertainment, or other personal benefits, or for travel on official business proscribed by Decision B-128527 of the Comptroller General dated March 7, 1967.

(c) *Gifts to superiors.*—An employee shall not solicit contributions from another employee for a gift to an employee in a superior official position. An employee in a superior official position shall not accept a gift presented as a contribution from employees receiving less salary than himself. An employee shall not make a donation as a gift to an employee in a superior official position (5 U.S.C. 7351). However, this does not prohibit a voluntary gift of nominal value or donation in a nominal amount made on a special occasion; i.e., marriage, illness, or retirement.

(d) *Gifts from foreign governments.*—An employee shall not accept a gift, present, decoration, or other thing from a foreign government unless authorized by Congress as provided by the Constitution and in Public Law 89-673, 5 U.S.C. 7342.

§ 1600.735-203 OUTSIDE EMPLOYMENT AND OTHER ACTIVITY

(a) General limitations: An employee shall not engage in outside employment or other activity not compatible with the full and proper discharge of the duties and responsibilities of his Government employment. Incompatible activities include but are not limited to:

(1) Acceptance of a fee, compensation, gift, payment of expense, or any other thing of monetary value in circumstances in which acceptance may result in, or create the appearance of, conflicts of interest; or

(2) Outside employment which tends to impair the mental or physical capacity to perform his Government duties and responsibilities in an acceptable manner.

(3) Receipt by an employee of any salary or anything of monetary value from a private source as compensation for his services to the Government (18 U.S.C. 209).

(b) Employees are encouraged to engage in teaching, lecturing and writing that is not prohibited by law, the Executive order, this part, or the agency regulations. However, an employee shall not, either for or without compensation, engage in teaching, lecturing, or writing, including teaching, lecturing, or writing for the purpose of the special preparation of a person or class of persons for an examination of the Commission or Board of Examiners for the Foreign Service, that depends on information obtained as a result of his Government employment, except when that information has been made available to the general public or will be made available on request, or when the agency head gives written authorization for use of nonpublic information on the basis that the use is in the public interest. In addition, an employee who is a Presidential appointee covered by section 401(a) of the order shall not receive compensation or anything of monetary value for any consultation, lecture, discussion, writing, or appearance the subject matter of which is devoted substantially to the responsibilities, programs, or operations of his agency, or which draws substantially on official data or ideas which have not become part of the body of public information.

(c) [Reserved]

(d) Exceptions: Section 1600.735-203 does not preclude:

(1) Participation in the activities of national or state political parties not proscribed by law.

(2) Participation in the affairs of, or acceptance of an award for, a meritorious public contribution or achievement given by a charitable, religious, professional, social, fraternal, nonprofit educational and recreational, public service, or civil organization.

(3) Outside employment permitted under this part, including payments or reimbursements under § 1600.735—202(b)(5).

(e) Procedure: An employee who engages in outside employment shall obtain this supervisor's approval in advance and shall inform the Personnel Division by memorandum.

§ 1600.735-204 FINANCIAL INTERESTS

An Employee shall not:

(a) Have a direct or indirect financial interest that conflicts substantially, or appears to conflict substantially, with his Government duties and responsibilities; or

(b) Engage in, directly or indirectly, as financial transaction as a result of, or primarily relying on, information obtained through his Government employment.

This does not preclude an employee from having a financial interest or engaging in financial transactions to the same extent as a private citizen not employed by the Government so long as it is not prohibited by law, the Executive order, or these regulations.

§ 1600.735-205 OTHER STANDARDS OF CONDUCT

(a) *Use of Government property.*—An employee shall not directly or indirectly use, or allow the use of, Government property of any kind, including property leased to the Government, for other than officially approved activities. An employee has a positive duty to protect and conserve Government property, including equipment, supplies, and other property entrusted or issued to him.

(b) *Misuses of information.*—For the purpose of furthering a private interest, an employee shall not, except as provided in § 1600.735-203(b), directly or indirectly use, or allow the use of, official information obtained through or in connection with his Government employment which has not been made available to the general public.

(c) *Indebtedness.*—An employee shall pay each just financial obligation in a proper and timely manner, especially one imposed by law such as Federal, State, or local taxes. A "just financial obligation" means one acknowledged by the employee, or reduced to judgment by a court, and "in a proper and timely manner" means in a manner which the agency determines does not, under the circumstances, reflect adversely on the Government as his employer. In the event of dispute between an employee and an alleged creditor, the agency is not required to determine the validity or amount of his disputed debt.

(d) *Gambling, betting, and lotteries.*—An employee shall not participate, while on Government-owned or leased property or while on duty for the Government, in any gambling activity including the operation of a gambling device, in conducting a lottery or pool, in a game for money or property, or in selling or purchasing a number slip or ticket.

(e) *General conduct prejudicial to the Government.*—An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government.

(f) *Miscellaneous statutory provisions.*—Each employee shall acquaint himself with each statute that relates to his ethical and other conduct as an employee of the Government. Attention is specifically directed to the following statutory provisions:

(1) House Concurrent Resolution 175, 85th Congress, 2d session, 72 Stat. B12, the "Code of Ethics for Government Service".

(2) Chapter 11 of Title 18, United States Code, relating to bribery, graft, and conflicts of interest, as appropriate to the employees concerned.

(3) The prohibition against lobbying with appropriated funds (18 U.S.C. 1913).

(4) The prohibitions against disloyalty and striking (5 U.S.C. 7311, 18 U.S.C. 1918).

(5) The prohibition against the employment of a member of a Communist organization (50 U.S.C. 784).

(6) The prohibitions against (1) the disclosure of classified information (18 U.S.C. 798, 50 U.S.C. 783); and (2) the disclosure of confidential information (18 U.S.C. 1905).

(7) The provision relating to the habitual use of intoxicants to excess (5 U.S.C. 7352).

(8) The prohibition against the misuse of a Government vehicle (31 U.S.C. 638a(c)).

(9) The prohibition against the misuse of the franking privilege (18 U.S.C. 1719).

(10) The prohibition against the use of deceit in an examination or personnel action in connection with Government employment (18 U.S.C. 1917).

(11) The prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001).

(12) The prohibition against mutilating or destroying a public record (18 U.S.C. 2071).

(13) The prohibition against counterfeiting and forging transportation requests (18 U.S.C. 508).

(14) The prohibitions against (1) embezzlement of Government money or property (18 U.S.C. 641), (2) failing to account for public money (18 U.S.C. 643), and (3) embezzlement of the money or property of another person in the possession of an employee by reason of his employment (18 U.S.C. 654).

(15) The prohibition against unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

(16) The prohibitions against political activities—in subchapter III of chapter 73 of Title 5, United States Code, and 18 U.S.C. 602, 607, and 608.

(17) The prohibition against an employee acting as an agent of a foreign principal registered under the Foreign Agents Registration Act (18 U.S.C. 219).

SUBPART C—CONDUCT AND RESPONSIBILITIES OF SPECIAL GOVERNMENT EMPLOYEES

§ 1600.735–301 LIMITATIONS

Special Government employees shall be subject to the same standards of conduct prescribed in Subpart B above for other employees, except § 1600.735–203 (a)(3), plus the following:

(a) *Use of Government employment.*—A special Government employee shall not use his Government employment for a purpose that is, or gives the appearance of being, motivated by the desire for private gain for himself or another person, particularly one with whom he has family, business, or financial ties.

(b) *Use of inside information.*—A special Government employee shall not use inside information obtained as a result of his Government employment for private gain for himself or another person either by direct action on his part or by counsel, recommendation, or suggestion to another person, particularly one with whom he has family, business, or financial ties. For the purpose of this section "inside information" means information obtained under Government authority which has not become part of the body of public information. Such employees may teach, lecture, or write in a manner not inconsistent with § 1600.735–203(b) above.

(c) *Coercion.*—A special Government employee shall not use his Government employment to coerce, or give the appearance of coercing, a person to provide financial benefit to himself or to another person, particularly one with whom he has family, business, or financial ties.

(d) *Gifts, entertainment, and favors.*—A special Government employee, while so employed or in connection with his employment, shall not receive or solicit from a person having business with his agency anything of value as a gift, gratuity, loan, entertainment, or favor for himself or another person, particularly one with whom he has family, business, or financial ties.

(e) *Miscellaneous statutory provisions.*—Special Government employees are responsible for a knowledge of statutory obligations as outlined in § 1600.735-205(f).

SUBPART D—STATEMENT OF EMPLOYMENT AND FINANCIAL INTERESTS

§ 1600.735-401 EMPLOYEES REQUIRED TO SUBMIT STATEMENTS

(a) The following categories of employees are determined by the EEOC, subject to the right of appear under § 1600.735-105, to be within the scope of 5 CFR 735-403, 735-404 and therefore they shall submit Statements of Employment and Financial Interests:

(1) Employees paid at a level of the Executive Schedule in Subpchapter II of Chapter 53 of Title 5 United States Code, except the members of the Commission who report under section 401 of Executive Order 11222.

(2) Employees in Grade GS-16 or above of the General Schedule in 5 U.S.C. 5332.

(3) Employees in the Office of Liaison engaged in grant or reimbursement activities classified at GS-13 or above of the General Schedule.

(4) Employees in the Office of Administration engaged in contracting or procurement activities who are classified at GS-13 or above of the General Schedule unless otherwise indicated, i.e., Director of Administration, Chief of Administrative Services. Contract Specialists, and Contract Specialist GS-12.

(b) Each special Government employee shall submit a Statement of Employment and Financial Interests showing all other employment and such financial interests as the agency determines are relevant in the light of the duties he is to perform, except when this requirement is waived under 5 CFR 735.412 (c).

§ 1600.735-402 TIME AND PLACE FOR SUBMISSION OF EMPLOYEE STATEMENT

Statement of Employment and Financial Interests shall be submitted by employees covered by § 1600.735-401 within 60 days after issuance of this part for employees on the rolls at that time and for new employees within 30 days of their entrance on duty. Special Government employees will complete duplicate copies of the forms in appendix A at the time of entrance on duty. All other employees required to file Statements of Employment and Financial Interests will complete duplicate copies of the form in appendix B. The completed original of these forms will be sent to the Director of Personnel in a sealed envelope marked on the outside "Confidential Statement Enclosed." The duplicate copy will be retained by the employee. The Personnel Division shall retain files of the Statements of Employment and Financial Interests.

§1600.735-403 REVIEW OF STATEMENT OF EMPLOYMENT AND FINANCIAL INTERESTS

The Director of Personnel shall review these statements for the purpose of disclosing any conflict of interest or apparent conflict of interest. If such conflict between the interests of an employee or special Government employee and the performance of his services for the Government are found, they shall be brought to the attention of the employee or special Government employee and he shall be granted the opportunity to explain the conflict and attempt to resolve it. If the indicated conflict cannot be resolved, the Director of Personnel should submit a written report with the recommendation for appropriate remedial action to the Chairman through the General Counsel.

§ 1600.735-404 SUPPLEMENTARY STATEMENTS

Changes in, or additions to, the information contained in an employee's Statement of Employment and Financial Interests shall be reported in a supplementary statement as of June 30 each year. If no changes or additions occur, a negative report is required. Notwithstanding the filing of the annual report required by this section, each employee shall at all times avoid acquiring a financial interest that could result, or taking an action that would result, in a violation of the conflicts of interest provisions of 18 U.S.C. 208 or this part.

§ 1600.735-405 INTERESTS OF EMPLOYEES' RELATIVES

The interest of a spouse, minor child, or other member of an employee's immediate household is considered to be an interest of the employee. For the purpose of this section, "member of an employee's immediate household" means those blood relations who are residents of the employee's household.

§ 1600.735–406 INFORMATION NOT KNOWN BY EMPLOYEES

If any information required to be included on a statement of employment and financial interests or supplementary statement, including holdings placed in trust, is not known to the employee but is known to another person, the employee shall request that other person to submit information in his behalf.

§ 1600.735–407 INFORMATION NOT REQUIRED

This subpart does not require an employee to submit on a statement of employment and financial interests or supplementary statement any information relating to the employee's connection with, or interest in a professional society or a charitable, religious, social, fraternal, recreational public service, civil, or political organization or a similar organization not conducted as a business enterprise. For the purpose of this section, educational and other institutions doing research and development or related work involving grants of money from or contracts with the Government are deemed "business enterprises" and are required to be included in an employee's statement of employment and financial interests.

§ 1600.753–408 CONFIDENTIALITY OF EMPLOYEES' STATEMENTS

The agency shall hold each Statement of Employment and Financial Interests, and each supplementary statement, in confidence. The Director of Personnel or other employee authorized to review or retain a statement are responsible for maintaining them in confidence and shall not allow access to, or allow information to be disclosed from, a statement except to carry out the purpose of this part. The agency may not disclose information from a statement except as the Civil Service Commission or the Chairman, EEOC, may determine for good cause shown.

§ 1600.753–409 EFFECT OF EMPLOYEES' STATEMENTS ON OTHER REQUIREMENTS

The Statements of Employment and Financial Interest and supplementary statements are in addition to, and not in substitution for, or in derogation of, any similar requirement imposed by law, order, or regulation. The submission of a statement or supplementary statement by an employee does not permit him or any other person to participate in a matter in which he or the other person's participation is prohibited by law, order, or regulation.

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Authority: The provisions of this Part 1601 are issued under sec. 713, 78 Stat. 265; 42 U.S.C. 2000e–12.

Source: The provisions of this Part 1601 appear at 30 F.R. 8407, July 1, 1965, unless otherwise noted.

§ 1601.1 PURPOSE

The regulations set forth in this Part 1601 contain the procedures established by the Equal Employment Opportunity Commission for carrying out its responsibilities in the administration and enforcement of Title VII of the Civil Rights Act of 1964. Based upon its experience in the administration of the Act and upon its evaluation of suggestions and petitions for amendments submitted by interested persons in accordance with § 1601.32, the Commisison may from time to time amend and revise these procedures.

Subpart A—Definitions

§ 1601.2. TERMS DEFINED IN TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED

The terms "person," "employer," employment agency," "labor organization," "employee," "commerce," industry affecting commerce," "State," and religion, as used herein shall have the meanings set forth in section 701 of title VII of the Civil Rights Act of 1964, as amended.
[37 FR 9215, May 6, 1972]

§ 1601.3 TITLE VII, AS AMENDED: COMMISSION

The term "title VII, as amended" as used herein shall mean title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972. The term "Commission" shall mean the Equal Employment Opportunity Commission or any of its designated representatives.
[37 FR 9215, May 6, 1972]

§ 1601.3A VICE CHAIRMAN'S FUNCTIONS

The member of the Commission designated by the President to serve as Vice Chairman shall act as Chairman in the absence or disability of the Chairman or in the event of a vacancy in that office.
[37 FR 9215, May 6, 1972]

§ 1601.4 REGION; SUBREGION

The term "region" as used herein shall mean that part of the United States or any territory thereof fixed by the Commission as a particular region. The term "subregion" shall mean that area within a region fixed by the Commission as a particular subregion.

SUBPART B—PROCEDURE FOR THE PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

§ 1601.5 SUBMISSION OF INFORMATION

The Commission will receive information concerning alleged violations of this title from any person. Where the information discloses that a person is entitled to file a charge with the Commission, the appropriate office will render him assistance in the filing of a charge. In the alternative, a member of the Commission may file a charge based upon the information, in accordance with § 1601.10.

§ 1601.6 CHARGES BY OR ON BEHALF OF AGGRIEVED PERSONS

A charge that any person has engaged in or is engaging in an unlawful employment practice within the meaning of title VII, as amended, may be made by or on behalf of any person claiming to be aggrieved. A charge on behalf of a person claiming to be aggrieved may be made by any person, agency, or organization. Such charge need not identify by name the person on whose behalf it is made. The person making the charge, however, must provide the Commission with the name and address of the person on whose behalf the charge is made. During the Commission investigation, Commission personnel shall verify the authorization of such charge by the person on whose behalf such charge is made. The Commission shall keep such information confidential and in making deferrals to State and local authorities pursuant to §§ 1601.10 and 1601.12 not disclose such information to the State or local authorities except on condition that the identity of the person on whose behalf the charge is made be kept confidential. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests for such information. A person filing a charge on behalf of an aggrieved person shall be considered a party to the Commission's proceeding with respect to receiving notice at each stage at which notice is sent to parties.
[37 FR 9215, May 6, 1972]

§ 1601.7 WHERE TO MAKE A CHARGE

A charge may be made at the offices of the Commission in Washington, D.C., or any of its field offices or with any designated representative of the Commission.
[37 FR 9215, May 6, 1972]

§ 1601.8 FORMS; JURAT

Such charge shall be in writing and signed, and shall be sworn to before a notary public, designated representative of the Commission, or other person duly authorized by law to administer oaths, and take acknowledgements. Charge forms are available to all persons from all offices of the Commission. Appropriate assistance in filling out forms will be rendered to aggrieved persons or persons filing charges on their behalf by personnel of the Commission.
[37 FR 9215, May 6, 1972]

§ 1601.9 WITHDRAWAL OF A CHARGE BY AN AGGRIEVED PERSON

A charge filed by or on behalf of an aggrieved person may be withdrawn only by the aggrieved person with the consent of the Commission.
[37 FR 9215, May 6, 1972]

§ 1601.10 CHARGES BY MEMBERS OF THE COMMISSION

Any member of the Commission may file a charge in writing with the Commission. If section 706(d) of title VII should be applicable, the Commission, before taking any action with respect to the charge, shall notify the appropriate State or local 706 Agency, as defined in § 1601.12(c), and offer to refer the charge to it, except for certain section 704(a) charges as provided in § 1601.12(f). The Commission will allow the State or local authority a 10-day period to request an opportunity to act under its law except when EEOC notifies the appropriate authority in writing of a different time period.
[37 FR 9215, May 6, 1972]

§ 1601.11 CONTENTS; AMENDMENT

(a) Each charge should contain the following:

(1) The full name and address of the person making the charge.

(2) The full name and address of the person against whom the charge is made (hereinafter referred to as the respondent).

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practice.

(4) If known, the approximate number of employees of the respondent employer of the approximate number of members of the respondent labor organization, as the case may be.

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State or local authority charged with the enforcement of fair employment practice laws, and, if so, the date of such commencement and the name of the authority.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is deemed filed when the Commission receives from the person making a charge a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to swear to the charge, or to clarify and amplify allegations made therein, and such amendments alleging additional acts which constitute unlawful employment practices directly related to or growing out of the subject matter of the original charge will relate back to the original filing date.

[31 FR 10269, July 29, 1966, as amended at 37 FR 9215, May 6, 1972]

§ 1601.12 DEFERRALS TO STATE AND LOCAL AUTHORITIES

(a) In order to give full weight to the policy of section 706(c) of the Act, which affords State and local fair employment practice agencies that fall within the provisions of that section an opportunity to remedy alleged discrimination concurrently regulated by title VII of the Civil Rights Act of 1964 and State or local law, the Equal Employment Opportunity Commission adopts the following procedures with respect to allegations of discrimination filed with the Commission where there is no evidence that such allegations were earlier presented to an appropriate 706 Agency. It is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and local agencies. The Commission shall endeavor to maintain close communication with the State and local agencies with respect to all matters forwarded to such agencies and shall provide such assistance to the State and local agency as is permitted by law and is practicable. It is the experience of the Commission that because of the complexities of the present procedures, persons who seek the aid of the Commission are often confused and even risk loss of the protection of the Act. Accordingly, it is the intent of the Commission to simplify procedures for parties in deferral States and localities and thereby avoid the accidental forfeiture of important Federal rights.

(b) The following procedures shall be followed with respect to cases arising in the jurisdiction of "706 Agencies" to which the Commission defers as further defined in paragraph (c) of this section.

(1) Any document, whether or not verified, received by the Equal Employment Opportunity Commission as provided in § 1601.7, which may constitute a charge cognizable under title VII, shall be deferred to the appropriate 706 Agency, as further defined in paragraph (c) of this section, pursuant to the procedures set forth below.

(i) All such documents shall be dated and time stamped on receipt.

(ii) A copy of the original document shall be transmitted by registered mail, return receipt requested, to the appropriate State or local agency, or, where the State or local agency has consented thereto, by certified mail, by regular mail or by hand delivery.

(iii) The aggrieved party and any person filing a charge on behalf of an aggrieved party shall be notified, in writing, that the document which he sent to the Commission has been forwarded to the State or local agency pursuant to the provisions of section 706(c), and that unless the Commission is notified to the contrary, on the termination of State or local proceedings, or after 60 days have passed, whichever comes first, the Commission will consider the charge to be filed with the Commission and commence processing the case. Where the State or local agency terminates its proceedings within 60 days without notification to the Commission of such action, the Commission will consider the charge to be filed with it on the date the person making the charge was notified of the termination.

(iv) The 60-day period shall be deemed to have commenced at the time such document is mailed or delivered to the State or local authority. On notification of the termination of State proceedings or the expiration of 60 days, whichever comes first, the Commission will consider the charge to be filed with the Commission and will commence processing the case.

(v) In cases where the document is filed with the Commission more than 240 days following the alleged act of discrimination but less than 30 days therefrom, the case shall be deferred pursuant to procedures set forth above: ***Provided, however,*** That unless the Commission is earlier notified of the termination of the State or local proceeding, the Commission will consider the charge to be filed with the Commission on the 299th day following the alleged discrimination and will commence processing the case. Where the State or local agency terminates its proceeding prior to the 299th day following the alleged act of discrimination, without notification to the Commission of such action, the Commission will consider the charge to be filed with it on the date the person making the charge was notified of the termination.

(vi) In any case where the State or local agency has not formally notified the Commission as to the termination of the State or local proceeding, the Commission shall serve the notice required by § 1601.13 within 10 days from the date it is made aware of the termination of such proceedings.

(c) 706 Agency defined: For the purposes of this section and § 1601.10, the term "706 Agency" shall include only those agencies which have applied for formal designation by the Commission in accord with the procedures set forth in paragraph (e) of this section; have been formally designated by the Commission in accord with the procedures set forth in paragraph (g) of this section; and have not had their formal designation withdrawn by the Commission in accord with the procedures set forth in paragraph (k) of this section.

(1) *Provided,* That effective immediately and until July 1, 1973, the Commission will consider the agencies designated by public notice as described in paragraph (d) as Provisional 706 Agencies and procedures for deferral of cases in paragraph (b) of this section and § 1601.10 will be followed with respect to them until that date.

(2) *Provided, further,* That no agency on such provisional list will be considered a 706 Agency for the purposes of according weight to its findings pursuant to § 1601.19d until it has complied with the procedures for application for formal designation and has received such formal designation by the Commission and has been listed in these regulations by formal amendment to paragraph (k) of this section.

(d) Provisional 706 Agencies and Provisional Notice Agencies:

(1) *Provisional 706 agencies.* Until October 1, 1974, the Commission will defer charges alleging employment discrimination on the grounds of race, color, religion, sex, or national origin against covered public or private employers, unless otherwise indicated by public notice, arising in the jurisdiction of provisional 706 agencies. Agencies may be added as provisional 706 agencies by public notice issued by the Commission.

(2) *Provisional notice agencies.* Until October 1, 1974, with respect to the jurisdictions of provisional notice agencies, the Commission will not defer, but will, with respect to charges alleging employment discrimination on the grounds of race, color, religion, national origin, and/or where indicated in the public notice which designated the agency a provisional notice agency, (i) Note: Receipt of said charges and serve notice thereof upon the respondent or respondents; (ii) inform the appropriate agency or person of the receipt of the charge. Agencies may be added as provisional notice agencies by public notice issued by the Commission.

(e) Procedure to apply for designation as a 706 Agency: Any agency desiring to be designated as a 706 Agency may obtain an application form from the Commission (by writing to the EEOC Regional Director having jurisdiction or to the Office of State and Community Affairs, 1800 G Street NW., Washington, DC 20506) and shall sumbit it together with the following materials and information:

(1) A copy of the agency's fair employment practices law and any rules, regulations and guidelines of general interpretation issued pursuant thereto.

(2) A chart of the organization of the agency responsible for administering and enforcing said law.

(3) The amount of funds made available to or allocated by the agency for fair employment purposes.

(4) The identity and telephone number of the agency attorney whom the Commission may contact in reference to any legal questions that may arise in the process of its review of the agency's application.

(5) A statement, on a form to be provided by the Commission, certifying the following:

(i) That the law prohibiting discrimination establishes or authorizes that agency to exercise administrative enforcement authority.

(ii) That the law and administrative practice do not place any excessive burdens on the complainant which might discourage the filing of complaints.

(iii) That the law is comparable in scope to title VII coverage and is administered by the agency so that, in fact, the practices prohibited and remedies required are comparable in scope to the practices prohibited and the remedies required under title VII of the Civil Rights Act of 1964, as interpreted by the United States Supreme Court in the case of "Griggs v. Duke Power," 401 U.S. 424 (1971).

(f) Criteria for the protection of Federal rights: No agency shall be designated or continued as a designated 706 Agency unless the law which it administers:

(1) Protects persons from discrimination on essentially all of the grounds covered by title VII as amended; and

(2) Includes in the practices prohibited essentially all of the practices prohibited by title VII as amended; and

(3) Includes in its coverage of persons by whom such practices are declared illegal, essentially all of the classes of persons as defined under title VII; and

(4) Is administered and interpreted by the agency so that it does, in fact, prohibit the practices prohibited by title VII and does, in fact, require the remedies required by title VII.

Provided, however, No agency shall be denied designation as a 706 Agency on the sole ground that the statute which it enforces omits from the practices prohibited (as that term is used in subparagraph (2) of this paragraph) those practices prohibited by section 704(a) of the Civil Rights Act of 1964: *Provided, further, however,* That the Commission will not defer charges alleging a violation of section 704(a) to any 706 Agency administering legislation omitting such a provision unless such agency (in the application for designation required in paragraph (e) of this section or otherwise) specifically certifies that it interprets its legislation to prohibit the practices prohibited by section 704(a). Unless and until this certificate of section 704(a) coverage is received, the Commission will consider section 704(a) charges in such jurisdiction as filed with the Commission when the written statement required by § 1601.11(b) is received and will serve the notice required by § 1601.13.

(g) Commission determinations: The Commission, after examining the materials and applications required in paragraph (e) of this section and after applying criteria outlined in paragraph (f) of this section, shall make a determination.

(1) If the Commission determines that an agency shall be designated as a 706 Agency, it shall notify the agency that it proposes to issue such designation. Such proposed designation shall be published in the FEDERAL REGISTER and shall provide any person or organization not less than 15 days in which to file written comments with the Commission. If after evaluating any comments so received the Commission is still of the opinion that issuance of the proopsed designation as published in the FEDERAL REGISTER is appropriate, it shall effect such designation by issuance and publication of an amendment to paragraph (k) of this section. Thereafter, the procedure in paragraph (b) of this section and § 1601.10 shall be followed for cases in the jurisdiction of the 706 Agency.

(2) If the Commission determines that any agency shall not be designated as a 706 Agency, it shall notify the applicant agency of its decision and such notice shall provide the reason(s) why it proposes not to designate the agency and shall grant it not less than 15 days to request a conference concerning the matter in accord with paragraph (j) of this section.

(h) Performance standards: The continued designation of a 706 Agency will be dependent upon the 706 Agency's willingness and ability to administer its law in such a manner that, in fact, the practices prohibited and remedies required are comparable in scope to those practices prohibited and remedies required under Federal law and satisfy the performance standards set forth below:

(1) In all cases where the 706 Agency finds cause to credit the allegations of a charge, it shall effectively eliminate the discrimination and, where appropriate, provide for full compensatory and prospective relief consistent with the applicable Federal law.

(2) In all cases where the 706 Agency enters into a conciliation agreement, consent order, or order after public hearing, it shall include in any such agreement or order mechanisms for monitoring compliance with the term thereof and mechanisms for enforcing compliance in the event any terms thereof are not implemented.

(i) Withdrawal of designation: The Commission may upon its own motion, upon the motion of any person or organization, or upon the motion of a Regional Director of the Commission, withdraw the designation as a 706 Agency previously issued to an agency based upon (1) reconsideration of the application and materials and the information referenced in paragraph (e) of this section; or

(2) application of the criteria in paragraph (f) of this section; or (3) consideration of the agency's performance as required in paragraph (h) of this section. Whenever the Commission has reason to believe that such designation as a 706 Agency no longer serves the interest of effective enforcement of title VII, it may, after following the procedures below, including the opportunity for a conference provided for in paragraph (j) of this section, withdraw such designation. Before taking such action it shall notify the 706 Agency of its proposed withdrawal of such designation. Such notification shall set forth the reasons for the proposed withdrawal and provide the agency not less than 15 days to submit data, views, and arguments in opposition and to request a conference in accordance with paragraph (j) of this section. Such proposed withdrawal of designation shall also be published in the FEDERAL REGISTER and shall provide any persons or organizations who take an interest at least 15 days in which to file written comments on the proposal with the Commission and to request a conference. If a request for a conference in accordance with paragraph (j) of this section is not received within the time period provided, the Commission shall evaluate any arguments or comments it has received from the agency and from any persons and organizations who take an interest and if, after such evaluation, the Commission still is of the opinion that designation should be withdrawn because it has determined that such designation no longer serves the interest of effective enforcement of title VII, the Commission shall so notify the agency and effect the withdrawal by the issuance and publication of an amendment to paragraph (k) of this section.

(j) Request for conference: In order to provide a State or local agency full opportunity to present its views whenever, pursuant to paragraph (g) or (i) of this section, a conference is requested within the time allowed by said sections for making such request, the Director of State and Community Affairs or his designee shall hold such a conference. Said conference officer shall issue a preconference order. The order shall indicate the issues to be resolved and any initial procedural instructions which might be appropriate for the particular conference. It shall fix the date, time, and place of the conference. The date shall not be less than 20 days after the date of the order. The date and place shall be subject to change for good cause.

(1) A copy of such preconference order shall be served on the State or local agency and on any person or organization who files a written comment in accordance with paragraph (g) or (i) of this section. The agency and all such persons and organizations shall be deemed to be participants in the conference. After service of the order, or of a notice designating a conference officer and until such officer submits his recommended determination, all communications relating to the subject matter of the conference shall be addressed to him. The conference officer shall have full authority to regulate the course and conduct of the conference. A transcript shall be made of the proceedings at the conference. The transcript and all comments and petitions relating to the proceedings shall be made available for inspection by interested persons.

(2) The conference officer shall prepare his proposed findings and recommended determination, a copy of which shall be served on each participant. Within 20 days after such service any participant may file written exceptions. After the expiration of the period for filing exceptions, the conference officer shall certify the entire record, including his proposed findings and recommended determination and exceptions thereto, to the Commission, which shall review the record and issue a final determination.

(3) Such determination shall become effective by the issuance and publication of an amendment to paragraph (k) of this section.

(k) The designated 706 Agencies are:

(1) Baltimore Community Relations Commission.
Iowa Commission on Civil Rights.
Wisconsin Department of Industry, Labor and Human Relations.
(2) Bloomington Human Rights Commission.
(3) Dade County Fair Housing and Employment Commission.
(4) East Chicago Human Relations Commission.
(5) Gary Human Relations Commission.
(6) Idaho Commission on Human Rights.
(7) Kansas Commission on Civil Rights.
(8) Kentucky Commission on Human Rights.
(9) New York City Commission on Human Rights.
(10) Ohio Civil Rights Commission.
(11) Oklahoma Human Rights Commission.
(12) Philadelphia Commission on Human Relations.

(13) Seattle Human Rights Commission.
(14) Tacoma Human Rights Commission.
(15) Washington State Human Rights Commission.

The Notice Agencies are:

(1) Florida Commission on Human Relations.
(2) South Carolina Human Affairs Commission (Sec. 713(a) (76 Stat. 265 (42 U.S.C. 2000e–12(a))).

I—Provisional 706 Agencies

NOTE 1: Pursuant to § 1601.12(d)(1) as amended and published in the FEDERAL REGISTER Vol. 38, No. 121, June 25, 1973, the Equal Employment Opportunity Commission (hereinafter referred to as the Commission) has extended until July 1, 1974, designation of the agencies listed in Chart I below as Provisional 706 Agencies for the purposes of receiving referenced types of charges deferred by the Commission, pursuant to section 706 (c) and (d) of Title VII of the Civil Rights Act of 1964, as amended.

The designations reflected herein were officially adopted by the Commission on April 17, 1972, and extended June 25, 1973. The Commission may, from time to time, amend the designations listed herein by subsequent publications.

NOTE 2: If this list contains two or more agencies whose geographic jurisdiction is concurrent as to a particular charge, the Commission reserves the right to defer the charge to only one of the agencies and to make an administrative determination as to which agency is more appropriate to the effective enforcement of title VII.

I—PROVISIONAL 705 AGENCIES

	Provisional 706 Agency relationships			No Provisional 706 Agency relationship	
State	State FEP law appears to provide enforceable sanctions against discrimination on account of race, color, religion, and national origin, and charges alleging violation on these grounds will be deferred to the agency listed below	State FEP law also appears to bar sex discrimination	State FEP law appears to provide enforceable sanctions against discrimination by State or local, governments, government agencies, and political subdivisions	State has failed to enact legislation with enforceable sanctions against any practice prohibited by Title VII	Comments
A	B	C	D	E	F
Alabama				×	
Arizona				See chart II	
Arkansas				See chart II	
California	Fair Employment Practice Commission.	×	×		
Florida				×	
Georgia				See chart II	
Hawaii	Department of Labor and Industrial Relations.	×			
Idaho	Commission on Human Rights.	×	×		
Iowa	Civil Rights Commission.	×	×		
Kansas	Commission on Civil Rights.	×	×		
Kentucky	Commission on Human Rights.	×	×		
Louisiana				×	
Maine	Human Rights Commission.	×			Charges alleging sex discrimination will be deferred for 120 days until 10-3-74.
Maryland	Commission on Human Relations.	×	×		

I—PROVISIONAL 706 AGENCIES—Continued

	Provisional 706 Agency relationships			No Provisional 706 Agency relationship	
State	State FEP law appears to provide enforceable sanctions against discrimination on account of race, color, religion, and national origin, and charges alleging violation on these grounds will be deferred to the agency listed below	State FEP law also appears to bar sex discrimination	State FEP law appears to provide enforceable sanctions against discrimination by State or local, governments, government agencies, and political subdivisions	State has failed to enact legislation with enforceable sanctions against any practice prohibited by Title VII	Comments
A	B	C	D	E	F
Massachusetts		X	X		
Mississippi					X.
Missouri	Commission on Human Rights.	X	X		
Montana				See chart II	
Nebraska	Equal Employment Opportunity Commission.	X	X		
Nevada	Commission on Equal Rights of Citizens.	Commissioner of Labor (but see comments).	X		Although the Commissioner of Labor is responsible for processing complaints alleging sex discrimination by agreement among the EEOC and the 2 Nevada agencies, all complaints will be deferred to the Commission on Equal Rights of Citizens, which will transfer appropriate charge to the Commissioner of Labor.
New Mexico	Human Rights Commission.	X	X		
New York	Division of Human Rights.	X	X		
North Carolina					X.
North Dakota				See chart II	
Ohio	Civil Rights Commission.	Dayton Human Relations Council (only those violations which occur within city limits).	X		
Oklahoma	Human Rights Commission.	X	X		
Puerto Rico	Department of Labor.	X	X		
Rhode Island	Commission for Human Rights.	X			
South Carolina				X	
Tennessee				X	
Texas				X	
Vermont				See chart II	
Virginia				X	
Virgin Islands	Commissioner of Public Safety.	Department of Labor.			
Washington	Human Rights Commission.	X	X		
Wisconsin	Department of Industry, Labor and Human Relations.	X	X		

II—Provisional Notice Agencies

NOTE. 1: Pursuant to § 1601.12(d)(2) of Title 29 as amended in the FEDERAL REGISTER, Vol. 38, No. 121, the Equal Employment Opportunity Commission (hereinafter referred to as the Commission) has extended, until July 1, 1974, designation of the agencies and persons listed in Chart II below as Provisional Notice Agencies. With respect to the referenced types of charges, the Commission will (1) note receipt of said charge and serve notice upon the respondent or respondents, (2) schedule the charge for investigation, and (3) inform the agency or person indicated in this charter of the receipt of the charge.

The designations reflected herein were officially adopted by the Commission on April 17, 1972, and extended on June 25, 1973. The Commission may from time to time, amend the designations listed herein by subsequent public notice.

II—PROVISIONAL NOTICE AGENCIES

State	State law prohibits discrimination on account of race, color, religion, and national origin, and charges alleging violations on these grounds will be forwarded to the agency listed below.	State law bars sex discrimination.	State has enacted a (sex) equal pay statute and agency (or title of person) listed below will be forwarded charges filed alleging violations on those grounds.	State PEP law appears to prohibit discrimination by State or local governments, government agencies, and political subdivisions.
A	B	C	D	E
Arkansas			Commissioner of Labor	
Arizona	Civil Rights Commission	X		X.
Georgia			Commissioner of Labor	
Kentucky			Commissioner of Labor	
Montana	Attorney General	X		X.
North Dakota			Commissioner of Agriculture and Labor.	
Ohio	Director of Industrial Relations.			
Vermont	Attorney General	X		

37 FR 9215, May 6, 1972, as amended at 38 FR 16640, June 25, 1973; 38 FR 20829, Aug. 3, 1973; 39 FR 23996, June 28, 1974]

§ 1601.13 SERVICE OF A NOTICE OF CHARGE

Within 10 days after the filing of a charge, the Commission shall furnish the respondent with a notice thereof by mail or in person (including the date, place and circumstances of the alleged unlawful employment practice). Unless otherwise determined by the Commission, the notice shall not indentify the person filing the charge or on whose behalf it was filed. When a charge is received at some other Federal office (EEOC or otherwise) than the appropriate EEOC District office, it shall be forwarded immediately to that District office and notice shall be mailed to the respondent within 10 days after receipt of the charge in that District office, or after termination of any necessary deferral period, as the case may be.

[37 FR 9217, May 6, 1972]

Investigation of a Charge

§ 1601.14 BY WHOM MADE

The investigation of a charge shall be made by the Commission. During the course of such investigation, the Commission may utilize the services of State and local agencies which are charged with the administration of fair employment practice laws or appropriate Federal agencies, and, to the extent relevant, may utilize the information gathered by such agencies. As a part of each investigation, the person making the charge on behalf of the aggrieved person, the aggrieved person, and the respondent shall each be offered an opportunity to submit a statement of its position or evidence with respect to the allegations.

[37 FR 9218, May 6, 1972]

§ 1601.15 DOCUMENTARY EVIDENCE; SUMMONING WITNESSES AND TAKING TESTIMONY

(a) To effectuate the purposes of title VII, as amended, any member of the Commission shall have the authority to issue subpenas requiring the attendance and testimony of witnesses and the production of evidence, including, but not limited to, books, records, correspondence, or documents, in the possession or under the control of the person subpenaed. Any District Director or Deputy District Director of the Commission may issue and sign a subpena on behalf of the Commission. The subpena shall state the name and address of its issuer, identify the person subpenaed, the person to whom and the place, date, and time at which it is returnable. A subpena may be returnable to a duly authorized investigator or other representative of the Commission. No member of the Commission or any District Director or his deputy will issue a subpena upon request of a person filing a charge, a person on whose behalf a charge was filed, or a respondent.

(b) Any person served with a subpena whether ad testificandum or duces tecum who intends not to comply therewith, shall, within 5 days after the date of service of the subpena upon him, petition the Director of Compliance by mail at 1800 G Street NW., Washington, D.C. 20506 (serving a copy upon the District Director who issued the subpena) to revoke or modify the subpena. The petition shall state each ground upon which the petitioner relies. Within 5 days after receipt thereof, so far as practicable, the Director of Compliance shall make a determination upon the petition, stating reasons, which shall be reviewed by the Commission and unless the Commission decides otherwise shall become final 3 days thereafter. The Commission shall serve a copy of the final determination of the petition upon the petitioner. For purposes of this section, service shall be made and proof thereof established pursuant to section 11(4) of the National Labor Relation Act, as amended, 29 U.S.C. 161(4), as made applicable to proceedings hereunder by section 710 of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-9.

(c) Upon the failure of any person to comply with a subpena issued under this section, the Commission may utilize the procedures of section 11(2) of the National Labor Relation Act as amended, 29 U.S.C. 161(2), to compel enforcement of the subpena.

[37 FR 9218, May 6, 1972]

§ 1601.16 WITNESSES

To effectuate the purposes of Title VII, the Commission may demand in writing that a person appear at a stated time and place within the State in which such person resides, transacts business, or is served with the demand, for the purpose of testifying under oath before the Commission or its representative. If there be noncompliance with any such demand, the Commission may utilize the procedures of section 710(b) of Title VII to compel such person to testify. A transcript of testimony may be made a part of the record of each investigation.

§ 1601.17 PAYMENT OF WITNESS FEES AND MILEAGE

Witnesses who testify as provided above shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

§ 1601.18 RIGHT TO INSPECT OR COPY DATA

A person who submits data or evidence to the Commission may retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that a witness may for good cause be limited to inspection of the official transcript of his testimony.

Procedure Following Filing of Charge[1]

NOTE: Amendments made 35 F.R. 3163, February 19, 1970 re charges shall be applicable with respect to charges presently pending in which the investigation had not been completed by February 19, 1970; 35 FR 10110, June 19, 1970.

§ 1601.19 DISMISSAL OF CHARGE

Whereas the allegations of a charge on its face, or as amplified by the statements of the charging party to the Commission, disclose that the charge is not timely filed or otherwise fails to state a valid claim for relief under title VII, the Commission, through the Director of the District Office where the charge is lodged, may dismiss the charge without further action. Where notice of the charge or

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[1] FR 3163, Feb. 19, 1970.

the charge has been served the aggrieved person, the person making the charge on behalf of such person, where applicable, and the respondent shall be notified in writing of the disposition of the charge, together with the reasons therefor.
[37 FR 20165, Sept. 27, 1972]

§ 1601.19a PREDETERMINATION SETTLEMENT PROCEDURE

At any time subsequent to a preliminary investigation and prior to the issuance of a determination as to reasonable cause, the District Directors, or other designated officers, may engage in settlement discussions. The District Directors, or other designated officers, may make and approve settlements, on behalf of the Commission, in those cases where such authority has been delegated to them by the Commission.
[37 FR 20165, Sept. 27, 1972]

§ 1601.19b DETERMINATION AS TO REASONABLE CAUSE

(a) If the Commission determines that a charge fails to state a valid claim for relief under title VII, or that there is not reasonable cause to believe that a charge is true, the Commission shall dismiss the charge. Where, however, it determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring, it shall endeavor to eliminate such practice by informal methods of conference, conciliation, and persuasion.

(b) The Commission shall promptly notify the aggrieved person, the person making a charge on behalf of such person, where applicable, and the respondent, or, in the case of a charge filed under § 1601.10, the person aggrieved, if known and the respondent of its determination under paragraph (a) of this section. The determination is final when issued; therefore, requests for reconsideration will not be granted. The Commission may, however, on its own motion, reconsider its determination at any time and, when it does so, the Commission shall promptly notify the aggrieved person, the person making the charge on behalf of the aggrieved person, where applicable, and the respondent, or, in the case of a charge filed under § 1601.10, the person aggrieved, if known, and the respondent of its subsequent decision on reconsideration.

(c) Where a member of the Commission has filed a charge under § 1601.10, that member shall not participate in the determination in that case.

(d) The District Directors, or other designated officers, on behalf of the Commissioner, may, upon completioin of an investigation, dismiss charges, make and issue determinations as to reasonable cause, and serve a copy thereof upon the parties, and make and approve conciliation agreements in those cases where such authority has been delegated to them by the Commission. The determination is final when issued; therefore, requests for reconsideration will not be granted. The District Directors, or other designated officers, may, however, on their own motion, reconsider their determination at any time and, when they do so, they shall promptly notify the aggrieved person, the person making the charge on behalf of the aggrieved person, where applicable, and the respondent, or in the case of a charge filed under § 1601.10, the person aggrieved, if known, and the respondent of their subsequent decision on reconsideration.

(e) In making a determination as to whether reasonable cause exists, substantial weight shall be accorded final findings and orders made by designated 706 agencies, as listed in § 1601.12(k) pursuant to the requirements of section 706(b), (c), and (d) of title VII. For the purposes of this section, the following definitions shall apply:

(1) "Final findings and orders" shall mean:

(i) The findings of fact and order incident thereto issued by a 706 Agency after a public hearing on the merits of a charge; or

(ii) The consent order or consent decree entered into by the 706 Agency prior to or during a public hearing on the merits of a charge, if such consent order or decree may be enforced by the courts. *Provided, however,* That no findings and order of a 706 Agency shall be considered the final findings and order for purposes of this section unless the 706 Agency shall have served a copy of such findings and order upon the Commission and upon the persons claiming to be aggrieved; and shall have informed such persons of their rights of appeal, or to request reconsideration, or rehearing or similar rights; and the time for such appeal, reconsideration, or rehearing request shall have expired or the issues on such appeal, reconsideration, or rehearing shall have been fully determined.

(2) "Substantial weight" shall mean that such full and careful consideration shall be accorded to final findings and orders, as defined above, as is appropriate in light of the facts supporting them, when they meet all of the prerequisites set forth below:

(i) The proceedings were fair and regular; and

(ii) The remedies and relief granted are comparable in scope to the remedies and relief required by Federal law; and

(iii) The final findings and order serve the interest of the effective enforcement of title VII.

Provided, That giving "substantial weight to final findings and orders" of a "706 Agency" does not include according weight, for purposes of applying Federal law, to that agency's conclusions of law.

[37 FR 21065, Sept. 27, 1972]

§ 1601.20 CONFIDENTIALITY

Neither a charge, nor information obtained pursuant to section 709(a) of title VII, nor information obtained from records required to be kept or reports required to be filed pursuant to section 709 (c) and (d) of said title, shall be made matters of public information by the Commission prior to the institution of any proceedings under this title involving such charge or information. This provision does not apply to such earlier disclosures to the charging party, the respondent, witnesses, and representatives of interested Federal, State, and local agencies as may be appropriate or necessary to the carrying out of the Commission's functions under the title, nor to the publication of data derived from such information in a form which does not reveal the identity of the charging party, respondent, or person supplying the information.

[36 F.R. 20600, Oct. 27, 1971]

Procedure To Rectify Unlawful Employment Practices

§ 1601.22 CONCILIATION; SETTLEMENTS

In conciliating a case in which a determination of reasonable cause has been made, the Commission shall attempt to achieve a just resolution and to obtain assurances that the respondent will eliminate the unlawful employment practice and take appropriate affirmative action. Disposition of a case pursuant to this section shall be in writing, and notice thereof shall be sent to the parties. Proof of the Commission's functions under the title: *Provided*, That the Commission is closed.

[31 F.R. 10270, July 29, 1966]

§ 1601.23 REFUSAL OF RESPONDENT TO COOPERATE

Should a respondent fail or refuse to confer with the Commission or its representative, or fail or refuse to make a good faith effort to resolve any dispute, the Commission may terminate its efforts to conciliate the dispute. In such event, the respondent shall be notified promptly, in writing, that such efforts have been unsuccessful and will not be resumed except upon the respondent's written request within the time specified in such notice.

§ 1601.24 CONFIDENTIALITY OF ENDEAVORS

Nothing that is said or done during and as part of the informal endeavors of the Commission to eliminate unlawful employment practices by informal methods of conference, conciliation, and persuasion may be made a matter of public information by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the parties concerned. This provision does not apply to such disclosures to the representatives of Federal, State, and local agencies as may be appropriate or necessary to the carrying out of the Commission's functions under the title: *Provided*, That the Commission may refuse to make disclosures to any such agency which does not maintain the confidentiality of such endeavors in accord with this section or in any circumstances where the disclosures will not serve the purposes of the effective enforcement of title VII.

[37 FR 9218, May 6, 1972]

Procedure After Failure of Conciliation

§ 1601.25 NOTICE TO RESPONDENT, PERSON FILING A CHARGE ON BEHALF OF THE AGGRIEVED PERSON AND AGGRIEVED PERSONS

(a) In any instance in which the Commission is unable to obtain voluntary compliance as provided by Title VII, as amended, it shall so notify the repondent, the person filing a charge on behalf of the aggrieved person, the aggrieved person or persons, and any State or local agency to which the charge has been previously deferred pursuant to § 1601.12 or § 1601.10. Notification to the aggrieved person shall include:

(1) A copy of the charge.

(2) A copy of the Commission's reasonable cause or no reasonable cause determination as appropriate.

(3) Advice concerning his or her rights to proceed in court under Section 709(f) (1) of Title VII.

(b) The Commission hereby delegates to its District Directors, Deputy District Directors, and the Director of Compliance, the authority to issue Notices of Right-To-Sue on behalf of the Commission in all cases except those in which a government, governmental agency or political subdivision is named in the charge, pursuant to the procedures set forth in paragraph (a) (2) and (3) of this section.

[39 FR 10123, Mar. 18, 1974]

§ 1601.25a PRELIMINARY OR TEMPORARY RELIEF

In the interest of the expeditious procedure required by section 706(f) (2) of title VII, as amended, the Commission hereby delegates to the District Director the authority, upon the basis of a preliminary investigation, to make the determination on its behalf that prompt judicial action is necessary to carry out the purposes of the Act, and, where the District Director so determines, the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge.

[37 FR 9219, May 6, 1972]

§ 1601.25b PROCESSING OF CASES, WHEN NOTICE ISSUES UNDER § 1601.25

(a) The Commission may bring a civil action against any respondent named in a charge, not a government, governmental agency or political subdivision, after thirty (30) days from the date of the filing of a charge with the Commission unless a conciliation agreement acceptable to the Commission has been secured. Where the person claiming to be aggrieved is not a party to such an agreement, the agreement shall not extinguish or in any way prejudice such person's right to proceed in court under section 706(f) (1).

(b) The Commission shall not issue a notice pursuant to § 1601.25 prior to a determination under § 1601.19b or where reasonable cause has been found prior to efforts at concilation with respondent, except as provided in paragraph (c) of this section.

(c) At any time after the expiration of one hundred and eighty (180) days from the date of the filing of a charge or upon dismissal of a charge at any stage of the proceedings, an aggrieved person may demand in writing that a notice issue pursuant to § 1601.25, and the Commission shall promptly issue a notice, and provide copies thereof and copies of the charge to all parties.

(d) Issuance of notice pursuant to paragraph (c) of this section shall suspend further Commission proceedings unless the Field Director determines that it is in the public interest to continue such proceedings, or unless, within twenty (20) days after receipt of such notice, a party requests the Field Director, in writing, to continue to process the case.

[37 FR 9219, May 6, 1972, as amended at 37 FR 20165, Sept. 27, 1972; 38 FR 34810, Dec. 19, 1973]

§ 1601.25c ISSUANCE OF NOTICE IN CASES INVOLVING COMMISSIONER CHARGES

(a) Section 706f(1) of the Civil Rights Act of 1964, as amended, provides that in cases involving Commissioner charges when the Commission has been unable to secure voluntary compliance with the Act, the Commission shall notify any person whom the charge alleges was aggrieved by the alleged unlawful employment practices of his right to sue in a Federal District Court. To come within the purview of this section an individual may either be specifically designated by name or be among the class of persons aggrieved by the practices complained of in the charge. Accordingly, in cases involving Commissioner charges, the Commission will follow the procedures outlined in paragraphs (b), (c), (d), and (e) of this section.

(b) The Commission shall not issue any Notice-of-Right-to-Sue prior to a determination on the merits, except as provided in paragraph (d) of this section. Furthermore, where the Commission has found reasonable cause, the Commission shall not issue such notice prior to failure of the Commission's conciliation efforts except as provided in paragraph (d) of this section.

(c) Where the Commission has found reasonable cause but has been unable to obtain voluntary compliance with title VII, the Commission shall so notify the respondent and all identifiable members of the class aggrieved by the practices complained of in the charge. Notification to aggrieved members of the class shall include the following:

(1) A copy of the charge.

(2) A copy of the Commission decision.

(3) Advice concerning his right to proceed in court under section 706(1) of title VII.

(d) At any time after 180 days have expired since the charge was filed, any member of the class aggrieved by the practices alleged in the charge may demand in writing that a Notice-of-Right-to-Sue issue, and the Commission shall promptly issue such Notice-of-Right-to-Sue, pursuant to paragraph (c) of this section and provide copies thereof and copies of the charge to all parties.

(e) Issuance of a notice pursuant to paragraph (d) of this section does not terminate the Commission's jurisdiction of the proceeding and the case shall continue to be processed.

[37 FR 9219, May 6, 1972]

§ 1601.26 REFERRAL TO THE ATTORNEY GENERAL

If the Commission is unable to obtain voluntary compliance, it may inform the Attorney General of appropriate facts in the case with recommendations for intervention by him in a civil action previously instituted by an aggrieved party under section 706 of Title VII, and the Commission may make public the fact that it has so recommended to the Attorney General. The Commission may further recommend to the Attorney General that he institute a civil action under section 707 of said title involving a pattern or practice of resistance to the full enployment of any of the rights secured by said title.

SUBPART C—NOTICES TO EMPLOYEES, APPLICANTS FOR EMPLOYMENT AND UNION MEMBERS

§ 1601.27 NOTICES TO BE POSTED

(a) Every employer, employment agency, labor organization, and joint labor-management committee controlling an apprenticeship or other training program, as the case may be, shall post and keep posted in conspicuous places upon its premises where notice to employees, applicants for employment, members, and trainees are customarily posted the following notice:

EQUAL EMPLOYMENT OPPORTUNITY
is the Law

DISCRIMINATION IS PROHIBITED

By The Civil Rights Act of 1964
And By Executive Order Number 11246

Title VII of the Civil Rights Act of 1964—Administered by The Equal Employment Opportunity Commission Prohibits discrimination because of Race, Color, Religion, Sex, or National Origin By Employers with 25 or more employees, by Labor Organizations with a hiring hall of 25 or more members, by Employment Agencies, and by Joint Labor-Management Committee for Apprenticeship of Training.

ANY PERSON

who believes he or she has
been discriminated against

SHOULD CONTACT

The Equal Employment Opportunity Commission, 1800 G Street NW., Washington, DC 20506.

OR ANY OF ITS
FIELD OFFICES

Executive Order Number 11246[1]—Administered by The Office of Federal Contract Compliance Prohibits discrimination because of Race, Color, Religion, Sex, or National Origin, and requires affirmative action to ensure equality of opportunity in all aspects of employment. By all Federal Government Contractors and Subcontractors, and by Contracts and Subcontractors, and by Contractors and Subcontractors Performing Work Under a Federally Assisted Constuction Contract, regardless of the number of employees in either case—

ANY PERSON

who believes he or she has
been discriminated against

SHOULD CONTACT

The Office of Federal Contract Compliance, U.S. Department of Labor, Washington, DC 20210.

(b) Copies of such notice may be obtained on request from the Commission.

(c) Section 711(b) of Title VII makes failure to comply with this section punishable by a fine of not more than $100 for each separate offense.

[31 F.R. 9004, June 30, 1966, as amended at 36 F.R. 9068, May 19, 1971]

SUBPART D—INTERPRETATIONS AND OPINIONS BY THE COMMISSION

§ 1601.28 REQUEST FOR INTERPRETATION OR OPINION; WHO MAY FILE

Any interested person desiring a written interpretation or opinion from the Commission may make a request therefor.

§ 1601.29 CONTENTS OF REQUEST; WHERE TO FILE

A request for an "opinion letter" shall be in writing, signed by the person making the request addressed to the Chairman, Equal Employment Opportunity Commission, Washington, D.C., and shall contain:

(a) The names and addresses of the person making the request and of other interested persons.

(b) A statement of all known relevant facts.

(c) A statement of reasons why the interpretation or opinion should be issued.

§ 1601.30 ISSUANCE OF INTERPRETATION OR OPINION

Only (a) a letter entitled "opinion letter" and signed by the General Counsel on behalf of the Commission or (b) matter published and so designated in the FEDERAL REGISTER may be considered a "written interpretation or opinions of the Commission" within the meaning of section 713 of Title VII.

SUBPART E—CONSTRUCTION OF RULES

§ 1601.31 RULES TO BE LIBERALLY CONSTRUED

The rules and regulations in this part shall be liberally construed to effectuate the purpose and provisions of Title VII.

SUBPART F—ISSUANCE, AMENDMENT, OR REPEAL OF RULES

§ 1601.32 PETITIONS

Any interested person may petition the Commission, in writing, for the issuance, amendment, or repeal of a rule or regulation. An original and 12 legibly duplicated (not carbon) copies of such petition shall be filed with the Commission in Washington, D.C., and shall state the rule or regulation proposed to be issued, amend, or repealed, together with a statement of grounds in support of such petition.

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[1] As amended by Executive Order 11375.

§ 1601.33 ACTION ON PETITION

Upon the filing of such petition, the Commission shall consider the same and may thereupon either grant or deny the petition in whole or in part, conduct an appropriate proceeding thereon, or make fater disposition of the petition. Should the petition be denied in whole or in part, prompt notice shall be given of the denial, accompanied by a simple statement of the grounds unless the denial be self-explanatory.

PART 1602—RECORDS AND REPORTS

Sec.
1602.1 General.

SUBPART A—PROCEDURE

1602.2 Initiating a proceeding.
1602.3 Notice of a proceeding.
1602.4 Procedure governing public hearings.
1602.5 Decision.
1602.6 Effective date of record keeping and reporting rules.

SUBPART B—EMPLOYER INFORATION REPORT

1602.7 Requirement for filing of report.
1602.8 Penalty for making of willfully false statements on report.
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SUBPART C—RECORDKEEPING BY EMPLOYERS

1602.12 Records to be made or kept.
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1602.15 Requirement for filing and preserving copy of report.

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1602.20 Records to be made or kept.
1602.21 Preservation of records made or kept.

SUBPART F—LOCAL UNION EQUAL EMPLOYMENT OPPORTUNITY REPORT

1602.22 Requirements for filing and preserving copy of report.
1602.23 Penalty for making of willfully false statements on reports.

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1602.24 Commission's remedy for failure to file report.
1602.25 Exemption from reporting requirements.
1602.26 Additional reporting requirements.

SUBPART G—RECORDKEEPING BY LABOR ORGANIZATIONS

1602.27 Records to be made or kept.
1602.28 Preservation of records made or kept.
1602.10 Employer's exemption from reporting requirements.
1602.11 Additional reporting requirements.

SUBPART H—RECORDS AND INQUIRIES AS TO RACE, COLOR, NATIONAL ORIGIN, OR SEX

1602.29 Applicability of State or local law.

SUBPART I—STATE AND LOCAL GOVERNMENTS RECORDKEEPING

1602.30 Records to be made or kept.
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individual schools' failure to file report.
1602.44 School systems', districts', or individual schools' exemption from reporting requirements.
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SUBPART J—STATE AND LOCAL GOVERNMENT INFORMATION REPORT

1602.32 Requirement for filing and preserving copy of report.
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1602.34 Commission's remedy for political jurisdiction's failure to file report.
1602.35 Political jurisdiction's exemption from reporting requirements.
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SUBPART K—RECORDS AND INQUIRIES AS TO RACE, COLOR, NATIONAL ORIGIN OR SEX

Sec.
1602.38 Applicability of state or local law.

SUBPART L—ELEMENTARY AND SECONDARY SCHOOL SYSTEMS, DISTRICTS, AND INDIVIDUAL SCHOOLS RECORDKEEPING

1602.39 Records to be made or kept.
1602.40 Preservation of records made or kept.

SUBPART M—ELEMENTARY-SECONDARY STAFF INFORMATION REPORT

Sec.
1602.41 Requirement for filing and preserving copy of report.
1602.42 Penalty for making of willfully false statements on report.
1602.43 Commission's remedy for school systems', districts', or

SUBPART N—RECORDS AND INQUIRIES AS TO RACE, COLOR, NATIONAL ORIGIN, OR SEX

1602.46 Applicability of State or local law.

Authority: The provisions of this Part 1602 issued under sections 709, 713, 78 Stat. 263, 265; 42 U.S.C. 2000e-8, 2000e-12, unless otherwise noted.

§ 1602.1 GENERAL

(a) Section 709 of Title VII requires the Commission to establish regulations pursuant to which employers, labor organizations, joint labor-management committees, and employment agencies subject to said Title shall make and preserve certain records and shall furnish specified information to aid in the administration and enforcement of the Title.

(b) This Part 1602 sets forth the procedure to be used by the Commission in establishing, amending and revoking such regulations, and by future amendments will set forth regulations so established.

[30 F.R. 8409, July 1, 1965]

§ 1602.2 INITIATING A PROCEEDING

Source: The provisions of this Subpart A appear at 30 F.R. 8409, July 1, 1965; F.R. 2832, Feb. 17, 1966, unless otherwise noted.

The Commission, on its own motion, or upon the petition of an interested person submitted as provided in § 1601.32 of this chapter, may initiate a proceeding to make, amend, or revoke regulations requiring persons subject to Title VII to make or keep records or to provide information in accordance with section 709.

§ 1602.3 NOTICE OF A PROCEEDING

(a) Notice of the institution of a proceeding shall be published in the FEDERAL REGISTER. Such notice shall (1) refer to section 709 as authority for the proposed regulations and direct attention to this Part 1602 governing the procedure; (2) contain the terms or substance of the proposed regulations; and (3) invite interested persons (i) to participate in a public hearing to be held with respect to the proposed regulations, specifying the time and place that such hearing shall commence and information that must be submitted earlier by persons desiring to participate, and (ii) to submit pertinent written data, view, and argument by means other than participation in a hearing, specifying the time and place for such submission.

(b) The Commission may also give additional notice of the initiation of a proceeding as it may deem necessary or appropriate.

§ 1602.4 PROCEDURE GOVERNING PUBLIC HEARINGS

A hearing under § 1602.3 shall be conducted by a member of the Commission or its designed representative who shall have authority to administer oaths and affirmations. Such hearing shall be made available to interested persons upon such terms as the Commission may provide. Matters which the Commission may wish to be made a part of the record shall be presented at the hearing by an attorney designed by the Commission who may call and examine witnesses, and cross-examine witnesses called by other persons. Subject to such limitations as the presiding officer may impose to limit the record to pertinent matters, every interested person shall be afforded the opportunity to offer evidence through witnesses, to cross-examine witnesses called by others, and to present argument. The presiding officer shall dispose of procedural requests, objections and comparable matters. The presiding officer shall also have power to call and examine witnesses, to govern the content of the record, to exclude persons from the hearing room for good cause, and, upon the conclusion of the testimony, to keep the hearing open for a stated reasonable time in order to receive written proposals and supporting reasons.

§ 1602.5 DECISION

After the close of the hearing and the receipt of materials under § 1602.3(a)(3)(ii), the Commission shall carefully consider all matters presented to it and any other matter available, and shall thereafter make a final decision adopting, rejecting, or modifying the proposed regulation. The decision shall be expressed in a document signed by the Chairman of the Commission on behalf of the Commission and shall be published in the Federal Register as an amendment to this Part 1602.

§ 1602.6 EFFECTIVE DATE OF RECORD KEEPING AND REPORTING RULES

Except to the extent that such decision of the Commission relieves a restriction, it shall provide an effective date for the change of not less than 30 days after the date of its publication in the Federal Register unless a shorter time is provided for good cause found and expressed in the document.

SUBPART B—EMPLOYER INFORMATION REPORT

SOURCE: The provisions of this Subpart B appear at 32 F.R. 2833, Feb. 17, 1966, unless otherwise noted.

§ 1602.7 REQUIREMENT FOR FILING OF REPORT

On or before March 31, 1967, and annually thereafter, every employer subject to title VII of the Civil Rights Act of 1964 which meets the 100-employee test set forth in section 701(b) thereof shall file with the Commission or its delegate executed copies of Standard Form 100, as revised (otherwise known as "Employer Information Report EEO–1") in conformity with the directions set forth in the form and accompanying instructions. Notwithstanding the provisions of § 1602.14, every such employer shall retain at all times at each reporting unit, or at company or divisional headquarters, a copy of the most recent report filed for each such unit and shall make the same available if requested by an officer, agent, or employee of the Commission under the authority of section 710 of title VII. Appropriate copies of Standard Form 100 in blank will be supplied to every employer known to the Commission to be subject to the reporting requirements, but it is the responsibility of all such employers to obtain necessary supplies of same prior to the filing date from the Joint Reporting Committee, Federal Depot, 1201 East 10 Street, Jeffersonville, IN 47130.
[37 FR 9219, May 6, 1972]

§ 1602.8 PENALTY FOR MAKING OF WILLFULLY FALSE STATEMENTS ON REPORT

The making of willfully false statements on Report EEO–1 is a violation of the United States Code, Title 18, section 1001, and is punishable by fine or imprisonment as set forth therein.

§ 1602.9 COMMISSION'S REMEDY FOR EMPLOYER'S FAILURE TO FILE REPORT

Any employer failing or refusing to file Report EEO-1 when required to do so may be compelled to file by order of a U.S. District Court, upon application of the Commission.

§ 1602.10 EMPLOYER'S EXEMPTION FROM REPORTING REQUIREMENTS

If an employer is engaged in activities for which the reporting unit criteria described in section 4(c) of the Instructions are not readily adaptable, special reporting procedures may be required. In such case, the employer should so advise by submitting to the Commission or its delegate a specific proposal for an alternative reporting system prior to the date on which the report is due. If it is claimed that the preparation or filing of the report would create undue hardship, the employer may apply to the Commission for an exemption from the requirements set forth in this part.

§1602.11 ADDITIONAL REPORTING REQUIREMENTS

The Commission reserves the right to require reports, other than that designated as the Employer Information Report EEO–1, about the employment practices of individual employers or groups of employers whenever, in its judgment, special or supplemental reports are necessary to accomplish the purposes of Title VII. Any system for the requirement of such reports will be established in accordance with the procedures referred to in section 709(c) of Title VII and as otherwise prescribed by law.

SUBPART C—RECORDKEEPING BY EMPLOYERS

Source: The provisions of this Subpart C appear at 31 F.R. 2833, Feb. 17, 1966, unless otherwise noted.

§ 1602.12 RECORDS TO BE MADE OR KEPT

The Commission has not adopted any requirement, generally applicable to employers, that records be made or kept. It reserves the right to impose recordkeeping requirements upon individual employers or groups of employers subject to its jurisdiction whenever, in its judgment, such records (a) are necessary for the effective operation of the EEO–1 reporting system or of any special or supplemental reporting system as described above; or (b) are further required to accomplish the purposes of Title VII. Such recordkeeping with the procedures referred to in section 709(c), and as otherwise prescribed by law.

§ 1602.13 RECORDS AS TO RACIAL OR ETHNIC IDENTITY OF EMPLOYEES

Employers may acquire the information necessary for completion of Items 5 and 6 of Report EEO–1 either by visual surveys of the work force, or at their option, by the maintenance of post-employment records as to the identity of employees where the same is permitted by State law. In the latter case, however, the Commission recommends the maintenance of a permanent record as to the racial or ethnic identity of an individual for purpose of completing the report form only where the employer keeps such records separately from the employee's basic personnel form or other records available to those responsible for personnel decisions, e.g., as part of an automatic data processing system in the payroll department.

§ 1602.14 PRESERVATION OF RECORDS MADE OR KEPT

(a) Any personnel or employment record made or kept by an employer (including but not necessarily limited to application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be preserved by the employer for a period of 6 months from the date of the making of the record or the personnel action involved, whichever occurs later. In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of 6 months from the date of termination. Where a charge of discrimination has been filed, or an action brought by the Commission or the Attorney General, against an employer under title VII, the respondent employer shall preserve all personnel records relevant to the charge or action until final disposition of the charge or the action. The term "personnel records relevant to the charge," for example, would include personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected. The date of "final disposition of the charge or the action" means the date of expiration of the statutory period within which the aggrieved person may bring an action in a U.S. District Court or, where an action is brought against an employer either by the aggrieved person, the Commission, or by the Attorney General, the date on which such litigation is terminated.

(b) The requirements of this section shall not apply to application forms and other preemployment records of applicants for positions known to applicants to be a temporary or seasonable nature.

NOTE: The reporting and/or recordkeeping requirements contained herein have been approved by the Office of Management and Budget in accordance with the Federal Reports Act of 1942.

[37 FR 9219, May 6, 1972]

SUBPART D—APPRENTICESHIP INFORMATION REPORT

Source: The provisions of this Subpart D appear at 32 FR 10650, July 20, 1967, unless otherwise noted.

§ 1602.15 REQUIREMENTS FOR FILING AND PRESERVING COPY OF REPORT

On or before September 30, 1967, and annually thereafter, certain joint labor-management committees subject to title VII of the Civil Rights Act of 1964 which control apprenticeship programs shall file with the Commission, or its delegate, executed copies of Apprenticeship Information Report EEO-2 in conformity with the directions set forth in the form and accompanying instructions. The committees covered by this regulation are those which (a) have five or more apprentices enrolled in the program at any time during August and September of the reporting year, and (b) represent at least one employer sponsor and at least one labor organization sponsor which are themselves subject to title VII. Every such committee shall retain at all times among the records maintained in the ordinary course of its affairs a copy of the most recent report filed, and shall make the same available if requested by an officer, agent, or employee of the Commission under the authority of section 710 of title VII. It is the responsibility of all such committees to obtain from the Commission or its delegate necessary supplies of the form.

[37 FR 9220, May 5, 1972]

§ 1602.16 PENALTY FOR MAKING WILLFULLY FALSE STATEMENTS ON REPORT

The making of willfully false statements on Report EEO-2 is a violation of the U.S. Code, Title 18, section 1001, and is punishable by fine or imprisonment as set forth therein.

§ 1602.17 COMMISSION'S REMEDY FOR FAILURE TO FILE REPORT

Any person failing or refusing to file Report EEO-2 when required to do so may be compelled to file by order of a U.S. District Court, upon application of the Commission, under authority of section 709(c) of title VII.

[37 FR 9220, May 6, 1972]

§ 1602.18 EXEMPTION FROM REPORTING REQUIREMENTS

If it is claimed that the preparation or filing of Report EEO-2 would create undue hardship, the committee may apply to the Commission for an exemption from the requirements set forth in this part.

§ 1602.19 ADDITIONAL REPORTING REQUIREMENTS

The Commission reserves the right to require report, other than that designated as Report EEO-2, about apprenticeship procedures of joint labor-management committees, employers, and labor organizations whenever, in its judgment, special or supplemental reports are necessary to accomplish the purpose of Title VII. Any system for the requirement of such reports will be established in accordance with the procedures referred to in section 709(c) of Title VII and as otherwise prescribed by law.

SUBPART E—APPRENTICESHIP RECORDKEEPING

Source: The provisions of this Subpart E appear at 32 FR 10660, July 20, 1967, unless otherwise noted.

§ 1602.20 RECORDS TO BE MADE OR KEPT

(a) Every person required to file Report EEO–2 shall make or keep such records as are necessary for its completion under the conditions and circumstances set forth in the instructions accompanying the report, which are specifically incorporated herein by reference and have the same force and effect as other sections of this part.

(b) Every employer, labor organization, and joint labor-management committee subject to Title VII which controls an apprenticeship program (regardless of any joint or individual obligation to file a report) shall, beginning August 1, 1967, maintain a list in chronological order containing the names and addresses of all persons who have applied to participate in the apprenticeship program, including the dates on which such applications where received. (See section 709(c), Title VII, Civil Rights Act of 1964). Such list shall contain a notation of the sex of the applicant and of the applicant's identification as "Negro," "Spanish Surnamed American," "Oriental," "American Indian," or "Other." The methods of making such identification are set forth in the instructions accompanying Report EEO–2, section 7. The words "applied," "applicant" and "application" as used in this section refer to situations involving actual applications only. An applicant is considered to be a person who files a formal application, or in some informal way indicates a specific intention to be considered for admission to the apprenticeship program. A person who casually appears to make an informal inquiry about the program, or about apprenticeship in general, is not considered to be an applicant. The term "apprenticeship program" as used herein refers to programs described in section 8 of the instructions accompanying Report EEO–2.

(c) In lieu of maintaining the chronological list referred to in § 1602.20(b), persons required to compile the list may maintain on file written applications for participation in the apprenticeship program, provided that the application form contains a notation of the date the form was received, the address of the applicant, and a notation of the sex, and the race, color, or national origin of the applicant as described above.

[32 FR 10650, July 20, 1967 as amended by 33 FR 282, Jan. 9, 1968]

§ 1602.21 PRESERVATION OF RECORDS MADE OR KEPT

(a) Notwithstanding the provisions of section 1602.14, every person subject to § 1602.20 (b) or (c) shall preserve the list of applicants or application forms, as the case may be, for a period of 2 years from the date the application was received, except that in those instances where an annual report is required by the Commission calling for statistics as to the sex, and the race, color, or national origin of apprentices, the person required to file the report shall preserve the list and forms for a period of 2 years or the period of a successful applicant's apprenticeship, whichever is longer. Persons required to file Report EEO–2, or other reports calling for information about the operation of an apprenticeship program similar to that required on Report EEO–2, shall preserve any other record made solely for the purpose of completing such reports for a period of 1 year from the due date thereof.

(b) Other records: Except to the extent inconsistent with the law or regulation of any State or local fair employment practices agency, or of any other Federal or State agency involved in the enforcement of an antidiscrimination program in apprenticeship, other records relating to apprenticeship made or kept by a person required to file Report EEO–2, including but not necessarily limited to test papers completed by applicants for apprenticeship and records of interviews with applicants, shall be kept for a period of 2 years from the date of the making of the record. Where a charge of discrimination has been filed, or an action brought by the Attorney General under Title VII, the respondent shall preserve all records relevant to the charge or action until final disposition of the charge or the action. The term "records relevant to the charge," for example, would include applications, forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the charging party applied and was rejected. The date of "final disposition of the charge or the action" means the date of expiration of the statutory period within which a charging party may bring an action in a U.S. District Court or, where an action is brought either by a charging party or by the Attorney General, the date on which such litigation is terminated.

SUBPART F—LOCAL UNION EQUAL EMPLOYMENT OPPORTUNITY REPORT

Source: The provisions of this Subpart F appear at 32 F.R. 10651, July 20, 1967, unless otherwise noted.

§ 1602.22 REQUIREMENTS FOR FILING AND PRESERVING COPY OF REPORT

On or before November 30, 1967, and annually thereafter, every labor organization subject to title VII of the Civil Rights Act of 1964 shall file with the Commission or its delegate an executed copy of Local Union Equal Employment Opportunity Report EEO–3 in conformity with the directions set forth in the form and accompanying instructions, provided that the labor organization has 100 or more members at any time during the 12 months preceding the due date of the report and is a "local union" (as that term is commonly understood) or an independent or unaffiliated union. Labor organizations required to report are those which perform, in a specific jurisdiction, the functions ordinarily performed by a local union, whether or not they are so designated. Every local union or a labor organization acting in its behalf, shall retain at all times among the records maintained in the ordinary course of its affairs a copy of the most recent report filed, and shall make the same available if requested by an officer, agent, or employee of the Commission under the authority of section 710 of title VII. It is the responsibility of all persons required to file to obtain from the Commission or its delegate necessary supplies of the form.
[37 FR 9220, May 6, 1972]

§ 1602.23 PENALTY FOR MAKING OF WILLFULLY FALSE STATEMENTS ON REPORTS

The making of willfully false statements on Report EEO–3 is a violation of the United States Code, Title 18, section 1001, and is punishable by fine or imprisonment as set forth herein.

§ 1602.24 COMMISSION'S REMEDY FOR FAILURE TO FILE REPORT

Any person failing or refusing to file Report EEO–3 when required to do so may be compelled to file by order of a U.S. District Court, upon application of the Commission, under authority of section 709(c) of title VII.
[37 FR 9220, May 6, 1972]

§ 1602.26 ADDITIONAL REPORTING REQUIREMENTS

If it is claimed that the preparation or filing of Report EEO–3 would create undue hardship, the labor organization may apply to the Commission for an exemption from the requirements set forth in this part.

§ 1602.26 ADDITIONAL REPORTING REQUIREMENTS

The Commission reserves the right to require reports, other than that designated as Report EEO–3, about the membership or referral practices or other procedures of labor organizations, whenever, in its judgment, special or supplemental reports are necessary to accomplish the purposes of Title VII. Any system for requirement of such reports will be established in accordance with the procedures referred to in section 709(c), and as otherwise prescribed by law.

SUBPART G—RECORDKEEPING BY LABOR ORGANIZATIONS

Source: The provisions of this Subpart G appear at 32 F.R. 10651, July 20, 1967, unless otherwise noted.

§ 1602.27 RECORDS TO BE MADE OR KEPT

Those portions of Report EEO–3 calling for information about union policies and practices and for the compilation of statistics on the race, color, national origin, and sex of members, persons referred, and apprentices, are deemed to be "records" within the meaning of section 709(c), Title VII, Civil Rights Act of 1964. Every local, independent, or unaffiliated union with 100 or more members (or any agent acting in its behalf, if the agent has responsibility for referral of persons for employment) shall make these records or such other records as are necessary for the completion of Report EEO-3 under the circumstances and conditions set forth in the instructions accompanying it, which are specifically incorporated herein by reference and have the same force and effect as other sections of this part.

§ 1602.28 PRESERVATION OF RECORDS MADE OR KEPT

(a) All records made by a labor organization or its agent solely for the purpose of completing Report EEO-3 shall be preserved for a period of 1 year from the due date of the report for which they were compiled. Any labor organization identified as a "referral union" in the instructions accompanying Report EEO-3, or agent thereto, shall preserve other membership or referral records (including applications for same) made or kept by it for a period of 6 months from the date of the making of the record. Where a charge of discrimination has been filed, or an action brought by the Commission or the Attorney General, against a labor organization under title VII, the respondent labor organization shall preserve all records relevant to the charge or action until final disposition of the charge or the action. The date of "final disposition of the charge or the action" means the date of expiration of the statutory period within which the aggrieved person may bring an action in a U.S. District Court or, where an action is brought against a labor organization either by the Commission, the aggrieved person, or by the Attorney General, the date on which such litigation is terminated.

(b) Nothing herein shall relieve any labor organization covered by title VII of the obligations set forth in Subpart E, §§ 1602.20 and 1602.21, relating to the establishment and maintenance of a list of applicants wishing to participate in an apprenticeship program controlled by it.

[37 FR 9220, May 6, 1972]

Subpart H—Records and Inquiries as to Race, Color, National Origin, or Sex

§ 1602.29 APPLICABILITY OF STATE OR LOCAL LAW

The requirements imposed by the Equal Employment Opportunity Commission in these regulations, Subparts D through G, supersede any provisions of State or local law which may conflict with them. Any State or local laws prohibiting inquiries and recordkeeping with respect to race, color, national origin, or sex do not apply to inquiries required to be made under these regulations and under the instructions accompanying Reports EEO-2 and EEO-3.

[32 FR 10652, July 20, 1967]

Subpart I—State and Local Governments Recordkeeping

§ 1602.30 RECORDS TO BE MADE OR KEPT

On or before September 30, 1974, and annually thereafter, every political jurisdiction with 15 or more employees is required to make or keep records and the information therefrom which are or would be necessary for the completion of report EEO-4 under the circumstances set forth in the instructions thereto, whether or not the political jurisdiction is required to file such report under § 1602.32 of the regulations in this part. The instructions are specifically incorporated herein by reference and have the same force and effect as other sections of this part.[1] Such records and the information therefrom shall be retained at all times for a period of 3 years at the central office of the political jurisdiction and shall be made available if requested by an officer, agent, or employee of the Commission under section 710 of title VII, as amended. Although agency data are aggregated by functions for purposes of reporting, separate data for each agency must be maintained either by the agency itself or by the office of the political jurisdiction responsible for preparing the EEO-4 form. It is the responsibility of every political jurisdiction to obtain from the Commission or its delegate necessary instructions in order to comply with the requirements of this section.

[38 FR 12604, May 14, 1973]

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[1] NOTE: Instructions were published as an appendix to the proposed regulations on Mar. 2, 1973 (38 FR 5662).

§ 1602.31 PRESERVATION OF RECORDS MADE OR KEPT

(a) Any personnel or employment record made or kept by a political jurisdiction (including but not necessarily limited to application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be preserved by the political jurisdiction for a period of 2 years from the date of the making of the record or the personnel action involved, whichever occurs later. In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of 2 years from the date of termination. Where a charge of discrimination has been filed, or an action brought by the Attorney General against a political jurisdiction under title VII, the respondent political jurisdiction shall preserve all personnel records relevant to the charge or action until final disposition of the charge or the action. The term "personnel record relevant to the charge," for example, would include personnel or employment records relating to the person claiming to be aggrieved and to all other employees holding positions similar to that held or sought by the person claiming to be aggrieved; and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the person claiming to be aggrieved applied and was rejected. The date of final disposition of the charge or the action means the date of expiration of the statutory period within which a person claiming to be aggrieved may bring an action in a U.S. district court or, where an action is brought against a political jurisdiction either by a person claiming to be aggrieved or by the Attorney General, the date on which such litigation is terminated.

(b) The requirements of this section shall not apply to application forms and other preemployment records of applicants for positions known to applicants to be of a temporary or seasonal nature.

NOTE.—The reporting and/or recordkeeping requirements contained herein have been approved by the Office of Management and Budget in accordance with the Federal Reports Act of 1942.

[38 FR 12605, May 14, 1973]

SUBPART J—STATE AND LOCAL GOVERNMENT INFORMATION REPORT

SOURCE: 38 FR 12605, May 14, 1973, unless otherwise noted.

§ 1602.32 REQUIREMENT FOR FILING AND PRESERVING COPY OF REPORT

(a) On or before September 30, 1974 and annually thereafter, certain political jurisdictions subject to title VII of the Civil Rights Act of 1964, as amended, shall file with the Commission or its delegate executed copies of "State and Local Government Information Report EEO-4" in conformity with the directions set forth in the form and accompanying instructions. The political jurisdictions covered by this regulation are (1) those which have 100 or more employees, and (2) those other political jurisdictions which have 15 or more employees from whom the Commission requests the filing of reports. Every such political jurisdiction shall retain at all times a copy of the most recently filed EEO-4 at the central office of the political jurisdiction for a period of 3 years and shall make the same available if requested by an officer, agent, or employee of the Commission under the authority of section 710 of title VII, as amended.

(b) For calendar year 1973, the requirements of paragraph (a) of this section shall be carried out on or before October 31, 1973.

§ 1602.33 PENALTY FOR MAKING OF WILLFULLY FALSE STATEMENTS ON REPORT

The making of willfully false statements on report EEO—4, is a violation of the United States Code, title 18, section 1001, and is punishable by fine or imprisonment as set forth therein.

§ 1602.34 COMMISSION'S REMEDY FOR POLITICAL JURISDICTION'S FAILURE TO FILE REPORT

Any political jurisdiction failing or refusing to file report EEO—4 when required to do so may be compelled to file by order of a U.S. district court, upon application of the Attorney General.

§ 1602.35 POLITICAL JURISDICTION'S EXEMPTION FROM REPORTING REQUIREMENTS

If it is claimed that the preparation or filing of the report would create undue hardship, the political jurisdiction may apply to the Commission for an exemption from the requirements set forth in this part by submitting to the Commission or its delegate a specific proposal for an alternative reporting system prior to the date on which the report is due.

§ 1602.36 SCHOOLS EXEMPTION

The recordkeeping and report-filing requirements of Subparts I and J of this part shall not apply to State or local educational institutions or to school districts or school systems or any other educational functions. The previous sentence of this section shall not act to bar jurisdiction which otherwise would attach under § 1602.30.

§ 1602.37 ADDITIONAL REPORTING REQUIREMENTS

The Commission reserves the right to require reports, other than that designated as the "State and Local Government Information Report EEO—4," about the employment practices of individual political jurisdictions or group of political jurisdictions whenever, in its judgment, special or supplemental reports are necessary to accomplish the purposes of title VII. Any system for the requirement of such reports will be established in accordance with the procedures referred to in section 709(c) of title VII and as otherwise prescribed by law.

SUBPART K—RECORDS AND INQUIRIES AS TO RACE, COLOR, NATIONAL ORIGIN, OR SEX

§ 1602.38 APPLICABILITY OF STATE OR LOCAL LAW

The requirements imposed by the Equal Employment Opportunity Commission in these regulations, subparts I and J, supersede any provisions of State or local law which may conflict with them.

[38 FR 12605, May 14, 1973]

SUBPART L—ELEMENTARY AND SECONDARY SCHOOL SYSTEMS, DISTRICTS, AND INDIVIDUAL SCHOOLS RECORDKEEPING

SOURCE: 38 FR 26719, Sept. 25, 1973, unless otherwise noted.

§ 1602.39 RECORDS TO BE MADE OR KEPT

On or before November 30, 1974, and annually thereafter, every public elementary and secondary school system or district, including every individually or separately administered district within a system, with 15 or more employees and every individual school within such system or district, regardless of the size of the school shall make or keep all records and information therefrom which are or would be necessary for the completion of report EEO—5 whether or not it is required to file such a report under § 1602.41. The instructions for completion of report EEO—5 are specifically incorporated herein by reference and have the same force and effect as other sections of this part.[1] Such records and the information therefrom shall be retained at all times for a period of 3 years at the central office of the elementary or secondary school system or district, or at the individual school which is the subject of the records and the information therefrom, where more convenient, and shall be made available if requested by an officer, agent, or employee of the Commission under sec. 710 of Title VII, as amended. It is the responsibility of every such school system or district, to obtain from the Commission or its delegate necessary instructions in order to comply with the requirements of this section.

§ 1602.40 PRESERVATION OF RECORDS MADE OR KEPT

(a) Any personnel or employment record made or kept by a school system, district, or individual school (including but not necessarily limited to application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, layoff, or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be preserved by such school system, district, or school, as the case may be, for a period of 2 years from the date of the making of the record or the personnel action involved, whichever occurs later. In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of 2 years from the date of termination. Where a charge of discrimination has been filed, or an action brought against an elementary or secondary school by the Commission or the Attorney General, the respondent elementary or secondary school system, district, or individual school shall preserve similarly at the central office of the system or district or individual school which is the subject of the charge or action, where more convenient, all personnel records relevant to the charge or action until final disposition thereof. The term "personnel record relevant to the charge," for example, would include personnel or employment records relating to the person claiming to be aggrieved and to all other employees holding positions similar to that held or sought by the person claiming to be aggrieved; and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the person claiming to be aggrieved applied and was rejected. The date of "final disposition of the charge or the action" means the date of expiration of the statutory period within which a person claiming to be aggrieved may bring an action in a U.S. district court or, where an action is brought against a school system, district, or school either by a person claiming to be aggrieved, the Commission, or the Attorney General, the date on which such litigation is terminated.

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[1] NOTE: Instructions were published as an appendix to the proposed regulations on June 12, 1973 (38 FR 15463).

(b) The requirements of this section shall not apply to application forms and other preemployment records of applicants for positions known to applicants to be a exemplary or seasonal nature.

Notes: The reporting and/or recordkeeping requirements contained herein have been approved by the Office of Management and Budget in accordance with the Federal Reports Act of 1942.

SUBPART M—ELEMENTARY-SECONDARY STAFF INFORMATION REPORT

Source: 38 FR 26719, Sept. 25, 1973, unless otherwise noted.

§ 1602.41 REQUIREMENT FOR FILING AND PRESERVING COPY OF REPORT

(a) On or before November 30, 1974, and annually thereafter, certain public elementary and secondary school systems and districts, including individually or separately administered districts within such systems, and individual schools within such systems or districts shall file with the Commission or its delegate executed copies of Eelementary-Secondary Staff Information Report EEO–5 in conformity with the directions set forth in the form and accompanying instructions. The elementary and secondary school systems and districts covered are: (1) Every one of those which have 100 or more employees, and (2) every one of those others which have 15 or more employees from whom the Commission requests the filing of reports. Every such elementary or secondary school system or district shall retain at all times, for a period of 3 years, a copy of the most recently filed report EEO–5 at the central office of the school system or district, or the individual school which is the subject of the report, where more convenient, and shall make the same available if requested by an officer, agent, or employee of the Commission under the authority of sec. 710 of Title VII, as amended. It is the responsibility of the school systems or districts above described in this section to obtain from the Commission or its delegate necessary supplies of the form.

(b) For calendar year 1973, the requirements of paragraph (a) of this section shall be carried out on or before January 15, 1974.

[38 FR 26719, Sept. 25, 1973, as amended at 38 FR 32576, Nov. 27, 1973]

§ 1602.42 PENALTY FOR MAKING OF WILLFULLY FALSE STATEMENTS ON REPORT

The making of willfully false statements on report EEO–5 is a violation of the United States Code, Title 18, section 1001, and is punishable by fine or imprisonment as set forth therein.

§ 1602.43 COMMISSION'S REMEDY FOR SCHOOL SYSTEMS', DISTRICTS, OR INDIVIDUAL SCHOOL'S FAILURE TO FILE REPORT

Any school system, district, or individual school failing or refusing to file report EEO–5 when required to do so may be compelled to file by order of a U.S. district court, upon application of the Commission or the Attorney General.

§ 1602.44 SCHOOL SYSTEMS', DISTRICTS', OR INDIVIDUAL SCHOOLS' EXEMPTION FROM REPORTING REQUIREMENTS

If it is claimed that the preparation or filing of the report would create undue hardship, the school system, district, or individual school may apply to the Commission for an exemption from the requirements set forth in this part by submitting to the Commission or its delegate a specific proposal for an alternative reporting system prior to the date on which the report is due.

§ 1602.45 ADDITIONAL REPORTING REQUIREMENTS

The Commission reserves the right to require reports, other than that designated as the Elementary-Secondary Information Report EEO-5, about the employment practices of private or public individual school systems, districts, or schools, or groups thereof, whenever, in its judgment, special or supplemental reports are necessary to accomplish the purposes of Title VII. Any system for the requirement of such reports will be established in accordance with the procedures referred to in section 709(c) of Title VII and as otherwise prescribed by law.

SUBPART N—RECORDS AND INQUIRIES AS TO RACE, COLOR, NATIONAL ORIGIN, OR SEX

§ 1602.46 APPLICABILITY OF STATES OR LOCAL LAW

The requirements imposed by the Equal Employment Opportunity Commission in these regulations, Subparts L and M of this part, supersede any provisions of State or local law which may conflict with them.

(Sec. 709(c), 78 Stat. 265, 42 U.S.C. 2000e–8(c), 29 CFR 1602.3.) [38 FR 26720, Sept. 25, 1973]

PART 1604—GUIDELINES ON DISCRIMINATION BECAUSE OF SEX

Sec.

1604.1 General principles.
1604.2 Sex as a bona fide occupational qualification.
1604.3 Separate lines of progression and seniority systems.
1604.4 Discrimination against married women.
1604.5 Job opportunities advertising.
1604.6 Employment agencies.
1604.7 Pre-employment inquiries as to sex.
1604.8 Relationship of Title VII to the Equal Pay Act.
1604.9 Fringe benefits.
1604.10 Employment policies relating to pregnancy and childbirth.

Authority: The provisions of this Part 1604 issued under sec. 713(b), 78 Stat. 265, 42 U.S.C. sec. 2000e–12.

Source: 37 FR 6836, April 5, 1972, unless otherwise noted.

§ 1604.1 GENERAL PRINCIPLES

(a) References to "employer" or "employers" in this Part 1604 state principles that are applicable not only to employers but also to labor organizations and to employment agencies insofar as their action or inaction may adversely affect employment opportunities.

(b) To the extent that the views expressed in prior Commission pronouncements are inconsistent with the views expressed herein, such prior views are hereby overruled.

(c) The Commission will continue to consider particular problems relating to sex discrimination on a case-by-case basis.

§ 1604.2 SEX AS A BONA FIDE OCCUPATIONAL QUALIFICATION

(a) The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels—"Men's jobs" and "Women's jobs"—tend to deny employment opportunities unnecessarily to one sex or the other.

(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

(i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

(iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.

(2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

(b) Effect of sex-oriented State employment legislation.

(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, for more than a specified number of hours per day or per week, and for certain periods of time before and after childbirth. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and, therefore, discriminate on the basis of sex. The Commission has concluded that such laws and regulations conflict with and are superseded by title VII of the Civil Rights Act of 1964. Accordingly, such laws will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

(2) The Commission has concluded that State laws and regulations which discriminate on the basis of sex with regard to the employment of minors are in conflict with and are superseded by title VII to the extent that such laws are more restrictive for one sex. Accordingly, restrictions on the employment of minors of one sex over and above those imposed on minors of the other sex will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

(3) A number of States require that minimum wage and premium pay for overtime be provided for female employees. An employer will be deemed to have engaged in an unlawful employment practice if:

(i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the payment of minimum wages or overtime pay required by State law; or

(ii) It does not provide the same benefits for male employees.

(4) As to other kinds of sex-oriented State employment laws, such as those requiring special rest and meal periods or physical facilities for women, provision of these benefits to one sex only will be a violation of title VII. An employer will be deemed to have engaged in an unlawful employment practice if:

(i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the provision of such benefits; or

(ii) It does not provide the same benefits for male employees. If the employer can prove that business necessity precludes providing these benefits to both men and women, then the State law is in conflict with and superseded by title VII as to this employer. In this situation, the employer shall not provide such benefits to members of either sex.

(5) Some States require that separate restrooms be provided for employees of each sex. An employer will be deemed to have engaged in an unlawful employment practice if it refuses to hire or otherwise adversely affects the employment opportunities of applicants or employees in order to avoid the provision of such restrooms for persons of that sex.

§ 1604.3 SEPARATE LINES OF PROGRESSION AND SENIORITY SYSTEMS

(a) It is an unlawful employment practice to classify a job as "male" or "female" or to maintain separate lines of progression or separate seniority lists based on sex where this would adversely affect any employee unless sex is a bona fide occupational qualification for that job. Accordingly, employment practices are unlawful which arbitrarily classify jobs so that:

(1) A female is prohibited from applying for a job labeled "male," or for a job in a "male" line of progression; and vice versa.

(2) A male scheduled for layoff is prohibited from displacing a less senior female on a "female" seniority list; and vice versa.

(b) A Seniority system or line of progression which distinguishes between "light" and "heavy" jobs constitutes an unlawful employment practice if it operates as a disguised form of classification by sex, or creates unreasonable obstacles to the advancement by members of either sex into jobs which members of that sex would reasonably be expected to perform.

§ 1604.4 DISCRIMINATION AGAINST MARRIED WOMEN

(a) The Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.

(b) It may be that under certain circumstances, such a rule could be justified within the meaning of section 703(e)(1) of title VII. We express no opinion on this question at this time except to point out that sex as a bona fide occupational qualification must be justified in terms of the peculiar requirements of the particular job and not on the basis of a general principle such as the desirability of spreading work.

§ 1604.5 JOB OPPORTUNITIES ADVERTISING

It is a violation of title VII for a help-wanted advertisement to indicate a preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job involved. The placement of an advertisement in columns classified by publishers on the basis of sex, such as columns headed "Male" or "Female" will be considered an expression of a preference, limitation, specification, or discrimination based on sex.

§ 1604.6 EMPLOYMENT AGENCIES

(a) Section 703(b) of the Civil Rights Act specifically states that it shall be unlawful for an employment agency to discriminate against any individual because of sex. The Commission has determined that private employment agencies which deal exclusively with one sex are engaged in an unlawful employment practice, except to the extent that such agencies limit their services to furnishing employees for particular jobs for which sex is a bona fide occupational qualification.

(b) An employment agency that receives a job order containing an unlawful sex specification will share responsibility with the employer placing the job order if the agency fills the order knowing that the sex specification is not based upon a bona fide occupational qualification. However, an employment agency will not be deemed to be in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupations qualification is without substance and the agency makes and maintains a written record available to the Commission of each such job order. Such record shall include the name of the employer, the description of the job and the basis for the employer's claim of bona fide occupational qualification.

(c) It is the responsibility of employment agencies to keep informed of opinions and decisions of the Commission on sex discrimination.

§ 1604.7 PRE-EMPLOYMENT INQUIRIES AS TO SEX

A pre-employment inquiry may ask "Male ____________, Female ____________"; or "Mr. Mrs. Miss," provided that the inquiry is made in good faith for a nondiscriminatory purpose. Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination as to sex shall be unlawful unless based upon a bona fide occupational qualification.

§ 1604.8 RELATIONSHIP OF TITLE VII TO THE EQUAL PAY ACT

(a) The employee coverage of the prohibitions against discrimination based on sex contained in title VII is coextensive with that of the other prohibitions contained in title VII and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) By virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under title VIII.

(c) Where such a defense is raised the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, but will not be bound thereby.

§ 1604.9 FRINGE BENEFITS

(a) "Fringe benefits," as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

(c) Where an employer conditions benefits available to employees and their spouses and families on whether the employees is the "head of the household" or "principal wage earner" in the family unit, the benefits tend to be available only to male employes and their families. Due to the fact that such conditioning discriminatorily affects the rights of women employees, and that "head of household" or "principal wage earner" status bears no relationship to job performance, benefits which are so conditioned will be found a prima facie violation of the prohibitions against sex discrimination contained in the Act.

(d) It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

(e) It shall not be a defense under title VIII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.

(f) It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex. A statement of the General Counsel of September 13, 1968, providing for a phasing out of differentials with regard to optional retirement age for certain incumbent employees is hereby withdrawn.

§ 1604.10 EMPLOYMENT POLICIES RELATING TO PREGNANCY AND CHILDBIRTH

(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of title VII.

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

PART 1605—GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION

§ 1605.1 OBSERVATION OF THE SABBATH AND OTHER RELIGIOUS HOLIDAYS

(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people.

(Sec. 713(a), 78 Stat. 265; 42 U.S.C. 2000e-12) [32 F.R. 10298, July 13, 1967]

PART 1606—GUIDELINES ON DISCRIMINATION BECAUSE OF NATIONAL ORIGIN

§ 1606.1 GUIDELINES ON DISCRIMINATION BECAUSE OF NATIONAL ORIGIN

(a) The Commission is aware of the widespread practices of discrimination on the basis of national origin, and intends to apply the full force of law to eliminate such discrimination. The bona fide occupational qualification exception as it pertains to national origin cases shall be strictly construed.

(b) Title VII is intended to eliminate covert as well as the overt practices of discrimination, and the Commission will, therefore, examine with particular concern cases where persons within the jurisdiction of the Commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations. Examples of cases of this character which have come to the attention of the Commission include: The use of tests in the English language where the individual tested came from circumstances where English was not that person's first language or mother tongue, and where English language skill is not a requirement of the work to be performed; denial of equal opportunity to persons married to or associated with persons of a specific national origin; denial of equal opportunity because of membership in lawful organizations identified with or seeking to promote the interests of national groups; denial of equal opportunity because of attendance at schools or churches commonly utilized by persons of a given national origin; denial of equal opportunity because their name or that of their spouse reflects a certain national origin, and denial of equal opportunity to persons who as a class of persons tend to fall outside national norms for height and weight where such height and weight specifications are not necessary for the performance of the work involved.

(c) Title VII of the Civil Rights Act of 1964 protects all individuals, both citizen and noncitizens, domiciled or residing in the United States, against discrimination on the basis of race, color, religion, sex, or national origin.

(d) Where discrimination on the basis of citizenship against a lawfully immigrated alien residing in the United States has the purpose or effect of discriminating against persons of a particular national origin, such person may not be discriminated against on the basis of citizenship, except that it is not an unlawful employment practice for an employer pursuant to section 703(g), to refuse to employ any person who does not fulfill the requirements imposed in the interests of national security pursuant to any statute of the United States or any Executive Order of the President respecting the particular position or the particular premises in question.

(e) In addition, some states have enacted laws prohibiting the employment of noncitizens. Where such laws have the purpose or effect of discriminating on the basis of national origin, they are in conflict with and are, therefore, superseded by Title VII of the Civil Rights Act of 1964, as amended.

(Sec. 713(a), 78 Stat. 265; 42 U.S.C. 2000e–12) [35 FR 421, Jan. 13, 1970; 39 FR 10123, Mar. 18, 1974]

PART 1607—GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

Sec.
1607.1 Statement of purpose.
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1607.10 Employment agencies and employment services.
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1607.12 Retesting.
1607.13 Other selection techniques.
1607.14 Affirmative action.

Authority: The provisions of this Part 1607 issued under sec. 713(a), 78 Stat. 265; 42 U.S.C. 2000e–12.

Source: The provisions of this Part 1607 appear at 35 F.R. 12333, Aug. 1, 1970, unless otherwise noted.

§ 1607.1 STATEMENT OF PURPOSE

(a) The guidelines in this part are based on the belief that property validated and standardized employee selection procedures can significantly contribute to the implementation of nondiscriminatory personnel policies, as required by title VII. It is also recognized that professionally developed tests, when used in conjunction with other tools of personnel assessment and complemented by sound programs of job design, may significantly aid in the development and maintenance of an efficient work force and, indeed, aid in the utilization and conservation of human resources generally.

(b) An examination of charges of discrimination filed with the Commission and an evaluation of the results of the Commission's compliance activities has revealed a decided increase in total test usage and a marked increase in doubtful testing practices which, based on our experience, tend to have discriminatory effects. In many cases, persons have come to rely almost exclusively on tests as the basis for making the decision to hire, transfer, promote, grant membership, train, refer or retain, with the result that candidates are selected or rejected on the basis of a single test score. Where tests are so used, minority candidates frequently experience disproportionately high rates of rejection by failing to attain score levels that have been established as minimum standards for qualification.

It has also become clear that in many instances persons are using tests as the basis for employment decisions without evidence that they are valid predictors of employee job performance. Where evidence in support of presumed relationships between test performance and job behavior is lacking, the possibility of discrimination in the application of test results must be recognized. A test lacking demonstrated validity (i.e., having no known significant relationship to job behavior) and yielding lower scores for classes protected by title VII may result in the reject of many who have necessary qualifications for successful work performance.

(c) The guidelines in this part are designed to serve as a workable set of standards for employers, unions and employment agencies in determining whether their selection procedures conform with the obligations contained in title VII of the Civil Rights Act of 1964. Section 703 of title VII places an affirmative obligation upon employers, labor unions, and employment agencies, as defined in section 701 of the Act, not to discriminate because of race, color, religion, sex, or national origin Subsection (h) of section 703 allows such persons "* * * to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

§ 1607.2 "TEST" DEFINED

For the purpose of the guidelines in this part, the term "test" is defined as any paper-and-pencil or performance measure used as a basis for any employment decision. The guidelines in this part apply, for example, to ability tests which are designed to measure eligibility for hire, transfer, promotion, membership, training, referral or retention. This definition includes, but is not restricted to, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interests; and attitudes, personality or temperament. The term "test" includes all formal, scored, quantified or standardized techniques of assessing job suitability including, in addition to the above, specific qualifying or disqualifying personal history or background requirements, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc.

§ 1607.3 DISCRIMINATION DEFINED

The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility as hereinafter described, and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use.

§ 1607.4 EVIDENCE OF VALIDITY

(a) Each person using tests to select from among candidates for a position or for membership shall have available for inspection evidence that the tests are being used in a manner which does not violate § 1607.3. Such evidence shall be examined for indications of possible discrimination, such as instances of higher rejection rates for minority candidates than nonminority candidates. Furthermore, where technically feasible, a test should be validated for each minority group with which it is used; that is, any differential rejection rates that may exist, based on a test, must be relevant to performance on the jobs in question.

(b) The term "technically feasible" as used in these guidelines means having or obtaining a sufficient number of minority individuals to achieve findings of statistical and practical significance, the opportunity to obtain unbiased job performance criteria, etc. It is the responsibility of the person claiming absence of technical feasibility to positively demonstrate evidence of this absence.

(c) Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.

(1) If job progression structures and seniority provisions are so established that new employees will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level, it may be considered that candidates are being evaluated for jobs at that higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it shall be considered that candidates are being evaluated for a job at or near the entry level. This point is made to underscore the principle that attainment of or performance at a higher level job is a relevant criterion in validating employment tests only when there is a high probability that persons employed will in fact attain that higher level job within a reasonable period of time.

(2) Where a test is to be used in different units of a multiunit organization and no significant differences exist between units, jobs, and applicant populations, evidence obtained in one unit may suffice for the others. Similarly, where the validation process requires the collection of data throughout a multiunit organization, evidence of validity specific to each unit may not be required. There may also be instances where evidence of validity is appropriately obtained from more than one company in the same industry. Both in this instance and in the use of data collected throughout a multi-unit organization, evidence of validity specific to each unit may not be required: *Provided*, That no significant differences exist between units, jobs, and applicant populations.

§ 1607.5 MINIMUM STANDARDS FOR VALIDATION

(a) For the purpose of satisfying the requirements of this part, empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion-related validity, such as those described in "Standards for Educational and Psychological Tests and Manuals" published by American Psychological Association, 1200 17th Street NW., Washington, D.C. 20036. Evidence of content or construct validity, as defined in that publication, may also be appropriate where criterion-related validity is not feasible. However, evidence for content or construct validity should be accompanied by sufficient information from job analyses to demonstrate the relevance of the content (in the case of job knowledge or proficiency tests) or the construct (in the case of trait measures). Evidence of content validity alone may be acceptable for well-developed tests that consist of suitable samples of the essential knowledge, skills or behaviors composing the job in question. The types of knowledge, skills or behaviors contemplated here do not include those which can be acquired in a brief orientation to the job.

(b) Although any appropriate validation strategy may be used to develop such empirical evidence, the following minimum standards, as applicable, must be met in the research approach and in the presentation of results which constitute evidence of validity:

(1) Where a validity study is conducted in which tests are administered to applicants, with criterion data collected later, the sample of subjects must be representative of the normal or typical candidate group for the job or jobs in question. This further assumes that the applicant sample is representative of the minority population available for the job or jobs in question in the local labor market. Where a validity study is conducted in which tests are administered to present employees, the sample must be representative of the minority groups currently included in the applicant population. If it is not technically feasible to include minority employees in validation studies conducted on the present work force, the conduct of a validation study without minority candidates does not relieve any person of his subsequent obligation for validation when inclusion of minority candidates becomes technically feasible.

(2) Tests must be administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of test scores and to insure that scores do not enter into any judgments of employee adequacy that are to be used as criterion measures. Copies of tests and test manuals, including instructions for administration, scoring, and interpretation of test results, that are privately developed and/or are not available through normal commercial channels must be included as a part of the validation evidence.

(3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.

(4) In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be carefully developed, and the ratings should be closely examined for evidence of bias. In addition, minorities might obtain unfairly low performance criterion scores for reasons other than supervisor's prejudice, as when, as new employees, they have had less opportunity to learn job skills. The general point is that all criteria need to be examined to insure freedom from factors which would unfairly depress the scores of minority groups.

(5) Differential validity. Data must be generated and results separately reported for minority and nonminority groups wherever technically feasible. Where a minority group is sufficiently large to constitute an identifiable factor in the local labor market, but validation data have not been developed and presented separately for that group, evidence of satisfactory validity based on other groups will be regarded as only provisional compliance with these guidelines pending separate validation of the test for the minority group in question. (See § 1607.9). A test which is differentially valid may be used in groups for which it is valid but not for those in which it is not valid. In this regard, where a test is valid for two groups but one group characteristically obtains higher test scores than the other without a corresponding difference in job performance, cutoff scores must be set so as to predict the same probability of job success in both groups.

(c) In assessing the utility of a test the following considerations will be applicable:

(1) The relationship between the test and at least one relevant criterion must be statistically significant. This ordinarily means that the relationship should

be sufficiently high as to have a probability of no more than 1 to 20 to have occurred by chance. However, the use of a single test as the sole selection device will be scrutinized closely when that test is valid against only one component of job performance.

(2) In addition to statistical significance, the relationship between the test and criterion should have practical significance. The magnitude of the relationship needed for practical significance or usefulness is affected by several factors, including:

(i) The larger the proportion of applicants who are hired for or placed on the job, the higher the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few job vacancies are available;

(ii) The larger the proportion of applicants who become satisfactory employees when not selected on the basis of the test, the higher the relationship needs to be between the test and a criterion of job success for the test to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few applicants turn out to be satisfactory;

(iii) The smaller the economic and human risks involved in hiring an unqualified applicant relative to the risks entailed in rejecting a qualified applicant, the greater the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when the former risks are relatively high.

§ 1607.6 PRESENTATION OF VALIDITY EVIDENCE

The presentation of the results of a validation study must include graphical and statistical representations of the relationships between the test and the criteria, permitting judgments of the test's utility in making predictions of future work behavior. (See § 1607.5(c) concerning assessing utility of a test.) Average scores for all tests and criteria must be reported for all relevant subgroups, including minority and nonminority groups where differential validation is required. Whenever statistical adjustments are made in validity results for less than perfect reliability or for restriction of score range in the test or the criterion, or both, the supporting evidence from the validation study must be presented in detail. Furthermore, for each test that is to be established or continued as an operational employee selection instrument, as a result of the validation study, the minimum acceptable cutoff (passing) score on the test must be reported. It is expected that each operational cutoff score will be reasonable and consistent with normal expectations of proficiency within the work force or group on which the study was conducted.

§ 1607.7 USE OF OTHER VALIDITY STUDIES

In cases where the validity of a test cannot be determined pursuant to § 1607.4 and § 1607.5 (e.g., the number of subjects is less than that required for a technically adequate validation study, or an appropriate criterion measure cannot be developed), evidence from validity studies conducted in other organizations, such as that reported in test manuals and professional literature, may be considered acceptable when: (a) The studies pertain to jobs which are comparable (i.e., have basically the same task elements), and (b) there are no major differences in contextual variables or sample composition which are likely to significantly affect validity. Any person citing evidence from other validity studies as evidence of test validity for his own jobs must substantiate in detail job comparability and must demonstrate the absence of contextual or sample differences cited in paragraphs (a) and (b) of this section.

§ 1607.8 ASSUMPTION OF VALIDITY

(a) Under no circumstances will the general reputation of a test, its author or its publisher, or casual reports of test utility be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions of validity based on test names or descriptive labels; all forms of promotional literature; data bearing on the frequency of a test's usage; testimonial statements of sellers, users, or consultants; and other nonempirical or anecdotal accounts of testing practices or testing outcomes.

(b) Although professional supervision of testing activities may help greatly to insure technically sound and nondiscriminatory test usage, such involvement alone shall not be regarded as constituting satisfactory evidence of test validity.

§ 1607.9 CONTINUED USE OF TESTS

Under certain conditions, a person may be permitted to continue the use of a test which is not at the moment fully supported by the required evidence of validity. If, for example, determination of criterion-related validity in a specific setting is practicable and required but not yet obtained, the use of the test may continue: *Provided:* (a) The person can cite substantial evidence of validity as described in § 1607.7 (a) and (b); and (b) he has in progress validation procedures which are designed to produce, within a reasonable time the additional data required. It is expected also that the person may have to alter or suspend test cutoff scores so that score ranges broad enough to permit the identification of criterion-related validity will be obtained.

§ 1607.10 EMPLOYMENT AGENCIES AND EMPLOYMENT SERVICES

(a) An employment service, including private employment agencies, State employment agencies, and the U.S. Training and Employment Service, as defined in section 701(c), shall not make applicant or employee appraisals or referrals based on the results obtained from any psychological test or other selection standard not validated in accordance with these guidelines.

(b) An employment agency or service which is requested by an employer or union to devise a testing program is required to follow the standards for test validation as set forth in these guidelines. An employment service is not relieved of its obligation herein because the test user did not request such validation or has requested the use of some lesser standard than is provided in these guidelines.

(c) Where an employment agency or service is requested only to administer a testing program which has been elsewhere devised, the employment agency or service shall request evidence of validation, as described in the guidelines in this part, before it administers the testing program and/or makes referral pursuant to the test results. The employment agency must furnish on request such evidence of validation. An employment agency or service will be expected to refuse to administer a test where the employer or union does not supply satisfactory evidence of validation. Reliance by the test user on the reputation of the test, its author, or the name of the test shall not be deemed sufficient evidence of validity (see § 1607.8(a)). An employment agency or service may administer a testing program where the evidence of validity comports with the standards provided in § 1607.7.

§ 1607.11 DISPARATE TREATMENT

The principle of disparate or unequal treatment must be distinguished from the concepts of test validation. A test or other employee selection standard—even though validated against job performance in accordance with the guidelines in this part—cannot be imposed upon any individual or class protected by title VII where other employees, applicants or members have not been subjected to that standard. Disparate treatment, for example, occurs where members of a minority or sex group have been denied the same employment, promotion, transfer or membership opportunities as have been made available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, no new test or other employee selection standard can be imposed upon a class of individuals protected by title VII who, but for prior discrimination, would have been granted the opportunity to qualify under less stringent selection standards previously in force.

§ 1607.12 RETESTING

Employers, unions, and employment agencies should provide an opportunity for retesting and reconsideration to earlier "failure" candidates who have availed themselves of more training or experience. In particular, if any applicant or employee during the course of an interview or other employment procedure claims more education or experience, that individual should be retested.

§ 1607.13 OTHER SELECTION TECHNIQUES

Selection techniques other than tests, as defined in § 1607.2, may be improperly used so as to have the effect of discriminating against minority groups. Such techniques include, but are not restricted to, unscored or casual interviews and unscored application forms. Where there are data suggesting employment discrimination, the person may be called upon to present evidence concerning the validity of his unscored procedures as well as of any tests which may be used, the evidence of validity being of the same types referred to in §§ 1607.4 and 1607.5. Data suggesting the possibility of discrimination exist, for example, when there are differential rates of applicant rejection from various minority and nonminority or sex groups for the same job or group of jobs or when there are disproportionate representations of minority and nonminority or sex groups among present employees in different types of jobs. If the person is unable or unwilling to perform such validation studies, he has the option of adjusting employment procedures so as to eliminate the conditions suggestive of employment discrimination.

§ 1607.14 AFFIRMATIVE ACTION

Nothing in these guidelines shall be interpreted as diminishing a person's obligation under both title VII and Executive Order 11246 as amended by Executive Order 11375 to undertake affirmative action to ensure that applicants or employees are treated without regard to race, color, religion, sex, or national origin. Specifically, the use of tests which have been validated pursuant to these guidelines does not relieve employers, unions or employment agencies of their obligations to take positive action in affording employment and training to members of classes protected by title VII.

PART 1610—AVAILABILITY OF RECORDS

SUBPART A—PRODUCTION OR DISCLOSURE UNDER 5 U.S.C. 552(A)

Sec.
1610.1 Definitions.
1610.2 Statutory requirements.
1610.4 Purpose and scope.
1610.5 Public reference facilities and current index.
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1610.9 Regional offices.
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1610.13 Records of other Agencies.
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1610.20 Exemptions.
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SUBPART B—PRODUCTION IN RESPONSE TO SUBPENAS OR DEMANDS OF COURTS OR COURTS OR OTHER AUTHORITIES

Sec.
1610.30 Purpose and scope.
1610.32 Production prohibited unless approved by the General Counsel.
Sec.
1610.34 Procedure in the event of a demand for production or disclosure.
1610.36 Procedure in the event of an adverse ruling.

Authority: The provisions of this Part 1610 issued under sec. 713(a), 78 Stat. 265; 42 U.S.C. 2000e–12, 5 U.S.C. 552.

Source: The provisions of this Part 1610 appear at 32 F.R. 16261, Nov. 29, 1967 unless otherwise noted.

SUBPART A—PRODUCTION OR DISCLOSURE UNDER 5 U.S.C. 552(A)

§ 1610.1 DEFINITIONS

As used in this part:

(a) "Act" refers to Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000e et seq.

(b) "Commission" refers to the Equal Employment Opportunity Commission.

§ 1610.2 STATUTORY REQUIREMENTS

5 U.S.C. 552(a)(3) requires each Agency, upon request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, to make such records promptly available to any person. 5 U.S.C. 552(b) exempts specified classes of records from all the public access requirements of 5 U.S.C. 552 and permits them to be withheld.

§ 1610.4 PURPOSE AND SCOPE

(a) This subpart contains the regulations of the Equal Employment Opportunity Commission implementing 5 U.S.C. 552. The regulations of this subpart provide information concerning the procedures by which records may be obtained from all organizational units within the Commission. Official records of the Commission made available pursuant to the requirements of 5 U.S.C. 552 shall be furnished to members of the public only as prescribed by this subpart. Officers and employees of the Commission may continue to furnish to the public informally and without compliance with the procedures prescribed herein, information and records which prior to the enactment of 5 U.S.C. 552 were furnished customarily in the regular performance of their duties. To the extent permitted by other laws, the Commission also will make available records which it is authorized to withhold under 5 U.S.C. 552 whenever it determines that such disclosure is in the public interest.

(b) The Attorney General's memorandum on the Public Information Section of the Administrative Procedure Act, which was published in June 1967 and is available from the Superintendent of Documents, should be consulted in considering questions arising under 5 U.S.C. 552.

§ 1610.5 PUBLIC REFERENCE FACILITIES AND CURRENT INDEX

The Commission will maintain in a public reading area located in the Commission's library at 1800 G Street NW., Washington, D.C. 20506, the materials which are required by 5 U.S.C. 552(a)(2) and 552(a)(4) to be made available for public inspection and copying. The Commission will maintain and make available for public inspection and copying in this public reading area a current index providing identifying information for the public as to any matter which is issued, adopted, or promulgated after July 4, 1967, and which is required to be indexed by 5 U.S.C. 552(a)(2). The Commission in its discretion may, however, include precedential materials issued, adopted, or promulgated prior to July 4, 1967. The Commission will also maintain on file in this public reading area all material published by the Commission in the FEDERAL REGISTER and currently in effect.

§ 1610.7 DELETION OF IDENTIFYING DETAILS

When making available any records pursuant to § 1610.5, the Commission will delete identifying details to the extent required to prevent a clearly unwarranted invasion of personal privacy. To each record from which identifying details shall have been deleted when the record is made available for public inspection and copying, the Commission will attach a written justification for such deletions. A single such justification shall suffice for deletions made in a group of similar or related records. Subject to necessary or appropriate variations in individual instances, the justification will be in substantially the following form:

This record is (These records are) made available for public inspection and copy pursuant to 5 U.S.C. sec. 552(a)(2). As authorized therein, to prevent a clearly unwarranted invasion of personal privacy, identifying details have been deleted.

§ 1610.9 REGIONAL OFFICES

Each office listed below will maintain in a public reading room or area various public materials delaing with the Act and the Commission:

Federal Office Building, Room 7515, 500 Gold Street SW., Albuquerque, N. Mex. 87101. Telephone No.: Area Code 505, 247–0311 Ext. 2061.
1776 Peachtree Street NW., Room 417, Atlanta, Ga. 30309. Telephone No.: Area Code 404, 526–5941.
300 East Eighth Street, Room G 115, Austin, Tex. 78701. Telephone No.: Area Code 512, 476–6411 Ext. 6845.
U.S. Courthouse and Federal Building, Room 1832, 219 South Dearborn Street, Chicago, Ill. 60604. Telephone No.: Area Code, 353–7550.
Engineers' Building, Room 402, 1365 Ontario Street, Cleveland, Ohio 44113. Telephone No.: Area Code, 522–4784.
911 Walnut Street, Room 305, Kansas City, Mo. 64106. Telephone No.: Area Code 816 374–5773.

Federal Office Building, Room 7730, 300 North Los Angeles Street, Los Angeles, Calif. 90012. Telephone No.: Area Code 213, 688–3400.
Masonic Temple Building, 333 St. Charles Avenue, New Orleans, La. 70130. Telephone No.: Area Code 504, 527–2721.
346 Broadway, Suite 701, New York, N.Y. 10013. Telephone No.: Area Code, 264–3642.
Appraisers' Building, Room 126, 630 Sansome Street, San Francisco, Calif. 94111. Telephone No.: Area Code 415, 556–0260.
1016 16th Street NW., Room 104, Washington, D.C. 20036. Telephone No.: Area Code 202, 382–1914.

§ 1610.11 REQUESTS FOR IDENTIFIABLE RECORDS AND COPIES

(a) A request for inspection or copying of a record of the Commission which is neither published in the FEDERAL REGISTER nor customarily made available and which is not available in the public reading area as described in § 1610.5, may be made in person or by mail to the Office of the General Counsel, 1800 G Street NW., Washington, D.C. 20506. Requests may be presented from 9 a.m. to 5:30 p.m., Mondays through Fridays, with the exception of holidays. Telephone inquiries or requests may be made by calling Washington, D.C., telephone number: Area Code 202, 342–7693. Collect calls will not be accepted.

(b) Charges for processing requests will be made in accordance with the schedule set forth in § 1610.17. Such charges are payable in advance.

(c) Each request shall contain a description of the record requested which is sufficiently specific with respect to names, dates, subject matter, and location, to permit the record to be identified and located. A separate request must be submitted for each record requested.

(d) Except where circumstances require special processing, requests will be processed in the order in which they are received. Efforts will be made to make such records available as promptly as is reasonable under the particular circumstances.

(e) No obligation is undertaken by the Commission to compile or creat information or records not already in existence at the time of the request.

(f) Where a requested record cannot be located from the information submitted or is known to have been destroyed or otherwise disposed of, the person making the request will be appropriately notified.

(g) When a requested record has been identified and is available, the person who made the request will be notified as to where and when the record will be available for inspection. Upon payment of the necessary fees, a copy of an available record may be furnished to the requester in person or by mail.

§ 1610.13 RECORDS OF OTHER AGENCIES

Request for records that originated in another Agency and are in the custody of the Commission, will be referred to that Agency for processing, and the person submitting the request shall be so notified. The decision made by that Agency with respect to such records will be honored by the Commission.

§ 1610.16 USER CHARGES, WAIVER

It is the policy of the Equal Employment Opportunity Commission to cooperate with charging parties, their counsel, and private agencies working to eliminate employment discrimination. To the extent practicable that policy will be applied under this part so as to permit requests for inspection or copies of records and information to be met without cost to the charging party, attorney, or group making the request. Fees will be charged, however, in the case of requests which are determined by the General Counsel to involve a burden on staff or facilities significantly in excess of that normally accepted by the agency in handling routine requests for information. While the fees charged for services and copying will in no event exceed those as specified in § 1610.17, the Commission reserves the right to limit the number of copies that will be provided of any document or to require that special arangements for copying be made in the case of records or requests presenting unusual problems of reproduction or handling.

[36 F.R. 20600, Oct. 27, 1971]

§ 1610.17 SCHEDULE OF FEES AND METHOD OF PAYMENT FOR SERVICES RENDERED

(a) Except as provided for in § 1610.16 the following specific fees shall be applicable with respect to services rendered to members of the public under this subpart:

(1) Searching for records, per hour or fraction thereof	$3.60
(2) Other facilitative services and index assistance minimum charge	3.60
(3) Copies made by Xerox or otherwise (per page)	0.05
(4) Certification of each record as a true copy	.75
(5) Certification of each record as a true copy, under the seal of the agency	1.00
(6) For each signed statement of negative result of search for record	1.00

(b) When no specific fee has been established for a service, e.g., legal or research assistance, or the request for a service does not fall under one of the above categories due to the amount, size, or type thereof, the Director of Administration is authorized to establish an appropriate fee pursuant to the criteria established in Bureau of the Budget Circular No. A-25, entitled "User Charges."

(c) When a request for identifiable records is made by mail, it should be accompanied by remittance of the total fee chargeable, as well as a self-addressed stamped envelope, if special mail services are desired.

(d) Fees must be paid in full prior to issuance of requested copies of records. If uncertainty as to the existence of a record, or as to the number of sheets to be copied or certified precludes remitting the exact fee chargeable with the request, the agency will inform the interested party of the exact amount required.

(e) Payment shall be in the form of a check, bank draft, money order. Remittances shall be made payable to the order of the Equal Employment Opportunity Commission.

(f) A receipt for fees paid will be given only upon request. Refund of fees paid for services actually rendered will not be made.

(g) No charge will be made for services performed at the request of other governmental agencies or officers thereof, acting in their official capacities.

[36 F.R. 20600, Oct. 27, 1971]

§ 1610.20 EXEMPTIONS

(a) 5 U.S.C. 552 exempts from all of its publication and disclosure requirements nine categories of records which are described in subsection (b). These categories include such matters as national defense and foreign policy information, investigatory files, internal procedures and communications, materials exempted from disclosure by other statutes, information given in confidence, and matters involving personal privacy. The scope of the exemptions is discussed in the Attorney General's memorandum referred to in § 1610.4(b).

(b) Section 706(a) of the Act provides that the Commission shall not make public charges which have been filed. It also provides that (subsequent to the filing of a charge, an investigation, and a finding that there is reasonable cause to believe that the charge is true) nothing said or done during and as a part of the Commission's endeavors to eliminate any alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion may be made public by the Commission without the written consent of the parties; nor may it be used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of section 706(a) shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than 1 year.

(c) Section 709 of the Act authorizes the Commission to conduct investigations of charges filed under section 706, engage in cooperative efforts with State and local agencies charged with the administration of State fair employment practices laws, and issue regulations concerning reports and recordkeeping. Subsection (e) of section 709 provides that it shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under section 709 prior to the institution of any proceeding under the Act involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of section 709(e) shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than 1 year. The Commission will, however, make available for inspection and copying some tabulations of aggregate industry, area, and other statistics derived from the Commission's reporting programs authorized by section 709(c) of the Act, where such tabulations have been previously compiled by the Commission and are available in documentary form, to the extent that such tabulations do not consist of aggregate data from less than three respondents, and do not reveal the identity of an individual or the dominant respondent in a particular industry or area in any manner.

§ 1610.23 ADMINISTRATIVE DECISION AND REVIEW

(a) The General Counsel shall grant or deny each request made. The denial of each request shall be in writing and shall contain a simple statement of the reasons for the denial. The decision of the General Counsel shall be final, subject only to review as provided in paragraph (b) of this section.

(b) Review of the decision of the General Counsel may be requested by the person submitting the request within 30 days after the date o fthe notice advising him of the decision. The 30-day limitation may be waived for good cause. The filing of a request for review by the Commission may be accomplished by mailing to the Chairman, Equal Employment Opportunity Commission, 1800 G Street NW., Washington, D.C. 20506, by certified mail, a copy of the written denial issued under paragraph (a) of this section and a statement of the circumstances, reasons or arguments advanced for insistence upon disclosure of the originally requested record. The decision of the Commission upon review shall be in writing and shall contain a simple statement of the reasons for the decision. The decision after review will be promptly communicated to the person requesting review, and will constitute the final action of the Commission.

(c) No personal appearance, oral argument or hearing will ordinarily be permitted in connection with an initial request made to the General Counsel or on review of a denial by him. Upon request and a showing of special circumstances, however, this limitation may be waived and an informal conference or appearance arranged with or before the General Counsel or the Commission, as the case may be, or any employee designated by him or it for this purpose.

[32 F.R. 16261, Nov. 29, 1967, as amended at 32 F.R. 16491, Dec. 1, 1967]

SUBPART B—PRODUCTION IN RESPONSE TO SUBPENAS OR DEMANDS OF COURTS OR OTHER AUTHORITIES

§ 1610.30 PURPOSE AND SCOPE

This subpart contains the regulations of the Commission concerning procedures to be followed when a subpena, order, or other demand (hereinafter in this subpart referred to as a "demand") of a court or other authority is issued for the production or disclosure of (a) any material contained in the files of the Commission; (b) any information relating to material contained in the files of the Commission; or (c) any information or material acquired by any person while such person was an employee of the Commission as a part of the performance of his official duties or because of his official status.

§ 1610.32 PRODUCTION PROHIBITED UNLESS APPROVED BY THE GENERAL COUNSEL

No employee or former employee of the Commission shall, in response to a demand of a court or other authority, produce any material contained in the files of the Commission or disclose any information or produce any material acquired as part of the performance of his official duties or because of his official status without the prior approval of the General Counsel.

§ 1610.34 PROCEDURE IN THE EVENT OF A DEMAND FOR PRODUCTION OR DISCLOSURE

(a) Whenever a demand is made upon an employee or former employee of the Commission for the production of material or the disclosure of information described in § 1610.30, he shall immediately notify the General Counsel. If possible, the General Counsel shall be notified before the employee or former employee concerned replies to or appears before the court or other authority.

(b) If response to the demand is required before instructions from the General Counsel are received, an attorney designated for that purpose by the Commission shall appear with the employee or former employee upon whom the demand has been made, and shall furnish the court or other authority with a copy of the regulations contained in this part and inform the court or other authority that the demand has been or is being, as the case may be, referred for prompt consideration by the General Counsel. The court or other authority shall be requested respectfully to stay the demand pending receipt of the requested instructions from the General Counsel.

§ 1610.36 PROCEDURE IN THE EVENT OF AN ADVERSE RULING.

If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with § 1610.34(b) pending receipt of instructions from the General Counsel, or if the court or other authority rules that the demand must be complied with irrespective of the instructions from the General Counsel not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall respectfully decline to comply with the demand (United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951)).

PUBLIC LAW 92-318, 92ND CONGRESS, S. 659, JUNE 23, 1972

Education Amendments of 1972

TITLE IX—PROHIBITION OF SEX DISCRIMINATION

SEX DISCRIMINATION PROHIBITED

SEC. 901. (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) in regard to admissions to educational institutions, this section shall not apply (A) for one year from the date of enactment of this Act, nor for six years after such date in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine; and

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(b) Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this title of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) For purposes of this title an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

FEDERAL ADMINISTRATIVE ENFORCEMENT

SEC. 902. Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

JUDICIAL REVIEW

SEC. 903. Any department or agency action taken pursuant to section 1002 shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 902, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, United States Code, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title.

PROHIBITION AGAINST DISCRIMINATION AGAINST THE BLIND

SEC. 904. No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity, but nothing herein shall be construed to require any such institution to provide any special services to such person because of his blindness or visual impairment.

EFFECT ON OTHER LAWS

SEC. 905. Nothing in this title shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

AMENDMENTS TO OTHER LAWS

SEC. 906. (a) Sections 401(b), 407(a)(2), 410, and 902 of the Civil Rights Act of 1964 (42 U.S.C. 2000c(b), 2000c-6(a)(2), 2000c-9, and 2000h-2) are each amended by inserting the word "sex" after the word "religion".

(b)(1) Section 13(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)) is amended by inserting after the words "the provisions of section 6" the following: "(except section 6(d) in the case of paragraph (1) of this subsection)".

(2) Paragraph (1) of subsection 3(r) of such Act (29 U.S.C. 203(r)(1)) is amended by deleting "an elementary or secondary school" and inserting in lieu thereof "a preschool, elementary or secondary school".

(3) Section 3(s)(4) of such Act (29 U.S.C. 203(s)(4)) is amended by deleting "an elementary or secondary school" and inserting in lieu thereof "a preschool, elementary or secondary school".

INTERPRETATION WITH RESPECT TO LIVING FACILITIES

SEC. 907. Notwithstanding anything to the contrary contained in this title, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
OFFICE OF THE SECRETARY,
Washington, D.C., August 1972.

MEMORANDUM TO PRESIDENTS OF INSTITUTIONS OF HIGHER EDUCATION PARTICIPATING IN FEDERAL ASSISTANCE PROGRAMS

As you may know, on June 23, 1972, the President signed into law the "Education Amendments of 1972" (effective July 1, 1972). Title IX of this Act prohibits sex discrimination in all federally assisted education programs and amends certain portions of the Civil Rights Act of 1964. The Office for Civil Rights, Department of Health, Education, and Welfare, is presently in the process of developing regulations and guidelines to implement Title IX. For your immediate information, however, I have set forth below a brief summary of the pertinent provisions of Title IX, and have attached a copy of the law.

A. BASIC PROVISION

Title IX of the Higher Education Act states:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal Financial assistance . . ."

This sex discrimination provision of Title IX is patterned after Title VI of the Civil Rights Act of 1964 which forbids discrimination on the basis of race, color, and national origin in all federally assisted programs. By specific exemption, the prohibitions of Title VI do not reach employment practices (except where the primary objective of the Federal aid is to provide employment). However, there is no similar exemption for employment in Title IX.

Therefore, effective July 1, as a condition of receiving Federal assistance, your institution must make all benefits and services available to students without discrimination on the basis of sex. As indicated below, there are exemptions to and an deferment in implementing the admissions provision. However, all other requirements of this Title are presently in effect.

B. WHICH INSTITUTIONS ARE COVERED

All educational programs and activities which are offered by any institution or organization and which receive Federal financial assistance by way of grant, loan, or contract other than a contract of insurance or guaranty are covered. Title IX specifically lists the types of educational institutions which are covered. These include public and private preschools, elementary and secondary schools, institutions of vocational education, professional education, and undergraduate and graduate higher education.

C. PROVISIONS CONCERNING ADMISSIONS TO SCHOOLS AND COLLEGES

1. Certain educational institutions covered by Title IX are prohibited from sex discrimination in all of their programs and activities, including admissions to their institutions. These institutions include:

a. Institutions of vocational education (public and private).

b. Elementary and secondary schools other than secondary vocational schools

c. Institutions of graduate higher education (public and private).

d. Public undergraduate institutions of higher education (except those which have been traditionally and continually single-sex).

2. Exemptions from the admissions provisions.

Some educational institutions covered under Title IX are exempted from complying with the prohibition against discrimination in admissions. These institutions are:

a. Private undergraduate institutions of higher education.

b. Elementary and secondary schools other than secondary vocational schools whose primary purpose is to train students in vocational and technical areas.

c. Public institutions of undergraduate higher education which have been traditionally and continually single-sex.

Schools of vocational, professional, graduate higher education, and public undergraduate higher education which are in transition from single-sex institutions to co-educational institutions are exempt from non-discrimination in admissions for specified periods of time provided each is carrying out a plan approved by HEW, under which the transition will be completed. Although all these institutions are exempt from the requirement of immediately admitting students of the previously excluded sex, they are required not to discriminate, as of the effective date of the Act (July 1, 1972), against any admitted students in any educational program or activity offered by the educational institutions.

D. OTHER EXEMPTIONS

1. *Religious Institutions.*—Institutions controlled by religious organizations are exempt if the application of the anti-discrimination provision is not consistent with the religious tenets of such organizations.

2. *Military Schools.*—Those educational institutions whose primary purpose is the training of individuals for the military services of the United States or the Merchant Marine are exempt.

E. PROVISION RELATING TO LIVING FACILITIES

The Act allows institutions receiving Federal funds to maintain separate living facilities for persons of different sexes.

F. WHO ENFORCES THE ACT

The Federal departments empowered to extend aid to educational institutions have the enforcement responsibility. (The enforcement provisions are virtually identical to those of Title VI of the Civil Rights Act of 1964.) Reviews can be conducted whether or not a complaint has been filed. We presently are in the process of developing procedures under which this agency will represent all Federal agencies in the administration of Title IX, as is presently the case under Title VI of the Civil Rights Act of 1964.

G. WHO CAN FILE CHARGES

Individuals and organizations can challenge any unlawful discriminatory practice in a Federal program or activity by filing a complaint with the appropriate Federal agency. During the review process, names of complainants are kept confidential if possible.

H. WHAT HAPPENS WHEN A COMPLAINT IS FILED

An investigation is conducted, if warranted, and if a violation is found, informal conciliation and persuasion are first used to eliminate the discriminatory practices.

I. FORMAL ENFORCEMENT PROCEDURES

If persuasion fails, the Act provides for formal hearings conducted by the Federal agency(s) involved. Such action can result in the termination or withholding of Federal financial assistance. In some instances, cases can be referred to the Department of Justice with a recommendation that formal legal action be taken. Recipients of Federal monies which have been terminated or withheld can seek judicial review of the final order issued by the agency.

J. PREFERENTIAL TREATMENT

Institutions cannot be required to establish quotas or grant "preferential or disparate" treatment to members of one sex when an imbalance exists with respect to the number of percentage of persons of one sex participating in or receiving the benefits of federally assisted educational programs or activities. This provision is analogous to the racial imbalance provision in Title VI which states that the absence of a racial balance is not in itself proof of discrimination: However, these provisions do not mean that corrective actions may not be required to overcome past discrimination.

K. PROVISION CONCERNING BLIND STUDENTS

Students cannot be denied admission on the grounds of blindness or severely impaired vision to any federally assisted education program or activity. The institution, however, is not required to provide special services for such persons.

We will provide more specific guidance on the requirements of Title IX in the near future. In the interim, should you have any questions relating to this matter, please feel free to write to me.

J. STANLEY POTTINGER,
Director, Office for Civil Rights.

STATEMENT BY CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

HEW will publish in the Federal Register on Thursday a regulation setting forth how this Department proposes to enforce the law banning sex discrimination by educational institutions which receive Federal financial aid.

This is the next step, and one I believe is overdue, in our country's continuing effort to assure equality of opportunity for all citizens in pursuing their full potential through education.

The published regulation is not a final order—it is a proposal on which the Department solicits comment from all interested citizens and organizations until October 15, 1974. We will review all comments received, make any indicated changes, and then—as required by the statute—will submit the regulation to the President for his approval. When so approved, the regulation will be published in final form to become effective 30 days from that date of publication.

Because this is a new and complex area, HEW will soon schedule a series of briefings and conferences on the law and the proposed regulation at a number of locations across the country. By this means, we hope to inform individuals, organizations, and the local press as to the substance of the proposed regulation and so to encourage broad public interest and comment.

The proposed regulation forbids discrimination by sex in most educational institutions—colleges, universities, secondary and elementary schools and preschools—which receive Federal funds.

It would cover three major areas: admission, treatment of students, and employment. With respect to admission to educational institutions, the proposed regulation is designed to ensure students equal access—with certain exceptions specified by Congress. With respect to treatment to students and employment, the proposal provides for nondiscrimination and equality of opportunity.

The proposed regulation would affect, among others, virtually all public school systems in the country, as well as almost 2,500 institutions of post-secondary education, currently receiving Federal funds.

By Congressional exemption, the proposed regulation would not apply at all to military schools; nor would it apply to religious schools if that would be inconsistent with the controlling religious tenets of these schools. In addition, Congress exempted, from the admissions requirements only, private undergraduate colleges, non-vocational elementary and secondary schools, and certain public undergraduate schools which have traditionally and continually been single-sex.

The proposed regulation also would prohibit discrimination in employment, on the basis of sex, by educational institutions.

We realize that this Federal effort has raised some understandable apprehensions, but we believe that sex discrimination in Federally assisted educational programs or activities can be eliminated, and eliminated without undue controversy or hardship in the academic community or elsewhere. Congress has decreed that sex discrimination in education cannot be allowed to persist where Federal funds are involved, and we are seeking interest and cooperation in our effort to enforce the law.

The law clearly requires that some inequitable practices will have to be revised or eliminated. We feel that can be accomplished with the cooperation of educational institutions, many of which have already been correcting such inequities. Further, we believe the necessary changes need not be negative and disruptive, but instead can be made so as to reinforce the best traditions of American education.

The regulation, for example, would neither exempt nor disrupt intercollegiate athletics as some have feared; rather the regulation moves in the direction of insuring better opportunities for women in athletic programs.

HEW launches this effort with a basic attitude of cooperation and not coercion. Enforcement will be based on seeking voluntary compliance first. We want the widest possible public understanding of the requirements of the law and the details of the proposed regulation, so that unfounded misapprehensions can be held to a minimum.

Only if voluntary efforts fail will enforcement move to the other two methods provided by the law—either an administrative proceeding to terminate Federal assistance, or other means authorized by law such as referral of a violator to the Department of Justice for court action.

I believe that the requirement and issuance of this proposed regulation in final form is a vital part of this Department's efforts to increase access to and improve opportunities in education for all Americans. I am sure that our educational institutions and all interested organizations will contribute the leadership needed to achieve this move toward equal opportunities for all of America's students.

HEW FACT SHEET

ANNOUNCEMENT

The Department of Health, Education and Welfare is publishing Thursday in the *Federal Register*, a proposed regulation to implement Title IX of the Education Amendments of 1972. That provision, with certain exception, prohibits sex discrimination in education programs or activities which receive Federal financial assistance. The regulation will be administered by the Department's Office for Civil Rights.

Contents

- Public Comments
- Substantive Provisions:
  - Coverage
  - Admission of Students
  - Treatment of Students
  - Employment
  - Enforcement Procedures

PUBLIC COMMENTS

The Department solicits comments on the proposed regulation from interested citizens until October 15, 1974. Copies of all comments will be available for public inspection in Room 3256 N., 330 Independence Avenue, S.W., Washington, D.C. 20201 between 9:00 a.m. and 5:30 p.m. Monday through Friday (except Federal holidays). Copies of selected comments will also be made available for public inspection in the Office of each Regional Director of the Office for Civil Rights during normal business hours before and after October 15. After the comments have been evaluated and appropriate changes have been made, the final regulation, as required by Title IX, will be submitted for approval by the President. When approved, it will be published in final form in the *Federal Register* to become effective thirty days from the date of publication.

PROPOSED 45 C.F.R. PART 86—SUBSTANTIVE PROVISIONS

The proposed regulation covers the following areas with respect to recipients of Federal financial assistance for educational programs or activities:

Coverage;
Admission of students;
Employment; and
Procedures.

COVERAGE

Except for the specific limited exemptions set forth below, the proposed regulation applies to all aspects of all education programs or activities of a school district, institution of higher education, or other entity which receives Federal funds for any of those programs.

With respect to *admissions to educational institutions*, the proposed regulation applies *only* to: vocational, professional and graduate schools, and to institutions of public undergraduate education (except those few public undergraduate schools which have been traditionally and continually single sex).

The proposed regulation *does not cover admission to:* recipient pre-schools, elementary, and secondary schools (except vocational schools), private undergraduate institutions and, as noted above, to those few public undergraduate educational institutions that have been traditionally and continually single sex.

Even institutions whose admissions are exempt from coverage must treat all students nondiscrriminatorily once they have admitted members of both sexes.

Military institutions at both the secondary and higher education level are *entirely exempt* from coverage under Title IX. *Practices in schools run by religious organizations* also are *exempt to the extent compliance would be inconsistent* with religious tenets. Thus, for example, if a religious tenet relates only to employment, the institution would still be prohibited from discrimination against students.

ADMISSIONS

The proposed regulation covers *recruitment as well as all admissions policies and practices* of those recipients *not exempt as to admissions.* It includes specific prohibitions of sex discrimination through separate ranking of applicants, application of sex-based quotas, administration of sex-biased tests or selection criteria, and granting of preference to applicants based on their attendance at particular institutions if the preference results in sex discrimination. The proposed regulation also forbids application in a discriminatory manner of rules concerning marital or parental status, and prohibits discrimination on the basis of pregnancy and related conditions, providing that recipients shall treat disabilities related to pregnancy in the same way as any other temporary disability or physicial condition.

Generally, *comparable efforts* must be made by recipients *to recruit* members of each sex. Where discrimination previously existed, *additional recruitment efforts* directed primarily toward members of one sex *must be undertaken to remedy the effects of the past discrimination.*

Examples

An institution whose admissions are covered by the regulation *may not set quotas* on the number of men or women who will be admitted. Thus, a medical school may not set such quotas, although a private undergraduate school may do so.

An institution whose admissions are covered *may not set different standards* of admission for one sex than for the other. Thus, a graduate school may not require a lower grade point average for men than for women, although a private undergraduate school may do so.

An institution of graduate, professional or vocational education which prior to enactment of Title IX had limited its admissions primarily to members of one sex *must* undertake special efforts to notify and recruit members of the sex previously barred or restricted in order to overcome the effects of past discrimination. Thus, a professional school which previously purposely limited the proportion of females in each entering class to approximately 15% would be required to initiate special recruitment efforts to attract qualified female students. A similar institution whose admissions had not been subject to such a quota arrangement, but had admitted students without discrimination on the basis of sex, would be required only to make comparable efforts to attract members of each sex.

TREATMENT

As stated before, although some schools are exempt from Title IX with regard to admissions, *all* schools must *treat* their admitted students *without discrimination* on the basis of sex. With regard to treatment of students, therefore, the proposed regulation applies to recipient pre-schools, elementary and secondary schools, vocational schools, colleges, and universities at the undergraduate, graduate and professional levels, as well as to other agencies, organizations and persons which receive Federal funds for educational programs and activities.

Specifically, the treatment sections of the regulation cover the following areas:

(1) Access to and participation in course offerings and extracurricular activities, including campus organizations and competitive athletics;

(2) Eligibility for and receipt or enjoyment of benefits, services, and financial aid;

(3) Use of facilities, and comparability of, availability of, and rules concerning housing (except that single-sex housing is permissible).

There is no provision in the regulation which would prohibit discrimination in textbooks and other curricular materials.—As noted in the Preamble to the proposed regulation, the Department recognizes that sex stereotyping in curricula is a serious matter, but has concluded that any specific regulatory provision in this area would raise grave constitutional questions under the First Amendment. The Department assumes that recipients will deal with this problem in the exercise of their general authority and control over curricula and course content. For its part, the Department will increase its efforts, through the Office of Education, to provide research, assistance, and guidance to local educational agencies in eliminating sex bias from curricula and educational material.

ACCESS AND PARTICIPATION GENERALLY

The regulation prohibits discrimination by recipients in granting access to or providing for participation in any course offering or extracurricular activity, including a campus organization or competitive athletics. No classes, including physical education, may be offered separately on the basis of sex.

ATHLETICS

Where selection is based on *competitive skill*, athletics *may* be provided through *separate* teams for males and females or through a single team open to both sexes. Institutions must determine, at least annually, in what sports students desire to participate. If separate teams are offered, a recipient institution may not discriminate on the basis of sex in provision of necessary equipment or supplies; or in any other way, *but equal aggregate expenditures are not required*. The goal of the regulation in the area of competitive athletics is to secure equal opportunity for males and females while allowing schools and colleges flexibility in determining how best to provide such opportunity.

Where athletic opportunities for students of one sex have been limited, an institution *must* make affirmative efforts to inform members of that sex of the availability of equal opportunities and to provide support and training to enable them to participate.

CAMPUS ORGANIZATIONS

Generally, a recipient may not, in connection with its education program or activity, *support or assist* any organization, agency or person which discriminates on the basis of sex. The proposed regulation does not specify in more detail what organization, agencies, or persons could not, if they operated discriminatorily, be supported by a recipient consistent with its obligations under Title IX. It does, however, set out the major criteria to be applied in determining existence of a violation in this area, which are (1) the *substantiality* of the relationship between the recipient and the organization (including financial support and housing), and (2) the *closeness* of the relationship between the organization's functions and the educational program or activity of the recipient.

Examples

A recipient school district may not require boys to take shop and girls to take home economics, exclude girls from shop and boys from home economics, or operate separate home economics or shop classes for boys and girls.

A recipient school district may not require segregation of boys into one health, physical education, or other class, and segregation of girls into another such class.

A recipient vocational or other educational institution may not state in its catalog or elsewhere that a course is solely or primarily for persons of one sex.

A recipient institution which admits male and female students may not provide varsity sports opportunities exclusively or virtually exclusively for male students. However, it is *not* required to provide women access to men's teams if it furnishes women separate opportunities to participate in competitive athletics of comparable types and at comparable levels of competition (*e.g.* varsity, junior varsity, etc.).

A recipient educational institution would be *prohibited from providing financial support* for an all-female hiking club, an all-male language club, or a single-sex honorary society. *However, an organization whose membership was restricted* to members of one sex *could adhere to its restrictive policies*, and operate on the campus of a recipient university, *if it received no support or housing from the university and did not operate in connection with the university's education program or activity.*

BENEFITS, SERVICES, AND FINANCIAL AID

Generally, a recipient subject to the regulation is prohibited from discriminating in making available, in connection with its educational program or activity, any benefits, services, or financial aid. Benefits and services include medical and insurance policies and services for students, counseling, and assistance in obtaining employment. Financial aid includes scholarships, loans, grants-in-aid and work-study programs.

The general prohibition does not apply to administration by a recipient of a scholarship or similar financial assistance program which is restricted to members of one sex *and* is established under a foreign will, trust, or similar legal instrument or by a foreign government.

FACILITIES

Generally, all facilities must be available without discrimination on the basis of sex. As provided in the statute, however, *the regulation permits separate housing based on sex as well as separate locker rooms, toilets and showers.* A recipient may not make available to members of one sex locker rooms, toilets and showers which are not comparable to those provided to members of the other sex. With respect to housing, the regulation requires comparability as to the facilities themselves and nondiscrimination as to their availability and as to the rules under which they are operated, including fees, hours, and requirements for off-campus housing.

Examples

An institution which has one swimming pool *must* provide for use by members of both sexes on a nondiscriminatory basis.

An institution which lists off-campus housing for its students *must ensure* that, *in the aggregate, comparable off-campus housing is available in equal proportion to those members of each sex expressing an interest in it.*

Administration by a recipient institution of different rules based on sex regarding eligibility for living off-campus, curfews, availability of cleaning and janitorial assistance, etc. would violate the regulation.

EMPLOYMENT

All employees in *all* institutions are covered, both full- and part-time, except those in military schools, and in religious schools, to the extent compliance would be inconsistent with the controlling religious tenets. Employment coverage under the proposed regulation generally follows the policies of the Equal Employment Opportunity Commission and the Department of Labor's Office of Federal Contract Compliance. Specifically, the proposal covers:

(a) employment criteria
(b) recruitment
(c) compensation
(d) job classification and structure
(e) fringe benefits

(f) marital or parental status
(g) effect of state or local law or other requirements
(h) advertising
(i) pre-employment inquiries
(j) sex as a *bona fide* occupational qualification.

As to fringe benefits, employers must provide either equal contributions to or equal benefits under pension plans for male and female employees; as to pregnancy, leave and fringe benefits to pregnant employees must be offered in the same manner as are leave and benefits to temporarily disabled employees.

Examples

A recipient employer may not recruit and hire employees solely from discriminatory sources in connection with its educational program or activity.

A recipient employer must provide *equal* pay to male and female employees performing the *same work* in connection with its educational program or activity.

A recipient employer may not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy or related conditions.

ENFORCEMENT PROCEDURE

The proposed regulation includes a general procedural section which includes among other things, compliance reviews, access to information, complaint procedures, administrative termination procedures (hearings), decision, administrative and judicial review and post-termination proceedings. As noted earlier, a more detailed procedural regulation will be issued at a later time.

Should a violation of the statute occur, the Department is obligated to seek voluntary compliance. If attempts to secure voluntary compliance fail, enforcement action may be taken:

(1) by administrative proceedings to terminate Federal financial assistance until the institution ceases its discriminatory conduct; or

(2) by other means authorized by law, including referral of the matter to the Department of Justice with a recommendation for initiation of court proceedings. Under the latter mode of enforcement, the recipient's Federal funds are not jeopardized.

[From the Federal Register, June 20, 1974]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE—OFFICE OF THE SECRETARY

[45 CFR PART 86]

EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITTING FROM FEDERAL FINANCIAL ASSISTANCE

NONDISCRIMINATION ON THE BASIS OF SEX

The Office of Civil Rights of the Department of Health, Education, and Welfare proposes to add Part 86 to the Departmental Regulation to effectuate Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681 *et seq.*), except sections 904 and 906 thereof (20 U.S.C. 1684 and 1686), with regard to Federal financial assistance administered by the Department. Title IX provides that "no person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," with certain exceptions. Title IX is similar to Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*) except that Title IX applies to discrimination based on sex, is limited to educational programs and activities, and includes employment.

Subpart A of these proposed regulations (§§ 86.1 through 86.9) includes definitions and provisions concerning: remedial and affirmative actions, required assurances, dissemination of information policies, and other general matters related to discrimination on the basis of sex. The Subpart also explains the effect of state or local laws and other requirements.

Subpart B (§§ 86.11 through 81.16) describes the educational institutions and other entities, whether public or private, which are covered in whole or in part by the proposed regulations. It also includes exemptions as to admissions for certain educational institutions, as set forth in the statute, but it should be noted that these exemptions are limited to admissions. This Subpart defines "admissions," and describes certain educational institutions which are eligible to submit transition plans designed to convert their single-sex admissions processes to nondiscriminatory processes over a stated period of time not to exceed seven years from the date of enactment of Title IX (i.e. by June 24, 1979).

Subpart C (§§ 86.21 through 86.23) sets forth the general and particular prohibitions with respect to nondiscrimination based on sex in admissions policies and admission preferences, including requirements concerning recruitment of students. The regulatory requirements regarding treatment of students and employment (Subparts D and E) are applicable to all educational institutions receiving Federal financial assistance, including those whose admissions are exempt under Subpart C.

Subpart D (§§ 86.31 through 86.38) sets forth the general rules with respect to prohibited discrimination in educational programs and activities. The specific subject matter covered in Subpart D includes discrimination on the basis of sex in academic research, extracurricular and other offerings, housing, facilities, access to programs and activities, financial and employment assistance to students, health and insurance benefits for students, physical education and instruction, athletics, and discrimination based on the marital or parental status of students.

Subpart E (§§ 86.41 through 86.51) sets forth the general rules with respect to employment in educational programs and activities. The specific subject matters covered are discrimination on the basis of sex in hiring and employment criteria, recruitment, compensation, job classification and structure, promotions and termination, fringe benefits and leave, advertising, pre-employment inquiries, and discrimination with respect to marital or parental status. It also includes provisions for exemptions where sex is a *bona fide* occupational qualification.

Subpart F (§§ 86.61 through 86.66) sets forth the procedures which would govern the implementation of the proposed regulations, including procedures for effecting compliance, conducting hearings, rendering decisions and issuing notices. It also includes provisions concerning the applicability of administrative and judicial review. Section 86.11, in Subpart A, provides that the regulations apply "to each education program or activity which receives or benefits from Federal financial assistance" administered by the Department. Under analogous cases involving constitutional prohibitions against racial discrimination, the courts have held that a school district's or college's education functions include any service, facility, activity or program which it operates or sponsors, including athletics and other extracurricular activities. These precedents have been followed with regard to sex discrimination: see Brenden v. Independent School District 742, 477 F. 2d 1292 (8th Cir. 1973).

Section 86.63(c), in Subpart F, provides, as Title IX requires in 20 U.S.C. 1682, that termination or refusal to grant or continue such assistance "shall be limited in its effect to the particular education program or activity" in which noncompliance has been found. The Secretary proposes to interpret section 86.63 (c) consistently with the interpretation of similar language contained in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–1). He proposes, therefore, that an education program or activity or part thereof operated by a recipient of Federal financial assistance administered by the Department will be subject to the requirements of this regulation if it receives or benefits from such assistance. This interpretation is consistent with the leading case interpreting the language contained in Title VI, which holds that Federal funds may be terminated under Title VI only upon a finding they "are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment * * *" Board of Public Instruction of Taylor County, Florida v. Finch, 414 F. 2d 1068, 1078–79 (5th Cir. 1969).

A more detailed discussion of various sections in each of the Subparts of the proposed Title IX regulations is set forth in the following paragraphs. In certain cases, major issues and the reasons for the proposed decision are discussed.

Subpart A. Section 86.2 generally provides definitions. Of particular note is § 86.2(o) which provides that where an educational institution is composed of more than one school, department or college, admission to which is independent of admission to any other component, each such school, department or college is considered as a separate unit for the purposes of determining whether its admissions are covered by the regulation. Thus, if a private institution is composed of an undergraduate and a graduate college, admissions to the undergraduate college are exempt (see discussion under Subpart B below) but admissions to the graduate school are not.

Section 86.3(a) requires remedial action to overcome the effects of previous discrimination based on sex in a Federally assisted educational program or activity. Remedial action pursuant to § 86.3(a) is restricted to areas of a recipient's educational program or activity which are not exempt from coverage. Section 86.3(b) permits, but does not require, affirmative action to overcome the effects of conditions which have resulted in limited participation by members of either sex. The Department will not require imposition of quotas under either of these sections.

Section 86.4 requires each recipient of Federal financial assistance to submit to the Director an assurance that each of its educational programs and activities receiving or benefiting from such assistance will be conducted in compliance with the regulations.

Subpart B. Section 86.13 of the regulation provides that all public and private military schools that are recipients of Federal financial assistance, whether secondary or post-secondary, are exempt from coverage. Neither the statute nor the regulation applies to U.S. military and merchant marine academies since these schools are Federal entities rather than recipients of Federal assistance.

Section 86.12 provides that the regulation does not apply to religiously controlled institutions to the extent that such application would be inconsistent with the religious tenets of the controlling organization. An educational institution wishing to claim an exemption on the ground of religion must do so in writing to the Director when it files its assurance of compliance pursuant to § 86.4 The institution would be required to set forth the manner and extent to which application of the regulation would not be consistent with the religious tenets of its controlling organization.

The statute covers admissions only in certain institutions: vocational, professional, graduate, and public undergraduate institutions, except such of the latter as from their founding have been traditionally and continually single-sex. The admissions policies of private undergraduate institutions are exempt. Under the statute and § 86.14, the admissions requirements do not apply, in general, to admissions to public or private preschool, elementary and secondary schools. Because the statute mandates such coverage as to vocational schools, however, admission to public or private vocational schools, whether at the junior high school, high school or post-secondary level, are covered by § 86.14(c) and must be nondiscriminatory. With respect to coverage of admissions to institutions of professional and vocational education, the Secretary has interpreted the statute as excluding admissions coverage of professional and vocational programs offered at private undergraduate schools. Thus, admission to programs leading to first degrees in fields such as teaching, engineering, and architecture at such private colleges will be exempt under § 86.14(d). While the admissions section of the statute might be read as including professional degrees wherever they are offered, the statute can also be read as stating, and the legislative history indicates, that admissions to private undergraduate schools were to be totally exempt.

The exemption in § 86.14(d) for admissions to public traditionally and continually single-sex undergraduate institutions will affect only a few institutions. Likewise, section 86.15 of the regulation, concerning transition by single-sex institutions whose admissions are covered by the statute into institutions with nondiscriminatory admissions practices, will affect relatively few institutions.

Subpart C. Subpart C prescribes (subject to the appropriate admissions exemptions) requirements for nondiscrimination in recruitment and admission of students to educational programs and activities. In addition to a general prohibition of discrimination in § 86.21(a), the regulations delineate, in § 86.21(b), specific prohibitions based on sex relating to such practices as ranking of applicants, application of quotas, and administration of tests or selection criteria. Use of tests for admission which are shown to have an adverse impact on members of one sex must be shown to predict validly the successful completion of the educational program or activity in question (§ 86.21(b)(2)). Further, in connection with this prohibition, § 86.22 of the regulation forbids a recipient from giving preference to applicants on the basis of their attendance at particular institutions if the preference results in discrimination on the basis of sex. Such preferences may be permissible under that section, however, if the granting institution can show that the pool of applicants eligible for such a preference includes roughly equivalent numbers of males and females, or if it can show that the total number of applicants eligible to receive the preference is insignificant in comparison to its total applicant pool.

Specific prohibitions in Subpart C also forbid applying rules concerning such matters as marital or parental status in a manner which discriminates in admissions on the basis of sex (§ 86.21(c)(1)). Section 86.21(c)(2) prohibits discrimination on the basis of pregnancy and related conditions, and § 86.21(c)(3) provides that recipients shall treat disabilities related to such conditions in the same manner and under the same policies as any other temporary disability or physical conditions is treated.

The last section of Subpart C, § 86.23, requires generally that comparable efforts be made by educational institutions to recruit members of each sex. Additional recruitment efforts directed primarily toward members of one sex must be undertaken to remedy past discrimination (pursuant to § 86.3(a) in Subpart A), and such additional efforts may also be taken absent past discrimination in order to correct the effects of conditions which have had the effect of limiting the admissions of members of one sex, to the recipient's educational program or activity (pursuant to § 86.3(b)). Finally, a recipient may not, under § 86.23(b), recruit primarily or exclusively at institutions whose student bodies are exclusively or predominantly single-sex if the effect of such recruitment efforts is to discriminate on the basis of sex.

Subpart D. Subpart D concerns the prohibition of discrimination in treatment of students in educational programs and activities. Generally, § 86.31 (a) states that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other educational program or activity operated by a recipient and which receives or benefits from Federal financial assistance. This provision is followed by specific prohibitions in § 86.31(b) which include: discriminating on the basis of sex in the application of any rules of appearance, or in the application of rules of domicile and residency (as discussed below), and aiding or perpetuating sex discrimination by assisting any agency, organization or person which discriminates on the basis of sex in providing any aid, benefits, or services to students or employees. Section 86.31(a) does permit an institution to assist its students in seeking admission to an education program which discriminates, if that admissions discrimination would be permissible under Subpart C. For example, a public undergraduate institution may administer an exchange program with a private undergraduate institution which admits only students of one sex because Subpart C permits the private institution to have such an admissions policy.

Section 86.31(b)(6) forbids application by recipients of residency and domicile rules in a manner which discriminates on the basis of sex. For example, many educational institutions base their determinations of eligibility for in-state tuition on domicile; applicable state law may require a married woman to take the domicile of her husband as of the date of marriage, or further require a year of residency to demonstate domicile. If a male student domiciled in State A marries a female student domiciled in State B, and they then move to State B where the woman continues in school and the man begins school, he may not be entitled to in-state tuition in State B until he has lived there for a year. Additionally, as the wife must take her husband's domicile, she will lose her in-state tuition eligibility. If, instead, the woman were from State A and the man from State B, both would have been entitled immediately to in-state tuition in State B. Application of such rules would be prohibited under § 86.31(b)(6). See Samuel v. University of Pittsburgh, et al., F. Supp. (W.D. Pa., No. 71-1202, April 10, 1974).

Section 86.31(b)(7) prohibits a recipient from assisting another party which discriminates on the basis of sex in serving students or employees of that recipient. This section might apply, for example, to financial support by the recipient to a community recreational group or to official institutional sanction of a professional or social organization. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient subject to the regulation and the other party involved, including the financial support by the recipient, and whether the other party's activities relate so closely to the recipient's educational program or activity, or to students or employees in that program, that they fairly should be considered as activities of the recipient itself. (Under § 86.6(c), a recipient's obligations are not changed by membership in any league or other organization whose rules require or permit discrimination on the basis of sex.)

A recipient is required to develop and implement a procedure to ensure that the operator or sponsor of an educational program or activity not operated wholly by such recipient, in which the recipient assists participation by its students and employees, takes no action which the regulation would prohibit the recipient from taking. This requirement would apply, for example, to a college's responsibility to ensure nondiscrimination in teaching assignments of student teachers from its education school in schools not operated by the college. If the recipient finds that such discrimination is taking place and is unable to secure its prompt correction, it is required to end its connection with the operating or sponsoring entity (§ 86.31(c)).

With respect to housing, § 86.32 provides that a recipient may not discriminate in any aspect of the provision of housing except that, as provided in the statute, housing may be separate on the basis of sex. Thus, all rules, fees, and other requirements must not discriminate on the basis of sex, and the housing provided or otherwise made available (*e.g.* through listing) must be proportionate in quantity to the number of applicants for housing of each sex and comparable in quality and cost to the student. Moreover, a recipient must administer rules concerning off-campus housing (*e.g.* rules concerning which students may live off campus) without discrimination. To the extent that it approves, or assists students in obtaining, off-campus housing, it must take whatever steps it believes necessary to assure that the off-campus housing available to members of one sex, when compared to that available to members of the other sex, is proportionate in quantity to the numbers of applicants of each sex as well as comparable in quality and cost.

Separate toilet, locker room and shower facilities on the basis of sex may be provided, but such facilities as are provided must be comparable in quality and number for men and women (§ 86.33).

Section 86.34(a) covers access to course offerings and other aspects of a recipient's educational program or activity. No course offerings may be conducted separately on the basis of sex including health, physical education, industrial arts, business, vocational, technical, home economics, music, and adult education, and no student may be required to participate or be refused participation in any course offering on the basis of sex. Section 86.34(b) provides that local educational agencies, in which admission to individual schools are exempt, nevertheless may not discriminate in admissions to the vocational institutions (see Subpart B). In addition, they may not discriminate in admissions to any other school or educational unit which they operate (*e.g.* a special high school operated for boys) unless they otherwise make available to students of the sex excluded, pursuant to the same policies and criteria of admission, comparable courses, services and facilities. Section 86.34(d) requires use of nondiscriminatory appraisal and counseling materials.

The Department recognizes that sex stereotyping in curricula and educational materials is a serious problem to which Title IX could well apply, but the Department has concluded that specific regulatory provisions in this area would raise grave constitutional problems concerning the right of free speech under the First Amendment to the Constitution, and for that reason the Secretary has not covered this subject matter in the proposed regulation. The Department assumes that recipients will deal with this problem in the exercise of their general authority and control over curricula and course content. For its part, the Department will increase its efforts, through the Office of Education, to provide research, assistance and guidance to local education agencies in eliminating sex bias from curricula and educational materials.

Section 86.35 requires that provision of financial aid, assistance in making outside employment available to students, and employment of students by a recipient must be undertaken in a nondiscriminatory manner.

Section 86.35(a) prohibits different amounts and types of all forms of student financial aid to members of one sex. Section 86.35(a) prohibits a college or university subject to Title IX from assisting private fellowship or scholarship programs which are limited to members of one sex or for which members of each sex are selected separately. There may be appropriate remedial action in this area, including temporarily considering a student's sex in awarding financial aid. This section does not apply to a recipient's assisting in the administration of a scholarship or fellowship program established under a foreign will, trust or similar legal instrument, or by a foreign government, which differentiates between the sexes. The Secretary believes that the statute was not intended to cover such programs. The Secretary is aware of the problems raised by financial aid limited to members of one sex by a domestic bequest, deed of trust, or other instruments and invites comment in this area.

Under § 86.36, recipients may not discriminate in the provision of medical, hospital, accident, or life insurance benefits, services, policies or plans to any of their students, and recipients may not provide such benefits, service, policies or plans or otherwise discriminate, an any manner which would violate the employment sections of the regulation (Subpart E) if the action were to be taken with respect to employees. The section does not, however, prohibit recipients from providing any benefits or services which may be used by a different proportion of students of one sex than of the other, including but not limited to family planning services.

Section 86.37 provides generally that recipients may not apply rules concerning a student's actual or potential parental, family, or marital status in a discriminatory manner, and it provides specific prohibitions regarding discrimination against students on account of pregnancy, childbirth, or pregnancy-related disabilities. A student may not be excluded from regular classes because of pregnancy or related conditions unless she so requests or unless her physician certifies that a different arrangement is necessary. The regulation reflects the principle that disabilities related to pregnancy should be treated like any other disability.

Section 86.38 imposes requirements concerning physical education and athletic programs, which are integral parts of the educational processes of schools and colleges and are fully subject to the requirements of Title IX. See Brenden v. Independent School District 742, 477 F. 2d 1292, 1292–96 (8th Cir. 1973); compare Bucha v. Illinois High School Association, 351 F. Supp. 69 (N.D. Ill. 1972).

Section 86.38(a) provides that physical education classes and athletic programs must be operated without discrimination on the basis of sex. Such activities for which participation or selection is premised on factors other than skill may not be conducted separately on the basis of sex. Athletics for which selection is based on competitive skill may be provided through separate teams for males and females to the extent such teams comply with the requirements of §§ 86.38 (b) through (e), which are summarized below. (The award of scholarships for participation on a single sex team will not be interpreted as a single sex scholarship prohibited by § 86.35(a) so long as the recipient complies with the requirements of § 86.38, providing for equal opportunity in athletics.)

Recipients must determine in what sports students of both sexes desire to participate (§ 86.38(b)). Where athletic opportunities for students of one sex have previously been limited, a recipient must make affirmative efforts to inform students of that sex of the availability of equal opportunities for them, and to provide support and training to enable them to participate in those opportunities (§ 86.38(c)).

Section 86.38(d) requires that a recipient make affirmative efforts to provide athletic opportunities in such sports and through such teams as will most effectively equalize opportunities for members of both sexes, and in so doing consider the determinations of student interest made pursuant to § 86.38(b). The regulation does not require equal aggregate expenditures for athletics for members of each sex nor equal expenditures for each team (§ 86.38(e)).

Subpart E. Subpart E proposes requirements concerning employment which generally follow those of the Equal Employment Opportunity Commission (29 CFR Part 1604), and the Department of Labor's Office of Federal Contract Compliance (41 CFR Part 60). The EEOC administers Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination, and the OFCC is responsible for the coordination of implementation of Executive Order 11246, as amended, which prohibits employment discrimination by Federal contractors. This Department is responsible for administration, pursuant to the OFCC regulations, of the Executive Order as to Federal contractors which are educational institutions. Virtually all recipients subject to Part 86 are also subject to Title VII, and many are also subject to the Executive Order. Where Subpart E of Title IX differs from either the Title VII regulations or those under Executive Order 11246, an employer who complies with this proposed regulation would also be complying with both Title VII and Executive Order, even where the latter provisions differ from each other, with the exception of fringe benefits as discussed in the following paragraph.

Section 86.46(b)(2) of Subpart E follows the Executive Order regulations in requiring that fringe benefit plans provide for either equal periodic benefits to members of each sex, or equal contributions by the employer for members of each sex (§ 86.36 imposes identical requirements for student benefit plans).

The Title VII regulation differs in that it prohibits payment of unequal periodic benefits on the basis of sex, and precludes employers from justifiying unequal periodic benefits on the basis of differences in cost for males and for females. Assuming different life spans at particular ages between the sexes, and assuming equal contributions by all employees, Title VII implicitly requires payment of higher employer contributions for, and the possibility of higher total benefits received by, women. (The Department of Labor is currently considering changes in the Executive Order regulations. One of the proposed changes would result in conforming the fringe benefit requirements with those in effect under Title VII. (See 38 FR 35336-28, December 27, 1973.)

The Secretary has considered a third alternative for possible adoption by the Department. That proposal would mandate the use of premium or rate tables which do not differentiate on the basis of sex, and would thus require both equal contributions and equal periodic benefits. The Secretary invites comment specifically on whether § 86.46(b)(2) should adopt the Executive Order approach, as it does presently, that of Title VII, or the third alternative as set forth above.

The regulation applies to part-time employees (§ 86.41(a)(2)). The Secretary will interpret the section concerning fringe benefits (§ 86.46) to require, where an institution's female permanent employees are disproportionately part-time or its permanent part-time employees are disproportionately female, and the institution does not provide its permanent part-time employees fringe benefits proportionate to those provided full-time employees, that the institution demonstrate that such a manner of providing fringe benefits does not discriminate on the basis of sex. "Permanent" would refer to any employee who is expected to work or has in fact worked at least one academic semester at half-time or half-time equivalent. The Secretary seeks comment on the implications of requiring all institutions to provide permanent part-time employees fringe benefits proportionate to those offered full-time employees, regardless of the relative composition of a particular institution's part-time and full-time work forces or of the ratio of part-time and full-time employment among its female employees.

The Secretary sees no reason for treating disabilities relating to pregnancy differently from other temporary disabilities in the context of educational institutions. Accordingly, § 86.47(b) reflects the more detailed Title VII regulation rather than the Executive Order regulation. Section 86.47(c) also follows the Title VII regulation in requiring not only that disabilities related to pregnancy must be considered a justification for leave, but that where an employer provides for temporary disabilities under its fringe benefit or leave plan, disabilities related to pregnancy must be treated in the same manner as any other temporary disability.

Section 86.47(e) provides that an employee may not be required to commence leave related to pregnancy so long as her physician certifies that she is capable of performing her duties, and that she must be allowed to resume work after such a leave no more than two weeks after her physician certifies that she is capable of doing so, or in the case of an employee who is a teacher, at the beginning of the first academic term after such certification is made. These rules are consistent with the recent holding of the Supreme Court in Cleveland Board of Education v. LaFleur, 94 S.Ct. 791 (1974).

Although LaFleur apparently permits an employer to require that every pregnant teacher commence leave "at some firm date during the last few weeks of pregnancy," *Id.* at 799, n. 13, there is no clear medical evidence as to what such date might be generally appropriate, and the Secretary believes individualized determinations based on the employee's own capacities should be required instead.

Section 86.50(a) departs from both the Title VII and the Executive Order regulations in prohibiting pre-employment inquiries as to an applicant's marital status, as such inquiries are frequently the predicate for discrimination against married women. Section 86.21(c)(4) contains a similar prohibition with regard to pre-admission inquires. Section 86.51 follows the Title VII and Executive Order regulations in providing for consideration of sex in making employment decisions where sex is a "*bona fide* occupational qualification." (The Title VII exemption is provided for by the statute; the Executive Order exemption is intended simply to be consistent with that legislation.) Section 86.41 is included only for consistency with those regulations.

Subpart F. As noted above, Subpart F sets forth the procedures which would govern implementation of the proposed regulations. These procedures are in most respects similar to those contained in the Department's regulation implementing Title VI of the Civil Rights Act of 1964, 45 CFR Parts 80 and 81. Several of the provisions, however, are particularly noteworthy.

The provisioin for amicus participation under Title VI is contained in the procedural rather than the substantive regulation and may be found at 45 CFR 81.22. Amicus participation under Title IX will be included when procedural regulations are issued.

The Office for Civil Rights has previously distributed a Memorandum to Presidents of Institutions of Higher Education Participating in Federal Assistance Programs (August 1972), a Memorandum for Directors of Institutions of Vocational Education Participating in Federal Assistance Programs (May 1973), and a Memorandum for Chief State School Officers and Local School Superintendents (February 1973), all of which describe the basic applicability of Title IX, and the Office for Civil Rights and the Office of Education have jointly distributed a Memorandum for Presidents of Selected Institutions of Higher Education Participating in Federal Assistance Programs (May 1973), which describes the criteria and procedures under which certain formerly single-sex institutions may operate pursuant to a plan for transition to nondiscriminatory admissions. These documents are consistent, with certain minor exceptions, with the provisions of proposed Part 86 (the requirements of Part 86 which correspond to those of the Memorandum for Presidents of Selected Institutions are contained §§ 86.15 and 86.16).

Persons who wish to submit comments, suggestions, or objections pertaining to these regulations may present their views, in writing, to the Director of the Office of Civil Rights of the Department of Health, Education, and Welfare, P.O. Box 2974, Washington, D.C. 20013. The Secretary believes that the comment period should extend for at least thirty days into the autumn academic semester, to enable academic institutions and student and faculty groups to formulate comments, and comments may therefore be submitted through October 15, 1974. Comments received in response to this notice will be available for public inspection in Room 3256, 330 Independence Avenue, SW., Washington, D.C. 20201, between 9 a.m. and 5:30 p.m., Monday through Friday (except Federal holidays) both before and after October 15, 1974, until the regulation is published in final form. Copies of representative comments received by the Director will also be made available for public inspection in the office of each Regional Director of the Office for Civil Rights during normal business hours before and after October 15, 1974. The Regional Directors and their offices are located as follows:

Region I—Mr. John G. Bynoe, RKO General Bldg., 5th Floor, Bulfinch Place, Boston, Massachusetts 02114.

Region II—Mr. Joel Barkan, 26 Federal Plaza, Rm. 3908, New York, New York 10007.

Region III—Mr. Dewey Dodds, Gateway Bldg., 3535 Market Street, Philadelphia, Pennsylvania 19101.

Region IV—Mr. William Thomas, 50 Seventh Street, NE, Rm. 404, Atlanta, Georgia 30323.

Region V—Mr. Kenneth A. Mines, 300 W. Jackson Blvd., 10th Floor, Chicago, Illinois 60606.

Region VI—Ms. Dorothy D. Stuck, 1114 Commerce Street, Dallas, Texas 75202.

Region VII—Mr. Taylor D. August, 12 Grand Bldg., 12th and Grand Avenue, Kansas City, Missouri 64106.

Region VIII—Mr. Gilbert D. Roman, Rm. 11037, Federal Bldg., 1961 Stout Street, Denver, Colorado 80202.

Region IX—Mr. Floyd L. Pierce, 760 Market Street, Rm. 700, San Francisco, California 94102.

Region X—Ms. Mariaina Kiner, 6101 Arcade Plaza Bldg., 1321 Second Avenue, Seattle, Washington 98101.

Comments received before October 15, 1974, will be considered before final action is taken on this proposal. Comments received after that date will be considered until the regulation is prepared in final form. The proposal may be changed in the light of the comments received. In the next several weeks, the Department will hold public forums in various cities to brief the public and media and to enter into a question and answer dialogue with the public about the proposed regulation. It is hoped that these forums will increase public awareness of the issues and assist interested citizens in developing formal comments, to be later submitted to the Department.

This Part 86 is proposed under the authority of section 902 of the Education Amendments of 1972 (20 U.S.C. 1682).

In consideration of the foregoing, it is proposed to add Part 86 to Title 45 of the Code of Federal Regulations to read as set forth below.

Dated: June 14, 1974.

CASPER W. WEINBERGER,
Secretary, Department of Health,
Education, and Welfare.

PART 86—NONDISCRIMINATION ON THE BASIS OF SEX UNDER FEDERALLY ASSISTED EDUCATION PROGRAMS AND ACTIVITIES

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AUTHORITY: Section 902 of the Education Amendments of 1972, 86 Stat. 374; 20 U.S.C. 1682.

SUBPART A—INTRODUCTION

§ 86.1 *Purpose.*

The purpose of this part is to effectuate title IX of the Education Amendments of 1972 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.2 *Definitions.*

As used in this part, the term—

(a) "*Title IX*" means title IX of the Education Amendments of 1972, Pub. L. 92–318, 20 U.S.C. 1681 *et seq.*

(b) "*Department*" means the Department of Health, Education, and Welfare.

(c) "*Secretary*" means the Secretary of Health, Education, and Welfare.

(d) "*Director*" means the Director of the Office of Civil Rights of the Department.

(e) "*Reviewing Authority*" means that component of the Department delegated authority by the Secretary to appoint, and to review the decision of, administrative law judges in cases arising under this part.

(f) "*Administrative law judge*" means a person appointed by the reviewing authority to preside over a hearing held under this part.

(g) "*Federal financial assistance*" means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal funds, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) "*Recipient*" means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

(i) "*Applicant*" means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(j) "*Educational institution*" means a local educational agency as defined by section 801(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 881), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (k), (l), (m), or (n).

(k) "*Institution of graduate higher education*" means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(l) "*Institution of undergraduate higher education*" means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable towards a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) an agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(m) "*Institution of professional education*" means an institution (except an institution of undergraduate higher education which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the United States Commissioner of Education.

(n) "*Institution of vocational education*" means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semi-skilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers full-time study.

(o) "*Administratively separate unit*" means a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(p) "*Admission*" means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(q) "*Student*" means a person who has gained admission.

(r) "*Transitition plan*" means a plan subject to the approval of the United States Commissioner of Education pursuant to section 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.3 Remedial and affirmative actions.

(a) *Remedial action.* A recipient which has previously discriminated against persons on the basis of sex in an education program or activity shall take such remedial action as is necessary to overcome the effects of such previous discrimination.

(b) *Affirmative action.* In the absence of prior discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.4 Assurances required.

(a) *General.* Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the recipient, satisfactory to the Director, that each education program or activity operated by the recipient and to which this part applies will be operated in compliance with this part.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.5 *Transfers of property.*

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee which operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government, both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of subpart B.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.6 *Effect of other requirements.*

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 779A and 845 of the Public Health Service Act (42 U.S.C. 295h-9 and 298b-2); title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other act of Congress or Federal regulation.

(Secs. 901, 902, 905, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1685)

(b) *Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate, or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives or benefits from Federal financial assistance.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.7 *Effect of employment opportunities.*

The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.8 *Designation of responsible employee.*

Each recipient shall designate an employee to coordinate its efforts to comply with this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.9 *Dissemination of policy.*

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission or employment, students, employees, counselors of applicants for admission or employment, and other participants, beneficiaries, and other interested persons, that it does not discriminate on the basis of sex in the education programs or activities which it operates, and that it is required by title IX and this part not to discriminate in such manner. Such notification shall contain such information, and be made in such manner, as the Director finds necessary to apprise such persons of the protections against discrimination assured them by title IX and this part, but shall state at least that the requirement not to discriminate in education programs and activities extends to employment therein and to admission thereto unless subpart C does not apply to the recipient, and that inquiries concerning the application of title IX and this part to such recipient may be referred to the employee designated pursuant to § 86.9, or to the Director.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in: (i) local newspapers; (ii) newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and (iii) memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form which it makes available to any person of a type described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and require such representatives to adhere to such policy.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

SUBPART B—COVERAGE

§ 86.11 *Application.*

Except as provided in this subpart, this Part 86 applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance.

§ 86.12 *Educational institutions controlled by religious organizations.*

(a) *Application.* This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) *Exemption.* An education institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so in writing to the Director when filing the assurance required by § 86.4, setting forth the extent of the requested exemption and enclosing a statement of the religious tenets under which the exemption is claimed and any other information which might aid the Director in determining whether the institution qualifies for such exemption.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.13 *Military and merchant marine educational institutions.*

This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ *86.14 Admissions.*

(a) *Administratively separate units.* For the purposes only of this section, §§ 86.15 and 86.16, and subpart C, each administratively separate unit shall be deemed to be an educational institution.

(b) *Application of subpart C.* Except as provided in paragraphs (c) and (d) of this section, subpart C applies to each recipient. A recipient to which subpart C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.

(c) *Educational institutions.* Except as provided in paragraph (d) of this section as to recipients which are educational institutions, subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(d) *Public institutions of undergraduate higher education.* Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ *86.15 Educational institutions eligible to submit transition plans.*

(a) *Application.* This section applies to each educational institution to which subpart C applies which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recrutment in violation of subpart C unless it is carrying out a transition plan approved by the United States Commissioner of Education as described in § 86.16, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ *86.16 Transition plans.*

(a) *Submission of plans.* An institution to which § 86.15 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the United States Commissioner of Education, a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes, as regular students, and if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to elimniate as soon as practicable each obstacles so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students; by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which § 86.15 applies shall result in treatment of applicants to or students of such recipient in violation of subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 86.15 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs which emphasize the institution's commitment to enrolling students of the sex previously excluded.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ *86.17–86.20* [*Reserved*]

SUBPART C—DISCRIMINATION ON THE BASIS OF SEX IN ADMISSION AND RECRUITMENT PROHIBITED

§ *86.21 Admission.*

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§ 86.15 and 86.16.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies shall not:

(i) give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which adversely affects any person on the basis of sex unless use of such test or criterion is shown to predict validly successful completion of the education program or activity in question.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, miscarriage, abortion, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) shall treat disabilities related to pregnancy, childbirth, miscarriage, abortion, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and,

(4) shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Ms.," "Miss," or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ *86.22 Preference in admission.*

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ *86.23 Recruitment.*

(a) *Comparable recruitment.* A recipient to which this subpart applies shall make comparable efforts to recruit members of each sex, except that such recipient may be required to undertake additional recruitment efforts as remedial action pursuant to § 86.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 86.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ *86.24–86.30* [*Reserved*].

SUBPART D—DICRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES PROHIBITED

§ *86.31 Education programs and activities.*

(a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other eduation program or activity operated by a recipient which receives or benefits from Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which subpart C does not apply, or (2) an entity, not a recipient, to which subpart C would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior or other treatment;

(5) Discriminate against any person in the application of any rules of appearance;

(6) Apply any rule concerning the domicile or residence of a student or applicant;

(7) Aid or perpetuate discrimination against any person by assisting any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or serivce to students or employees; or

(8) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Programs not operated by recipient.* (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to ensure that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S. 1681, 1682)

§ *86.32 Housing.*

(a) *Generally.* A recipient shall not on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.*

(1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A reipient which, through solicition, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to ensure that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole: (i) proportionate in quantity and (ii) comparable in quality and cost to the student. A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

(Secs. 901, 902, 907, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1686)

§ 86.33 *Comparable facilities.*

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374)

§ 86.34 *Access to education program or activity.*[1]

(a) *Course offerings.* A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(b) *Local educational agencies.* A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(1) any institution of vocational education operated by such recipient; or

(2) any other school or educational unit operated by such recipient, unless such recipient otherwise make available to such person, pursuant to the same policies and criteria of admission, courses, servcies, and facilities comparable to each course, service, and facility offered in or through such schools.

(c) *Appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for different students on the basis of their sex or use materials which permit or require different treatment of students on such basis.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.35 *Financial and employment assistance to students.*

(a) *Provision of financial assistance.* (1) In providing financial assistance to any of its students a recipient shall not:

(i) On the basis of sex provide different amounts or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate; or

(ii) through solicitation, listing, approval, provision of facilities, or other services assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex.

(2) This paragraph does not apply to assistance by a recipient in the administration of a scholarship, fellowship, or other financial assistance program which discriminates on the basis of sex and is established under a foreign will, trust, bequest, or similar legal instrument, or by a foreign government.

(b) *Assistance in making available employment.* A recipient which assists any agency, organization, or person in making employment available to any of its students:

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[1] See last page of this document for proposal clarifying this section—from *Federal Register*, Vol. 39, No. 135, Friday, July 12, 1974.

(1) shall take such action as may be necessary to assure that such employment is made available without discrimination on the basis of sex; and

(2) shall not render such services to any agency, organization, or person which discriminates on the basis of sex in so making available such employment.

(c) *Employment of students.* A recipient which employs any of its students shall not do so in a manner which violates subpart E.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

(d) *Assistance related to athletics.* Notwithstanding the provisions of this section, separate financial assistance for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with § 86.38.

§ 86.36 Health and insurance benefits and services.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate subpart E if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.37 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extra-curricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, miscarriage, abortion, or recovery therefrom, unless:

(i) The student requests voluntarily to participate in a different such program or activity; or

(ii) The student's physician certifies to the recipient that such different participation is necessary for her physical, mental, or emotional well being.

(2) A recipient shall treat disabilities related to pregnancy, childbirth, false pregnancy, miscarriage, abortion, or recovery therefrom in the same manner and under the same policies as any temporary disability in any medical or hospital benefit, service, plan, or policy which such recipient administers, operates, offers, or participates in with regard to students admitted to the entity.

(3) In the case of a recipient which does not maintain a temporary disability policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy as a justification for a leave of absence for a reasonable period of time, the conclusion of which the student shall be reinstated to her original status.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.38 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any physical education or athletic program operated by a recipient, and no recipient shall provide any physical education or athletic program separately on such basis; provided, however, that a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill.

(b) *Determination of student interest.* A recipient which operates or sponsors athletics shall determine at least annually, using a method to be selected by the recipient which is acceptable to the Director, in which sports members of each sex would desire to compete.

(c) *Affirmative efforts.* A recipient which operates or sponsors athletic activities shall, with regard to members of a sex for which athletic opportunities previously have been limited, make affirmative efforts to:

(1) Inform members of such sex of the availability for them of athletic opportunities equal to those available for members of the other sex and of the nature of those opportunities, and

(2) Provide support and training activities for members of such sex designed to improve and expand their capabilities and interests to participate in such opportunities.

(d) *Equal opportunity.* A recipient which operates or sponsors athletics shall make affirmative efforts to provide athletic opportunities in such sports and through such teams as will most effectively equalize such opportunities for members of both sexes, taking into consideration the determination made pursuant to paragraph (b) of this section.

(e) *Separate teams.* A recipient which operates or sponsors separate teams for members of each sex shall not discriminate on the basis of sex therein in the provision of necessary equipment or supplies for each team, or in any other manner.

(f) *Expenditures.* Nothing in this section shall be interpreted to require equal aggregate expenditures for athletics for members of each sex.

§§ *86.39–86.40* [*Reserved*]

SUBPART E—DISCRIMINATION ON THE BASIS OF SEX IN EMPLOYMENT IN EDUCATION PROGRAMS AND ACTIVITIES PROHIBITED

§ *86.41* *Employment.*

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a manner which furthers equal employment opportunity regardless of sex, and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting individuals to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering frange benefits to employees of the recipient.

(b) *Application.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, pregnancy leave, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

(Secs: 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ *86.42* *Employment criteria.*

A recipient shall not administer or operate any test or other criterion for any employment opportunity which adversely affects any person on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validily successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such adverse effect, are shown to be unavailable.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ *86.43* *Recruitment.*

(a) *Comparable and affirmative recruiting.* If a recipient recruits applicants for employment, either generally or for particular positions, it shall make comparable efforts to recruit members of each sex in all such recruiting, except that a recipient shall make such affirmative attempts to recruit members of a sex which previously had limited employment participation as are necessary to overcome the effects of such limited participation.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ *86.44* *Compensation.*

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Requires any person to perform duties for which compensation is lower than that for performance in a different position:

(1) Entailing similar duties or,

(2) The position description for which is limited to similar duties; or

(c) Makes any person subject to a position description under which compensation is lower than that for performance:

(1) Under a different position description which is limited to similar duties, or

(2) In a different position entailing duties similar to those set forth in such position description.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ *86.45* *Job classification and structure.*

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which operate to classify persons on the basis of sex, unless sex is a bona fide occupational qualification for the positions in question as set forth in § 86.51.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ *86.46* *Fringe benefits.*

(a) *"Fringe benefits" defined.* For purposes of this part, "fringe benefits" means any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provisions of § 86.44.

(b) *Prohibitions.* A recipient shall not:

(1) discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; and

(3) administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.57 *Marital or parental status.*

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, or establish or follow any policy or practice which so discriminates or excludes. For the purpose of this subpart, "pregnancy" means the entire process of pregnancy, childbirth, and recovery therefrom, and includes false pregnancy, miscarriage, and abortion.

(c) *Pregnancy as a temporary disability.* A recipient shall treat disabilities caused or contributed to by pregnancy as temporary disabilities for all job-related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a temporary disability policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy as a justification for a leave of absence without pay for a reasonable period of [illegible] at the conclusion of which the employee shall be reinstated to her original job or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

(e) *Inception of and return from pregnancy leave.* In complying with this section, a recipient shall not require any employee to:

(1) Begin leave related to pregnancy so long as the employee's physician certifies in writing that [illegible] is physically capable of performing her duties, provided that a pregnant employee shall notify her employer in writing of her expected date of delivery, at least 120 days prior to such date; or

(2) Return to her employment after a leave related to pregnancy later than two weeks after the employee's physician certifies in writing that she is physically capable of performing her duties, or in the case of any employee in a teaching positon, later than the beginning of the first full academic term commencing after such certification is made.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.58 *Effect of State or local law or other requirements.*

(a) *Prohibitory requirements.* The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) *Benefits.* A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.59 *Advertising.*

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discriminaton based on sex unless sex is a bona-fide occupational qualification for the particular job in question.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.60 *Pre-employment inquiries.*

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Ms., Miss, or Mrs."

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

§ 86.51 *Sex as a bona-fide occupational qualification.*

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room, or toilet facility used only by members of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 86.52–86.60 [*Reserved*]

SUBPART F—PROCEDURES

§ 86.61 *Compliance information.*

(a) *Cooperation and assistance.* The Director will to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and will provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the Director timely, complete and accurate compliance reports at such time, and in such form and containing such information, as the Director may determine to be necessary to enable him or her to ascertain whether the recipient has complied or is complying with this part. For example, recipients shall have available for the Department data showing the extent to which members of the different sexes are students, employees or other beneficiaries of or participants in federally-assisted education programs and activities. In the case of any such program or activity under which one recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) *Access to sources of information.* Each recipient shall permit access by the Director during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities, and shall permit the Director to make copies of any such written information, as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and such agency, institution or person fails or refuses to furnish such information the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement will not be disclosed by the Department except where necessary in formal enforcement proceedings or where otherwise required by law.

(Sec. 902, Education Amendments of 1972, 86 Stat. 374; 20 U.S.C. 1682)

§ 86.62 *Conduct of investigation.*

(a) *Periodic compliance reviews.* The Director will from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes himself or herself or any specific class of individuals to be subjected to discrimination prohibited by this part may be himself or herself or by a representative file with the Director a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the Director, or unless the alleged discrimination took place after June 30, 1972, but prior to the effective date of this part. The Director shall notify each complainant promptly, in writing, that the complaint has been received.

(c) *Investigations.* The Director will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation will include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the Director will so inform the recipient and the complainant, if any, and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 86.63.

(2) If, after an investigation pursuant to paragraph (c) of this section, it appears that action pursuant to paragraph (d)(1) of this section is not warranted, the Director will so inform each complainant, in writing, and will give each complainant the opportunity to submit additional information, orally or in writing. Such information will be reviewed promptly and the Director will notify the complainant, in writing, of what action appears to be warranted in light of the information.

(3) If after an investigation pursuant to paragraph (c) of this section or after action required by paragraph (d)(2) of this section, it appears that action pursuant to paragraph (d)(1) of this section is not warranted, the Director will so inform the recipient and each complainant, in writing.

(e) *Intimidatory or retaliatory acts prohibited.* Each recipient shall permit the Director to interview any of its students or employees without a representative of such recipient being present. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 901 of the Education Amendments of 1972 or this part, or because he or she has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of complainants will be kept confidential by the Department except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder, or where otherwise required by law.

(Sec. 902, Education Amendments of 1972, 86 Stat. 374, 20 U.S.C. 1682)

§ 86.63 *Procedure for effecting compliance.*

(a) *General.* If there appears to be a failure or threatened failure to comply with this part, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to award or continue Federal financial assistance in accordance with the procedures of paragraph (c) of this section or by any other means authorized by law. Such other means may include, but are not limited to, (1) a referral to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States, or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) *Noncompliance with § 86.4.* If an applicant or recipient fails or refuses to furnish an assurance required under § 86.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section, Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department will not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that the Department will continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* No order suspending, terminating or refusing to award or continue Federal financial assistance will become effective until (1) the Director has advised the applicant or recipient of its failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been a finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, and (3) 30 days have expired after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to award or continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular education program or activity or part thereof in which such noncompliance has been so found.

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law will be taken until (1) the Director has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person and the complainant, if any, has been notified of the recipient's failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts will be made to persuade the recipient or other person to comply with this part and to take such corrective action as may be appropriate.

(Secs. 902, Education Amendments of 1972, 86 Stat. 374; 20 U.S.C. 1682)

§ *86.64* *Hearings.*

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § *86.63*(c), responsible notice will be given by registered or certified mail, return receipt requested, to each affected applicant or recipient. This notice will advise such applicant or recipient of the action proposed to be taken the specific provision under which the proposed action against it is to be taken and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request, by certified or registered mail addressed to the Director, that the matter be scheduled for hearing or (2) advise such applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed will be subject to change for cause. A copy of this notice will be mailed by certified mail, return receipt requested, to each individual complainant, and to each organization or group which has filed a complaint on behalf of one or more individuals pursuant to § 86.62(b), and each such complainant, organization, or group will be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 902 of the Education Amendments of 1972 and § 86.63(c) of this regulation and consent to the making of a decision on the basis of such information as may be filed as the record.

(b) *Time and place of hearing.* Hearings will be held before an administrative law judge designated in accordance with 5 U.S.C. 3105 and 3344. Hearings will be held at the offices of the Department in Washington, D.C., at a time fixed by the Director unless the administrative law judge determines that the convenience of the applicant or recipient or of the Department requires that another place be selected.

(c) *Participation as amicus curiae.* Each individual complainant, and each organization or group which has filed a complaint on behalf of one or more individuals, may petition the administrative law judge for leave to participate as *amicus curiae*, by giving testimony, by filing a brief, or both, in a hearing held pursuant to paragraph (a) of this section in any matter concerning which such complainant, organization, or group, has filed a complaint pursuant to § 86.62(b). Such petition shall be made no more than 20 days after the date of the notice prescribed by paragraph (a) of this section. Leave to participate as *amicus curiae* shall be liberally granted.

(d) *Right to counsel.* In all proceedings under this section, the recipient shall have the right to be represented by counsel.

(e) *Procedures, evidence, and record.* (1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with 5 U.S.C. 554–557 and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing. Any person (other than a Government employee on official business) who, having been invited or requested to appear and testify as a witness on the Government's behalf, attends at a time and place scheduled for a hearing provided by this part, may be reimbursed for his or her travel and actual expenses of attendance in an amount not to exceed the amount payable under the standardized travel regulations to a Government employee traveling on official business.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(f) *Consolidated or joint hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this part with respect to two or more programs to which this part applies, or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued under title IX, the Director may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedures not inconsistent with this part. Final decisions in such cases, insofar as this regulation is concerned, shall be made in accordance with § 86.65.

(Sec. 902, Education Amendments of 1972, 86 Stat. 374; 20 U.S.C. 1682)

§ 86.65 Decisions and notices.

(a) *Decisions by administrative law judges.* Within 30 days after a hearing is held by an administrative law judge such administrative law judge shall either make an initial decision, if so authorized, or certify the entire record including his or her recommended findings and proposed decision to the reviewing autohrity for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient and to the complainant, if any. Where the initial decision referred to in this paragraph or in paragraph (c) of this section is made by the administrative law judge, the applicant or recipient or the Department may within 20 days after issuance of the initial decision, file with the reviewing authority exceptions to the initial decision, with his or her reasons therefor. Upon the filing of such exceptions the reviewing authority shall review the initial decision and issue its own decision including the reasons therefor. In the absence of exceptions the initial decision shall constitute the final decision, subject to the provisions of paragraph (e) of this section.

(b) *Decisions on record or review by the reviewing authority.* Whenever a record is certified to the reviewing authority for decision or it reviews the decision of an administrative law judge pursuant to paragraph (a) or (c) of this section, the applicant or recipient shall be given reasonable opportunity to file with it briefs or other written statements of its contentions, and a copy of the final decision of the reviewing authority shall be given in writing to the applicant or recipient and to the complainant, if any.

(c) *Decisions on record where a hearing is waived.* Whenever a hearing is waived pursuant to § 86.64(a) the reviewing authority shall make its final decision on the record or refer the matter to an administrative law judge for an initial decision to be made on the record. A copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required.* Each decision of an administrative law judge or reviewing authority shall set forth a ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) *Review in certain cases by the Secretary.* If the Secretary has not personally made the final decision referred to in paragraph (a), (b), or (c) of this section, a recipient or applicant or the Department may, within 30 days after issuance of the final decision by the reviewing autohrity, request the Secretary to review such decision. Such review is not a matter of right and will be granted only where the Secretary determines there are special and important reasons therefor. The Secretary's decision to undertake or not to undertake review will be communicated in writing, within 30 days after such request, to each party, including *amicus curiae*, if any. The Secretary may grant or deny such request, in whole or in part. He or she may also review such a decision upon his or her own motion in accordance with rules of procedure issued by the Director. The Secretary's decision to undertake such review will be communicated in writing within 30 days after the issuance of the reviewing authority's decision, to each party, including *amicus curiae*. Failure of an applicant or recipient to file an exception with the reviewing authority or to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

(f) *Final agency action for purposes of judicial review.* (1) Except as provided in paragraph (f)(2) of this section, a decision under this section will become the final decision of the Department and will constitute final agency action within the meaning of section 704 of title 5 of the United States Code in the following manner:

(i) A decision by an administrative law judge pursuant to paragraph (a) will become final on the 21st day after such decision is made, unless prior to such day review by the reviewing authority has been requested.

(ii) A decision by the reviewing authority pursuant to paragraph (b) of this section will become final on the 31st day following its issuance unless review by the Secretary is requested prior to such day under paragraph (e) of this section, or unless the Secretary undertakes review on his or her own motion prior to such day under paragraph (e) of this section; or on the 31st day following a request that the Secretary review such decision under paragraph (e) of this section, unless the Secretary prior to such day grants such review.

(iii) A decision of the Secretary under paragraph (c) of this section will become final on the day following its issuance.

(2) A decision to terminate or to refuse to grant or continue Federal financial assistance, which would otherwise constitute the final decision of the Department and final agency action pursuant to paragraph (f)(1) of this section, shall not constitute such action until the Secretary transmits it as such to the appropriate Congressional committees with the report required under section 902 of the Education Amendments of 1972.

(g) *Content of orders.* The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, to which this part applies, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of title IX and this part, including provisions designed to assure that no Federal financial assistance to which this part applies will thereafter be extended to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this part, or to have otherwise failed to comply with this part unless and until it corrects its noncompliance and satisfies the Director that it will fully comply with this part.

(h) *Post-termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonable assurance that it will fully comply with this part.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (g) of this section may at any time request the Director to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of paragraph (h)(1) of this section. If the Director determines that those requirements have been satisfied, he or she will restore such eligibility.

(3) If the Director denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes such official to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record, in accordance with rules of procedure issued by the Director. The applicant or recipient will be restored to such eligibility if it proves at such hearing that it satisfied the requirements of paragraph (h)(1) of this section. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

(4) The pendency of any proceeding under this paragraph shall not lift or stay the sanctions imposed by the order issued under paragraph (g) of this section.

(Sec. 902, Education Amendments of 1972, 86 Stat. 374; 20 U.S.C. 1682)

§ 86.66 *Judicial review.*

Action taken pursuant to section 902 of the Education Amendments of 1972 is subject to judicial review is provided in section 903 of the Amendments.

(Sec. 902, Education Amendments of 1972, 86 Stat. 374; 20 U.S.C. 1682)

[FR Doc 74-14197 Filed 6-19-74; 8:45 am]

[From the Federal Register, July 12, 1974]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE—OFFICE OF THE SECRETARY

[45 CFR PART 86]

EDUCATION PROGRAMS

NONDISCRIMINATION ON THE BASIS OF SEX

The Department published on June 20, 1974, a notice of proposed rulemaking to add Part 86 to the Departmental regulation to effect Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 *et seq.*) with regard to Federal financial assistance administered by the Department. The purpose of the present notice is to invite public comment on proposed additional language to clarify § 86.34(a) of the proposed regulation relating to nondiscrimination in course offerings.

As proposed, section 86.34(a) reads as follows:

(a) *Course offerings.* A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

Immediately after the text of the proposed regulation was made public on June 18, 1974, the Department received numerous inquiries as to whether § 86.34 (a) permitted elementary and secondary schools to present separately to boys and girls brief presentations in the area of sex education. Although the language of the proposed regulation precludes such separation, I have not intended it to do so in the area of sex education. Sex education is perhaps the only area of instruction in which the subject of instruction necessarily deals explicitly with the sexual functions. In view of personal and parental attitudes concerning the subject, and because rights of privacy on these matters, desired by both students and their parents may well be invaded by requiring mixed classes on sex education, school administrators, for reasons not applicable to other subjects, might properly decide that some of or all of such sessions be conducted separately for boys and girls. In order that the public may have an opportunity to comment on specific language in this connection, I hereby give notice that I propose to insert in the final regulation, when published, a proviso at the end of the present text of proposed § 86.34 to read as follows:

Provided, That elementary and secondary schools' sessions involving sex education may be conducted for boys and girls separately.

Comments on the language here proposed will be considered along with other comments on the proposed regulations received before October 15, 1974. Comments received after that date will be considered until the regulation is prepared in final form. The proposal may be changed in light of comments received.

Part 86, together with this proposed change in language thereof, is proposed under the authority of section 902 of the Education Amendments of 1972 (20 U.S.C. 1682).

Dated: July 8, 1974.

CASPAR W. WEINBERGER,
Secretary.

[FR Doc.74-16049 Filed 7-11-74;8:45 am]

PUBLIC LAW 88-38—EQUAL PAY ACT OF 1963

[29 USC 206(d)]

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality or production; or (iv) a differential based on an other factor other than sex; *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of and employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime-compensation under this Act.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

[This publication conforms to the Code of Federal Regulations as of August 31, 1971, the date this reprint was authorized.]

Title 29, Part 800

EQUAL PAY FOR EQUAL WORK

UNDER THE FAIR LABOR STANDARDS ACT

This publication is based on the provisions of the Fair Labor Standards Act before its amendment by Public Law 92-318, effective July 1, 1972, which extends equal pay protection to executive, administrative, and professional employees and outside salesmen and brings pre-school facilities under coverage of the Act. Revision of the publication will be made to conform to the new amendments. Specific questions should be addressed to the nearest Wage-Hour Office.

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AUTHORITY: The provisions of this Part 800 issued under secs. 1–19, 52 Stat. 1060 as amended; 77 Stat. 56; 29 U.S.C. 201–219.

SOURCE: The provisions of this Part 800 appear at 30 F.R. 11504, Sept. 9, 1965, unless otherwise noted.

SUBPART A—GENERAL

INTRODUCTORY

SECTION 800.0.—GENERAL SCOPE OF THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act, as amended, hereinafter referred to as the Act, is a Federal statute of general application which establishes minimum wage, overtime pay, child labor, and equal pay requirements that apply as provided in the Act. All employees whose employment has the relationship to interstate or foreign commerce which the Act specifies are subject to the prescribed labor standards unless specifically exempted from them. Employers having such employees are required to comply with the Act's provisions in this regard unless relieved therefrom by some exemption in the Act. Such employers are also required to comply with specified recordkeeping requirements contained in Part 516 of this chapter. The law authorizes the Department of Labor to investigate for compliance and, in the event of violations, to supervise the payment of unpaid wages or unpaid overtime compensation owing to any employee. The law also provides for enforcement in the courts.

SECTION 800.1.—PURPOSE OF THIS PART

It is the purpose of this Part 800 to make available official interpretations of the Department of Labor with respect to the meaning and application of the equal pay provisions added to the Fair Labor Standards Act by the Equal Pay Act of 1963 (Public Law 88–38). The Equal Pay Act was enacted on June 10, 1963, for the purposes of correcting "the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex". This law amends the Fair Labor Standards Act by adding a new section 6(d) to its minimum wage provisions.

SECTION 800.2.—SIGNIFICANCE OF OFFICIAL INTERPRETATIONS

The interpretations of the law contained in this part are official interpretations of the Department of Labor with respect to the application under described circumstances of the provisions of law which they discuss. The ultimate decisions on interpretations of the Act are made by the courts. Court decisions supporting interpretations contained in this part are cited where it is believed they may be helpful. On matters which have not been determined by the courts, it is necessary for the Secretary of Labor and the Administrator to reach conclusions as to the meaning and the application of provisions of the law in order to carry out their responsibilities of administration and enforcement (*Skidmore* v. *Swift*, 323 U.S. 134). In order that these positions may be made known to persons who may be affected by them, official interpretations are issued by the Administrator on the advice of the Solicitor of Labor, as authorized by the Secretary (Reorg. Pl. 6 of 1950, 64 Stat. 1263; Gen. Ord. 45A, May 24, 1950, 15 F.R. 3290). As included in the regulations in this part, these interpretations are believed to express the intent of the law as reflected in its provisions and as construed by the courts and evidenced by its legislative history. They indicate the construction of the law which the Secretary of Labor and the Administrator believe to be correct and which will guide them in the performance of their duties under the Act unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect. References to pertinent legislative history are made in this part where it appears that they will contribute to a better understanding of the interpretations.

SECTION 800.3.—RELIANCE ON INTERPRETATIONS

On and after publication of this part in the Federal Register, the interpretations contained therein shall be in effect and shall remain in effect until they are modified, rescinded, or withdrawn. So long as they remain effective and are not modified, amended, rescinded, or determined by judicial authority to be incorrect, they may be relied upon as provided in section 10 of the Portal-to-Portal Act of 1947 (61 Stat. 84, 29 U.S.C. 251 et seq., discussed in Part 790 of this chapter). In addition, the Supreme Court has recognized that such interpretations of this Act "provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it" and "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance". Further, as stated by the Court: "Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons." (*Skidmore* v. *Swift*, 323 U.S. 134). This part supersedes and replaces the interpretations previously published in the Federal Register and Code of Federal Regulations as Part 800 of this chapter. Prior opinions, rulings, and interpretations and prior enforcement policies which are not inconsistent with the interpretations in the part or with the Fair Labor Standards Act as amended are continued in effect; all other opinions, rulings, interpretations, and enforcement policies on the subjects discussed in the interpretations in this part are rescinded and withdrawn.

SECTION 800.4.—MATTERS DISCUSSED IN THIS PART

(a) This part primarily discusses the meaning and application of the equal pay provisions in section 6(d) of the Act. These provisions are discussed in some detail in Subpart B. The enforcement provisions applicable to the equal pay requirements are discussed in Subpart B, sections 800.164–800.166. In addition, section 800.5 et seq. of this subpart briefly consider or make reference to the guides for determining what interstate commerce activities will bring employees and employers within the basic coverage of the Act so that its equal pay requirements may apply. The meaning and application of other provisions of the Act are discussed only to make clear their relevance to the equal pay provisions and are not considered in detail in this part.

(b) The interpretations in this part provide statements of general principles applicable to the subjects discussed and illustrations of the application of these principles to situations that frequently arise. They do not and cannot refer specifically to every problem which may be met in the consideration of the provisions discussed. The omission to discuss a particular problem in this part or in interpretations supplementing it should not be taken to indicate the adoption of any position by the Secretary of Labor or the Administrator with respect to such problem or to constitute an administrative interpretation or practice or enforcement policy. Questions on matters not fully covered by this part may be addressed to the Administrator of the Wage and Hour Division, United States Department of Labor, Washington, D.C. 20210, or to any Regional Office of the Division.

(c) Interpretations published elsewhere in this title deal with such subjects as the general coverage of the Act (Part 776 of this chapter), methods of payment of wages (Part 531, Subpart C of this chapter), computation and payment of overtime compensation (Part 778 of this chapter), retailing of goods or services (Part 779 of this chapter), hours worked (Part 785 of this chapter), and child labor provisions (Part 1500 of this title). Regulations on recordingkeeping are contained in Part 516 of this chapter, and regulations defining exempt bona fide executive, administrative, professional employees and outside salesmen are contained in Part 541 of this chapter. Regulations and interpretations on other subjects concerned with the application of the Act are listed in the table of contents to this chapter. Copies of any of these documents may be obtained from any office of the Wage and Hour and Public Contracts Divisions.

Basic Coverage and Exemption Provisions Affecting Application of Equal Pay Requirements

SECTION 800.5.—BASIC COVERAGE AS RELATED TO THE EQUAL PAY PROVISIONS

The equal pay provisions neither extend nor curtail coverage of the Fair Labor Standards Act but simply place within the new requirements those employers and employees who were already subject to the Act's minimum wage requirements (H. Rept. No. 309, 88th Cong., 1st sess., p. 2). The nature of the employment coming within the basic or general coverage of the Act should therefore be clearly understood. The general coverage of the Act extends, and its requirements apply except as otherwise provided by a specific exemption, to every employee who is "engaged in commerce or in the production of goods for commerce" and every employee who is "employed in an enterprise engaged in commerce or in the production of goods for commerce" or "by an establishment" qualifying as such an enterprise, as specified and defined in the statute. What employees are so engaged or employed must be ascertained in the light of the definitions and delimitations set forth in the statute, giving due regard to authoritative interpretations by the courts and to the legislative history of the Act, as amended. In section 800.6 to 800.12, the employment which comes within this basic coverage is briefly outlined. For a more comprehensive discussion and a detailed explanation of the applicable principles, reference should be made to the interpretations on general coverage contained in Part 776 of this chapter.

SECTION 800.6.—GENERAL COVERAGE OF EMPLOYEES "ENGAGED IN COMMERCE"

(a) The minimum wage provisions of the Act have applied since 1938, and continue to apply along with the new equal pay provisions, except as otherwise provided by specific exemptions in the Act, to employees "engaged in commerce". "Commerce" is broadly defined in section 3(b) of the Act. It includes both interstate and foreign commerce and is not limited to transportation across State lines, or to activity of a commercial character. All parts of the movement among the several States or between any State and any place outside thereof of persons or things, tangibles or intangibles, including communication of information and intelligence constitute movement in "commerce" within the statutory definition This includes those parts of any such activity which take place wholly within a single State. In addition, the instrumentalities for carrying on such commerce are so inseparable from the commerce itself that employees working on such instrumentalities within the borders of a single State are, by virtue of the contribution made by their work to the movement of the commerce, "engaged in commerce" within the meaning of the Act.

(b) Consistent with the purpose of the Act to apply the Federal standards "throughout the farthest reaches of the channels of interstate commerce", the courts have made it clear that the employees "engaged in commerce" to whom coverage is extended include every employee employed in the channels of such commerce or in activities so closely related to such commerce as to be considered a part of it as a practical matter. See *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *Overstreet* v. *North Shore Corp.*, 318 U.S. 125; *Mitchell* v. *Volmer*, 349 U.S. 427; *Mitchell* v. *Lublin*, 358 U.S. 207; see also *Borden Co.* v. *Borella*, 325 U.S. 679; and see the discussion, with other pertinent court decisions cited, in Part 776 of this chapter. Engaging "in commerce" includes activities connected therewith such as management and control of the various physical processes, together with the accompanying accounting and clerical activities. Thus, employees engaged in interstate or foreign commerce will typically include, among others, employees in distributing industries such as wholesaling or retailing who sell, transport, handle, or otherwise work on goods moving in interstate or foreign commerce as well as workers who order, receive, guard, pack, ship, or keep records of such goods; employees who handle payroll or personnel functions for workers engaged in such activities; clerical and other workers who regularly use the mails, telephone, or telegraph for communication across State lines; and employees who regularly travel across State lines while working. For other illustrations see Part 776 of this chapter.

SECTION 800.7.—GENERAL COVERAGE OF EMPLOYEES "ENGAGED IN * * * THE PRODUCTION OF GOODS FOR COMMERCE"

(a) The minimum wage provisions of the Act also have applied since 1938 and continue to apply along with the new equal pay provisions, except as otherwise provided by specific exemptions in the Act, to employees "engaged in * * * the production of goods for commerce". The broad meaning of "commerce" as defined in section 3(b) of the Act has been outlined in section 800.6. "Goods" is also comprehensively defined in section 3(i) of the Act, and includes "articles or subjects of commerce of any character, or any part or ingredient thereof" not expressly excepted by the statute. The activities constituting "production" of the goods for commerce are defined in section 3(j) of the Act. These are not limited to such work as manufacturing but include handling or otherwise working on goods intended for shipment out of the State either directly or indirectly or for use within the State to serve the needs of the instrumentalities or facilities by which interstate or foreign commerce is carried on. See *United States* v. *Darby*, 312 U.S. 100; *Alstate Constr. Co.* v. *Durkin*, 345 U.S. 13. Employees engaged in any closely related process or occupation directly essential to such production of any goods, whether employed by the producer or by an independent employer, are also engaged, by definition, in "production". See section 800.8 and the detailed discussion in Part 776 of this chapter. Further, the courts have recognized that an enterprise producing goods for commerce does not accomplish the actual production of such goods solely with employees performing physical labor on them. Thus, in *Borden* v. *Borella*, 325 U.S. 679, it was held that employees engaged in the administration, planning, management, and control of the various physical processes together with the accompanying clerical and accounting activities are, from a productive standpoint and for purposes of the Act, "actually engaged in the production of goods for commerce just as much as are those who process and work on the tangible products" in the manufacturing plants or other producing facilities of the enterprise.

(b) Typically, but not exclusively, employees engaged in the production of goods for interstate or foreign commerce include those who work in manufacturing, processing, and distributing establishments, including wholesale and retail establishments, that "produce" (including handle or work on) goods for such commerce. This includes everyone employed in such establishments, or elsewhere in the enterprises by which they are operated, whose activities constitute "production" of such goods under the principles outlined in paragraph (a) of this section. Thus, employees who sell, process, load, pack, or otherwise handle or work on goods which are to be shipped or delivered outside the State either by their employer or by another firm, and either in the same form or as a part or ingredient of other goods, are engaged in the production of goods for commerce within the coverage of the Act. So also are the office, management, sales, and shipping personnel, and maintenance, custodial, and protective employees who perform, as a part of the integrated effort for the production of the goods for commerce, services related to such production or to such goods or to the plant, equipment, or personnel by which the production is accomplished.

SECTION 800.8.—"CLOSELY RELATED" AND "DIRECTLY ESSENTIAL" ACTIVITIES

As previously noted in section 800.7 an employee is engaged in the production of goods for interstate or foreign commerce within the meaning of the general coverage provisions of the Act even if his work is not an actual and direct part of such production, so long as he is engaged in a process or occupation which is "closely related" and "directly essential" to it. This is true whether he is employed by the producer of the goods or by someone else who provides goods or services to the producer. See in this connection *Kirschbaum* v. *Walling*, 316 U.S. 517, and *Mitchell* v. *Joyce Agency*, 348 U.S. 945, affirming 110 F. Supp. 918. A full discussion of "closely related" and "directly essential" work is contained in

Part 776 of this chapter. Typical of employees covered under these principles are bookkeepers, stenographers, clerks, accountants, and auditors and other office and white-collar workers, and employees doing payroll, timekeeping, and time study work for the producer of goods; employees in the personnel, labor relations, safety and health, advertising, promotion, and public relations activities of the producing enterprise; work instructors for the producers; employees maintaining, servicing, repairing or improving the buildings, machinery, equipment, vehicles or other facilities used in the production of goods for commerce, and such custodial and protective employees as watchmen, guards, firemen, patrolmen, caretakers, stockroom workers and warehousemen; and transportation workers bringing supplies, materials, or equipment to the producer's premises, removing waste materials therefrom, or transporting materials or other goods, or performing such other transportation activities, as the needs of production may require. These examples are illustrative, rather than exhaustive, of the employees who are "engaged in the production of goods for commerce" by reason of performing activities closely related and directly essential to such production.

SECTION 800.9.—WHAT GOODS ARE CONSIDERED AS PRODUCED FOR COMMERCE

Goods (as defined in 3(i) of the Act) are "produced for commerce" if they are "produced, manufactured, mined, handled or in any other manner worked on" in any State for sale, trade, transportation, transmission, shipment, or delivery, to any place outside thereof. Goods are produced for commerce where the producer intends, hopes, expects, or has reason to believe that the goods or any unsegregated part of them will move (in the same or in an altered form or as a part or ingredient of other goods) in interstate or foreign commerce. If such movement of the goods in commerce can reasonably be anticipated by the producer when the goods are produced, it makes no difference whether he himself or the person to whom the goods are transferred puts the goods in interstate or foreign commerce. The fact that goods do move in interstate or foreign commerce is strong evidence that the producer intended, hoped, expected, or had reason to believe that they would so move. Goods may also be produced "for commerce" where they are to be used within the State and not transported in any form across State lines. This is true where the use to which they are put is one which serves the needs of the instrumentalities or facilities by which interstate or foreign commerce is carried on within the State. These principles are discussed comprehensively in Part 776 of this chapter.

SECTION 800.10—COVERAGE IS NOT BASED ON AMOUNT OF COVERED ACTIVITY

The act makes no distinction as to the percentage, volume, or amount of activities of either the employee or the employer which constitute engaging in commerce or in the production of goods for commerce. (Mabee v. White Plains Publishing Co., 327 U.S. 128; United States v. Darby, 312 U.S. 100.) As explained more fully in Part 776 of this chapter, the law is settled that every employee whose activities in commerce or in the production of goods for commerce, even though small in amount, are regular and recurring, is considered "engaged in commerce or in the production of goods for commerce". Also, under the definition in section 3(s) of the act, an enterprise described in any of the four numbered clauses of the subsection is an enterprise "engaged in commerce or in the production of goods for commerce" if, in its activities, some employees are so engaged, "including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person".

[32 F.R. 2378, February 3, 1967]

SECTION 800.11.—"ENTERPRISE" COVERAGE

The scope of the added coverage on an enterprise basis, which was provided by amendments to the Act, is determined with reference to the special definitions of the term "enterprise" in section 3(r) of the Act and of the term "enterprise engaged in commerce or in the production of goods for commerce" under section 3(s). Under these enterprise coverage provisions, if an enterprise or establishment is an "enterprise engaged in commerce or in the production of goods for commerce" as defined and delimited in section 3(s) of the Act, every employee employed in such enterprise or by such establishment is within the coverage of the minimum wage and the equal pay provisions, except as otherwise specifically provided by the Act. "Enterprise" coverage is discussed comprehensively elsewhere in this chapter. A detailed discussion of the statutory definition of "enterprise" and of enterprise coverage as it relates to enterprises which have retail or service establishments and as it relates to gasoline service establishments is contained in Part 779 of this chapter.

SECTION 800.12.—EXEMPTIONS FROM SECTION 6 PROVIDED BY SECTION 13

The equal pay provisions do not apply to employees exempted from the provisions of section 6 under any provision of section 13(a) of the act. The following employees are among those excluded if their employment fully satisfies all the statutory conditions for exemption: Bona fide executive, administrative, and professional employees, including academic administrative personnel and teachers in elementary and secondary schools, and outside salesmen, as defined in regulations (see Part 541 of this chapter); employees of certain retail or service establishments (see Part 779 of this chapter); employees of certain amusement or recreational establishments (see Act, sec. 13(a)(3)); employees of certain small newspapers (see Act, sec. 13(a)(8)); employees of motion picture theaters (see Act, sec. 13(a)(9)); switchboard operators of independent telephone companies which have fewer than 750 stations (see Act, sec. 13(a)(10)); employees on small farms and certain hand harvest workers paid piece rates (see Part 780 of this chapter).

[32 F.R 2379, February 3, 1967]

SUBPART B—THE EQUAL PAY PROVISIONS

THE STATUTORY PROVISIONS

SECTION 800.100.—SECTION 6(D) OF THE ACT

The Equal Pay Act of 1963 amended section 6 of the Fair Labor Standards Act by adding thereto a new subsection (d) as follows:

> (d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.
>
> (2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.
>
> (3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act.
>
> (4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

SECTION 800.101.—EFFECTIVE DATE OF EQUAL PAY REQUIREMENTS

(a) Section 4 of the Equal Pay Act of 1963 provides as follows with respect to the effective date of its amendments to the Fair Labor Standards Act:

> SEC. 4. The amendments made by this Act shall take effect upon the expiration of 1 year from the date of its enactment: *Provided*, That in the case of employees covered by a bona fide collective bargaining agreement in effect at least 30 days prior to the date of enactment of this Act, entered into by a labor organization (as dfined in section 6(d)(4) of the Fair Labor Standards Act of 1938, as amended), the amendments made by this Act shall take effect

upon the termination of such collective bargaining agreement or upon the expiration of 2 years from the date of enactment of this Act, whichever shall first occur.

(b) Under the above provision, on and after June 11, 1965, the equal pay provisions are effective with respect to all employment subject to their terms. On and after June 11, 1964, these provisions were applicable to most such employment. However, their application was deferred as to employees covered by bona fide collective bargaining agreements, which were in effect on May 11, 1963, and which did not terminate until some date after June 11, 1964. As to employees covered by such agreements the provisions became effective on the termination date of the agreement or on June 11, 1965, whichever was the earlier date.

APPLICATION OF PROVISIONS IN GENERAL

SECTION 800.102.—APPLICATION TO EMPLOYERS

The prohibition against discrinmation in wages on account of sex contained in section 6(d)(1) of the Act (see sec. 800.100) is applicable to every employer having employees subject to a minimum wage under the Act. The employer may not discriminate on the basis of sex against such employees in any establishment (see sec. 800.103) in which such employees are employed by him by paying them wages at rates lower than he pays employees of the opposite sex employed in the same establishment for work subject to the equal pay standard—that is, where equal work is performed by such employees and by employees of the opposite sex on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. (See secs. 800.119–800.132.) The Act excepts from this general prohibition such differences between the wage rates for such work performed by men and women employed by the employer in the establishment as can be shown to be based on a factor or factors other than sex. (See secs. 800.140–800.151.) It is clear from the proviso included in section 6(d)(1) that where a wage rate differential in violation of the provision is paid, the violation cannot be corrected by reducing the wage rate of any employee.

SECTION 800.103.—APPLICATION TO ESTABLISHMENTS

The prohibition against discrimination in wages on account of sex contained in section 6(d)(1) of the Act applies "within any establishment" in which employees who must be paid a minimum wage under section 6 are employed by an employer. The term "establishment' as used in section 6(d)(1) has the same meaning as it has in section 13(a)(2) and elsewhere in the Act. (See sec. 800.108.) It should be kept in mind, in determining an employer's obligations under the equal pay provisions, that "employer" and "establishment" as used in these and other provisions of the Act are not synonymous terms. An employer may have more than one establishment in which he employs employees within the meaning of the Act. In such cases, the legislative history makes clear that there shall be no comparison between wages paid to employees in different establishments.

SECTION 800.104.—APPLICATION TO EMPLOYEES

As has been seen, there must be compliance by the employer with the equal pay requirements within any establishment in which employees subject to the Act's minimum wage provisions are employed by him. The Act's concern with wage discrimination by an employer on account of sex to the detriment of his employees who are subject to the minimum wage provisions is not limited either by its language or by its legislative history to those employees whose work is performed on the premises of their employer's establishment. The Act speaks of the employment of employees in the establishment rather than of their engagement in work there. Also, the legislative history of the Equal Pay Act makes it clear that coverage under the equal pay provisions is equal to that provided by the other provisions of section 6 of the Fair Labor Standards Act, and that those employers and employees who are subject to the minimum wage provisions will be subject to the new provisions on equal pay. (See S. Rept. No. 176, 88th Cong., 1st sess., p. 2; H. Rept. No. 309, 88th Cong., 1st sess., p. 2.) Congress clearly rejected the concept that the equal pay provisions apply only to work performed inside a physical establishment. Otherwise, those employees, subject to section 6 of the Act, would be incongruously deprived of equal pay protection simply because their work is performed away from the physical premises of the establishment in which they are employed. On the other hand, it is clear from the language of the Act that in each distinct physical place of business where employees of an employer work (including, but not limited to, the employer's own establishments), the obligation of the employer to comply with the equal pay requirements must be determined separately with reference to those of his employees who are employed in that particular establishment. Accordingly, where there are a number of distinct physical places of business in which an employer's employees are employed, compliance with the equal pay provisions must be tested within each establishment by comparing the jobs in which employees are employed in that establishment and the wages paid for work on such jobs when performed by employees of opposite sexes.

[31 F.R. 11720, Sept. 7, 1966, as amended at 32 F.R. 2379, February 3, 1967]

SECTION 800.105.—EMPLOYEES NOT SUBJECT TO PROVISIONS

An employee may be employed in an establishment by an employer subject to the equal pay provisions, and yet not be protected by these provisions. Unless such an employee is one to whom the minimum wage provisions apply, the Act does not afford protection from a discrimination in wages based on sex between such employee and an employee of the opposite sex. This is true both with respect to employees who are not covered under section 6 and with respect to employees to whom section 6 cannot apply by reason of an express exemption in section 13(a). (See sec. 800.12.) More particularly, the equal pay standards have no application with respect to wages paid employees who are neither engaged in or in the production of goods for interstate commerce nor employed in an enterprise which is so engaged.

SECTION 800.106.—APPLICATION TO LABOR ORGANIZATIONS

Section 6(d)(2) of the Act prohibits a labor organization, representing employees of an employer having employees subject to the minimum wage provisions of section 6, from engaging in acts that cause or attempt to cause the employer to discriminate against an employee in violation of the equal pay provisions. Agents of the labor organization are also prohibited from doing so. Thus, such a labor organization and its agents must refrain from strike or picketing activities aimed at inducing an employer to institute or maintain a prohibited wage differential, and must not demand any terms or any interpretation of terms in a collective bargaining agreement with such an employer which would require the latter to discriminate in the payment of wages contrary to the provisions of section 6(d)(1). Section 6(d)(2), together with the special provision in section 4 of the Equal Pay Act of 1963 allowing a deferred effective date for application of the equal pay provisions to employees covered by specified existing collective bargaining agreements (see sec. 800.101) are indicative of the legislative intent that in situations where wage rates are governed by collective bargaining agreements, unions representing the employees shall share with the employer the responsibility for ensuring that the wage rates required by such agreements will not cause the employer to make payments that are not in compliance with the equal pay provisions. Thus, where equal work is being performed within the meaning of the statute, a wage rate differential which exists between male and female employees cannot be justified on the ground that it is a result of negotiation by the union with the employer, for negotiation of such a discriminatory wage differential is prohibited under the terms of the equal pay amendment.

DEFINITIONS PERTINENT TO APPLICATION

SECTION 800.107.—"EMPLOYER", "EMPLOYEE", "EMPLOY" DEFINED

The Act provides its own definitions of "employer", "employee", and "employ", under which "economic reality" rather than technical concepts" determines whether there is employment subject to its terms (Goldberg v. Whitaker House Cooperative, 366 U.S. 28; United States v. Silk, 331 U.S. 704; Rutherford Food Corp. v. McComb, 331 U.S. 722). An "employer", as defined in section 3(d) of the Act, "includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State (except with respect to employees of a State, or a political subdivision thereof, employed (a) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (b) in the operation of a railway or carrier referred to in such sentence) or any labor organization (other than when acting as an employer), or anyone acting in the capacity of a officer or agent of such labor organization". An "employee" as defined in section 3(e) of the Act "includes any individual employed by an employer" and "employ", as used in the Act, is defined in section 3(g) to include "to suffer or permit to work". It should be noted, as explained in the interpretative bulletin on joint employment, Part 791 of this chapter, that in appropriate circumstances two or more employers may be jointly responsible for compliance with the statutory requirements applicable to employment of a particular employee.

[32 F.R. 2379, February 3, 1967]

SECTION 800.108.—MEANING OF "ESTABLISHMENT"

Although not expressly defined in the Act, the term "establishment" has a well settled meaning in the application of the Act's provisions. It refers to a "distinct physical place of business" rather than to "an entire business or enterprise" which may include several separate places of business. This is consistent with the meaning of the term as it is normally used in business and in government, is judicially settled, and has been recognized in the Congress in the course of enactment of amendatory legislation (Phillips v. Walling, 324 U.S. 490; Mitchell v. Bekins Van & Storage Co., 352 U.S. 1027; 95 Cong. Rec. 12505, 12579, 14877; H. Rept. No. 1453, 81st Cong., 1st sess., p. 25). Each physically separate place of business is ordinarily considered a separate establishment For example, where a manufacturer operates at separate locations a plant for production of its goods, a warehouse for storage and distribution, several stores from which its products are sold, and a central office for the enterprise, each physically separate place of business is a separate establishment. Under certain circumstances, however, two or more portions of a business enterprise, even though located on the same premises and under the same roof, may constitute more than one establishment. This would ordinarily be the case only if these portions of the enterprise are both physically segregated and engaged in operations which are functionally separated from each other and which have separate employees and maintain separate records. The application of these principles is illustrated further and in more detail by the discussion in Part 779 of this chapter of the term "establishment".

[32 F.R. 2379, February 3, 1967]

SECTION 800.109.—"LABOR ORGANIZATION" DEFINED

For purposes of application to labor organizations of the requirements of section 6(d) of the Act and the enforcement of such requirements under sections 16 and 17 (see sec. 800.166), section 6(d)(4) of the Act defines the term "labor organization" as meaning "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." This is the same definition of "labor organization" that is used in the Labor Management Relations Act, 1947, and will be applied in the same manner.

SECTION 800.110.—MEANING OF "WAGES"

The term "wages" used in section 6(d)(1) of the Act is considered to have the same meaning it has elsewhere in the Act. As a general rule, in determining compliance with the equal pay provisions, the wages paid by the employer will be calculated pursuant to the same principles and procedures as have traditionally been followed in calculating such wages for purposes of determining compliance with the minimum wage provisions of the Act. Wages paid to an employee generally include all payments made to or on behalf of the employee as remuneration for employment. The provisions of section 7(e) of the Act under which some such payments may be excluded in computing an employee's "regular rate" of pay for purposes of section 7 do not authorize the exclusion of any such remuneration from the "wages" of an employee in applying section 6(d) of the Act. Thus, vacation and holiday pay, and premium payments for work on Saturdays, Sundays, holidays, regular days of rest, or other days or hours in excess or outside of the employee's regular days or hours of work, are remuneration for employment and therefore wage payments that must be considered in applying the equal pay provisions of the Act, even though not a part of the employee's "regular rate". On the other hand, payments made by an employer to an employee which do not constitute remuneration for employment are not "wages" to be compared for equal pay purposes under section 6(d) of the Act. Examples are payments related to maternity, and such reasonable payments for reimbursable expenses of traveling on the employer's business as are discussed in section 778.217 of this chapter.

[32 F.R. 2379, February 3, 1967]

SECTION 800.111.—WAGE "RATE"

The term wage "rate" used in section 6(d)(1 of the Act is considered to encompass all rates of wages whether calculated on a time, piece, job, incentive or other basis. The term includes the rate at which overtime compensation or other special remuneration is paid as well as the rate at which straight time compensation for ordinary work is paid. The term also includes the rate at which a "draw", advance, or guarantee is paid against a commission settlement.

SECTION 800.112.—COST OR VALUE OF NON-CASH ITEMS AS INCLUDED IN WAGES

The reasonable cost or fair value of certain perquisites, as provided in section 3(m) of the Act and Part 531 of this chapter is, by definition, a part of the wage paid to an employee for purposes of the Act. Section 3(m), in part provides that the wage paid to any employee includes "the reasonable cost, as determined by the Secretary of Labor, to the employer of furnishing such employee with board, lodging, or other facilities if such board, lodging, or other facilities are customarily furnished by such employer to his employees". As an exception to this rule, section 3(m) provides the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee. A further provision of section 3(m) authorizes the Secretary "to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value." The statute directs that such evaluations, "where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee". As explained in Part 531 of this chapter, it is the above provision of the Act which governs the payment, otherwise than in cash, of wages which the Act requires. Regulations under which the reasonable cost or fair value of such facilities furnished may be computed for inclusion as part of the wages required by the Act are also contained in Part 531 of this chapter.

[32 F.R. 2380, February 3, 1967]

SECTION 800.113.—PARTICULAR TYPES OF PAYMENTS AS WAGES

In addition to the examples referred to in sections 800.110 through 800.112, some further illustrations of the types of payments that must be considered in computing wages and wage rates for purposes of the equal pay provisions may be helpful. The Act requires comparison of the wage rates paid for "work on jobs", which makes relevant all remuneration for employment and not just that portion which constitutes compensation for particular hours of employment or particular work done. Clearly this includes all payments that may be counted as part of the minimum wage rate per hour required under section 6 of the Act, all payments that are part of the employee's regular rate under section 7 of the Act, and all overtime premiums. It includes in addition, however, other payments (such as the holiday and vacation pay previously mentioned in section 800.110) for the employee's work on the job as a whole which may have no direct relation to particular hours or weeks of work; and the inclusion of such payments in the wages compared for equal pay purposes does not depend on whether they can be counted as a part of the wage rate per hour required under section 6 as a minimum wage or whether they constitute part of the regular rate of pay under section 7. In accordance with the foregoing principles, the wages to be considered in determining compliance with the equal pay provisions include, in addition to such payments as hourly and daily wages, sums paid as weekly, monthly, or annual salaries; wages measured by pieces produced or tasks performed; commissions, bonuses or other payments measured by production, efficiency, attendance, or other job-related factors, or agreed to be paid under the employment contract; standby and on-call pay; and extra payments made for hazardous, disagreeable, or inconvenient working conditions. These are illustrative, although not exhaustive, of the types of payments included, when part of the remuneration for employment, in the wages to be compared where employees of opposite sexes are employed in jobs subject to the equal pay standard. On the other hand, the "wages" which are compared for equal pay purposes do not include bona fide gifts or payments in the nature of gifts which would be excluded from the employee's regular rate under section 7(e)(1) of the Act and section 778.212 of this chapter. Likewise, sums paid as discretionary bonuses are not considered wages for equal pay purposes if such payments meet the requirements of section 7(e)(3)(a) of the Act and section 778.211 of this chapter. Study is still being given to some categories of payments made in connection with employment subject to the Act, to determine whether and to what extent such payments are remuneration for employment that must be counted as part of wages for equal pay purposes. These categories of payments include sums paid in recognition of services performed during a given period pursuant to a bona fide profit-sharing plan or trust meeting the requirements of Part 549 of this chapter or pursuant to a bona fide thrift or savings plan meeting the requirements of Part 547 of this chapter, and contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees. (See sections 778.214 and 778.215 of this chapter.)

[32 F.R. 2380, February 3, 1967]

EQUALITY OF PAY

SECTION 800.114.—"MALE JOBS" AND "FEMALE JOBS" GENERALLY

(a) Wage classification systems which designate certain jobs as "male jobs" and other jobs as "female jobs" frequently specify markedly lower rates for the "female jobs". Because such a practice frequently indicates a pay practice of discrimination based on sex, where such systems exist a serious question would be raised as to whether prohibited wage differentials are involved. This position is consistent with that taken by the National War Labor Board which found such systems inherently discriminatory and explained that it is not consistent with the principle of equal pay for equal work to designate certain jobs as "female jobs" and other jobs as "male jobs" and on that ground alone establish rate differentials against the former and in favor of the latter. The Board held that the equal pay principle requires that proper rates be set for all jobs, based upon a fair objective evaluation of duties and functions, irrespective of the sex of the workers assigned to them (General Electric Co. and Westinghouse Electric Corp., Case No. 111-17208-D and 111-17209-D, Dec. 12, 1945).

[32 F.R. 2380, February 3, 1967]

It should be further noted that wage classification systems which designate certain jobs as "male jobs" and other jobs as "female jobs" may contravene Title VII of the Civil Rights Act of 1964 except in those certain instances where sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise (78 Stat. 241, 256).

[32 F.R. 5737, April 8, 1967]

(b) Section 6(d)(1) prohibits discrimination on the basis of sex in the payment of wages to employees "for equal work *on jobs*" which are equal under the standards which it provides (emphasis supplied). (See the discussion in section 800.119 et seq.) The Legislative history of the Equal Pay Act expressly refers to the War Labor Board experience as furnishing a guide for testing "the relationship between jobs" and determining "equal work" and "equal skills" for purposes of a "practical" administration and application of the Act's "equal pay policy" (See, e.g., S. Rept. 176, 88th Cong. 1st sess., to accompany S. 1409; H. Rept. 309, 88th Cong. 1st sess., to accompany H.R. 6060). Some of the earliest cases confronting the War Labor Board on the application of the "equal pay for equal work" principle involved situations in which women were being hired to replace men as a result of the manpower shortages. The Board consistently ruled that the principle applied to these situations, as well as to situations where male and female employees performed the same work concurrently and interchangeably, and therefore that women assigned "to take the place of men" to perform substantially the same jobs "formerly performed by men" were entitled to the same rate of pay as the men whom they replaced. Rotary Cut Box Shook Industry, 12 W.L.B. Rept. 605, 606, 608; General Electric Co., and Westinghouse Electric Co., supra, at pp. 668–669, 677, 686.

(c) That the Equal Pay Act was intended to encompass situations of this kind is confirmed by the declared purposes and terms of the Act as well as by the legislative history. The statute is intended to eliminate sex as a basis for wage differentials between employees performing equal work on jobs within the establishment, and if the rates paid for the same jobs are lower when occupants of the jobs are of one sex than they are when the jobs are filled by employees of the opposite sex, such discrimination within the establishment is equally in violation of the statutory prohibition whether or not employees of both sexes are employed in such jobs at the same time. Accordingly, where an employee of one sex is hired or assigned to a particular job to replace an employee of the opposite sex, comparison of the newly assigned employee's wage rate with that of the replaced former employee is required for purposes of section 6(d)(1), whether or not the job is performed concurrently by employees of both sexes. For example, if a particular job which in the past has been performed by a male employee becomes vacant and is then filled by a female employee, it would be contrary to the equal pay requirement to pay the female employee a lower wage rate than was paid for the same job when performed by the male employee, even though employees of both sexes may not be performing the job at the same time. Payment of the lower wage rate in such circumstances is a prohibited wage differential. The same principle is involved if all employees of one sex are removed from a particular job (by transfer or discharge) so as to retain employees of only one sex in a job previously performed interchangeably or concurrently by employees of both sexes. If a prohibited sex-based wage differential had been established or maintained in violation of the Act when the same job was being performed by employees of both sexes, the employer's obligation to pay the higher rate for the job cannot be avoided or evaded by the device of confining the job to members of the lower paid sex. Compliance with the Act in such circumstances can be achieved only by increasing the wage rate to the higher rate paid for the job when performed by employees of the opposite sex.

[32 F.R. 2380, February 3, 1967]

SECTION 800.115.—INEQUALITIES IN PAY THAT RAISE QUESTIONS UNDER THE ACT

It is necessary to scrutinize with especial care those inequalities in pay between employees of opposite sexes which may indicate a pattern of discrimination in wage payment that is based on sex. Thus, a serious question would be raised where such an inequality, allegedly based on a difference in job content, is in fact one in which the employee occupying the job purportedly requiring the higher degree of skill, effort, or responsibility receives the lower wage rate. Likewise, because the equal pay amendment was designed to eliminate wage rate differentials which are based on sex, situations will be carefully scrutinized where employees of only one sex are concentrated in the lower grades of the wage scale, and where there does not appear to be any material relationship other than sex between the lower wage rates paid to such employees and the higher rates paid to employees of the opposite sex. Such concentrations in rate range situations may occur also where an employer follows a practice of paying a range of rates to newly hired employees. Differentials in entrance rates will not constitute a violation of the equal pay principle if the factors taken into consideration in determining which rate is to be paid each employee are applied equally to men and women. This would be true, for example, if all persons who have a parent employed by the firm are paid at the highest rate of the rate range whether they are men or women. However, if in a particular establishment all persons of one sex tend to be paid at the lowest rate of the range and employees of the opposite sex hired to perform the same work tend to be paid at the highest rate of the range, and if no specific factor or factors other than sex appear to be associated with the difference in pay, a serious question would be raised as to whether the pay practice involves prohibited wage differentials.

SECTION 800.116.—EQUALITY AND INEQUALITY OF PAY IN PARTICULAR SITUATIONS

(a) *Overtime work.*—Because overtime premiums are a part of wages for purposes of the equal pay provisions, where men and women receive the same straight-time rates for work subject to the equal pay standards, but the men receive an overtime premium rate of twice the straight-time rate while the women receive only one and one-half times the straight-time rate for overtime, a prohibited wage rate differential is being paid. On the other hand, where male and female employees perform equal work during regular hours but employees of one sex only continue working overtime into another work period, work performed during this later period may be compensated at a higher rate where such is required by law or is the customary practice of the employer. However, in such a situation the payment of the higher rate to employees of one sex for all hours worked, including the non-overtime hours when they are performing equal work with employees of the opposite sex, would result in a violation of the equal pay provisions. If male and female employees are performing equal work in the establishment during regular hours but only some of these employees continue working into an overtime period, payment of a higher wage rate for the overtime worked would not be in violation of the equal pay standard so long as it were paid for the actual overtime hours worked by the employees, whether male or female.

(b) *Special assignments.*—The fact that an employee may be required to perform an additional task outside his regular working hours would not justify payment of a higher wage rate to that employee for all hours worked. However, employees who are assigned a different and unrelated task to be performed outside the regular workday may under some circumstances be paid at a different rate of pay for the time spent in performing such additional duty provided such rate is commensurate with the task performed. For example, suppose a male employee is regularly employed in the same job with female employees in the same establishment in work which requires equal skill, effort, and responsibility, and is performed under similar working conditions, except that the male employee must carry money to a bank after the establishment closes at night. Such an employee may be paid at a different rate for the time spent in performing this unrelated task if the rate is appropriate to the task performed and the payment is bona fide and not simply used as a device to escape the equal pay requirements of the Act.

(c) *Vacation or holiday pay.*—Since vacation or holiday pay is deemed to be remuneration for employment included in wages within the meaning of the Act, if employees of one sex receive vacation pay for a greater number of hours than employees of the opposite sex, a prohibited wage rate differential is being paid if their work is subject to the equal pay standard and the differential is not shown to come within any of the specified exceptions.

(d) *Contributions to employee benefit plans.*—If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees.

(e) *Commissions.*—The establishment of different rates of commission on different types of merchandise would not result in a violation of the equal pay provisions where the factor of sex provides no part of the basis for the differential. For example, suppose that a retail store maintains two shoe departments, each having employees of both sexes, that the shoes carried in the two departments differ in style, quality, and price, and that the male and female sales clerks in the one department are performing "equal work" with those in the other. In such a situation, a prohibited differential would not result from payment of a lower commission rate in the department where a lower price line with a lower markup is sold than in the other department where the merchandise is higher priced and has a higher markup, if the employer can show that the commission rates paid in each department are applied equally to the employees of both sexes in the establishment for all employment in that department and that the factor of sex has played no part in the setting of the different commission rates.

[31 F.R. 6770, May 6, 1966]

SECTIONS 800.117–800.118.—[RESERVED]

THE EQUAL PAY FOR EQUAL WORK STANDARD—GENERALLY

SECTION 800.119.—THE JOB CONCEPT IN GENERAL

Section 6(d)(1) of the Act prohibits an employer from paying to employees of one sex wages at rates lower than he pays employees of the opposite sex for "equal work on jobs" described by the statute in terms of equality of the "skill, effort, and responsibility" required for performance and similarity of the "working conditions" under which they are performed. This descriptive language refers to "jobs". In applying the various tests of equally to the requirements for the performance of such jobs, it will generally be necessary to scrutinize the job as a whole and to look at the characteristics of the jobs being compared over a full work cycle. This will be true because the kinds of activities required to perform a given job and the amount of time devoted to such activities may vary from time to time. As the legislative history makes clear, the equal pay standard provided by the Act is designed to eliminate any wage rate differentials which are based on sex; nothing in the equal pay provisions is intended to prohibit differences in wage rates that are based not at all on sex but wholly on other factors. (See S. Rept. No. 176, 88th Cong. 1st sess., p. 4; H. Rept. No. 309, 88th Cong. 1st sess., p. 2.)

SECTION 800.120.—EFFECT OF DIFFERENCES BETWEEN JOBS IN GENERAL

There is evidence that Congress intended that jobs of the same or closely related character should be compared in applying the equal pay for equal work standard (Daily Congressional Record, House, May 23, 1963, pp. 8686, 8698). Jobs that require equal skill, effort, and responsibility in their performance within the meaning of the Act are usually not identical in every respect (Daily Congressional Record, Senate, May 28, 1963, p. 9219). Congress did not intend that inconsequential differences in job content would be a valid excuse for payment of a lower wage to an employee of one sex than to an employee of the opposite sex if the two are performing equal work on essentially the same jobs in the same establishment. It will be remembered in this connection that the National War Labor Board (to the experience of which attention is directed in the Senate and House Committee Reports) developed a policy of ignoring inconsequential differences in job content in administering equal pay for equal work provisions (Brown & Sharp Manufacturing Co. Case No. 2228–D, Sept. 25, 1942). On the other hand, it is clear that Congress did not intend to apply the equal pay standard to jobs substantially differing in their terms and conditions. Thus, the question of whether a female bookeeper should be paid as much as a male file clerk required to perform a substantially different job is outside the purview of the equal provisions. It is also clear that the equal pay standard is not to be applied where only men are employed in the establishment in one job and only women are employed in a dissimilar job. For example, the standard would not apply where only women are employed in clerk typist positions and only men are employed in jobs as administrative secretaries if the latter really require substantially different duties.

SECTION 800.121.—JOB CONTENT CONTROLLING

Application of the equal pay standard is not dependent on job classifications or titles but depends rather on actual job requirements and performance. For example, the fact that jobs performed by male and female employees may have the same total point value under an evaluation system in use by the employer does not in itself mean that the jobs concerned are equal according to the terms of the statute. Conversely, although the point values allocated to jobs may add up to unequal totals, it does not necessarily follow that the work being performed in such jobs is unequal when the statutory tests of the equal pay standard are applied. Job titles are frequently of such a general nature as to provide very little guidance in determining the application of the equal pay standard. For example, the job title "clerk" may be applied to employees who perform a variety of duties so dissimilar as to place many of them beyond the scope of comparison under the statute. Similarly, jobs included under the title "stock clerk" may include an employee of one sex who spends all or most of his working hours in shifting and moving goods in the establishment whereas another employee, of the opposite sex, may also be described as a "stock clerk" but be engaged entirely in checking inventory. Clearly, the equal pay standard would not apply where jobs require such substantially different duties, even though the job titles are identical. In other situations, including those which exist in the case of job identified by the general title "retail clerks", the facts may show that equal skill, effort, and responsibility are required in the jobs of male and female employees notwithstanding they are engaged in selling different kinds of merchandise. In all such situations, the application of the equal pay standard will have to be determined by applying the terms of the statute to the full factual situation.

SECTION 800.122.—GENERAL GUIDES FOR TESTING EQUALITY OF JOBS

(a) What constitutes equal skill, equal effort, or equal responsibility cannot be precisely defined. In interpreting these key terms of the statute, the broad remedial purpose of the law must be taken into consideration. The terms are considered to constitute three separate tests, each of which must be met in order for the equal pay standard to apply. In applying the tests it should be kept in mind that "equal" does not mean "identical" (Daily Congressional Record, Senate, May 28, 1963, p. 9219). Insubstantial or minor differences in the degree or amount of skill, or effort, or responsibility required for the performance of jobs will not render the equal pay standard inapplicable. On the other hand, substantial differences, such as those customarily associated with differences in wage levels when the jobs are performed by persons of one sex only, will ordinarily demonstrate an inequality as between the jobs justifying differences in pay. In determining whether job differences are so substantial as to make jobs unequal, it is pertinent to inquire whether and to what extent significance has been given to such differences in setting the wage levels for such jobs. Such an inquiry may, for example, disclose that apparent differences between jobs have not been recognized as relevant for wage purposes and that the facts as a whole support the conclusion that the differences are too insubstantial to prevent the jobs from being equal in all significant respects under the law.

(b) To illustrate, where employees of opposite sexes are employed in jobs in which the duties they are required to perform and the working conditions are substantially the same, except that an employee of one sex is required to perform some duty or duties involving a higher skill which an employee of the other sex is not required to perform, the fact that the duties are different in this respect is insufficient to remove the jobs from the application of the equal pay standard if it also appears that the employer is paying a lower wage rate to the employee performing the additional duties notwithstanding the additional skill which they involve. In other situations, where employees of opposite sex are employed in jobs which are equal in the levels of skill, effort, and responsibility required for their performance, it may be alleged that the assignment to employees of one sex but not the other of certain duties requiring less skill makes the jobs too different for comparison under the equal pay provisions. But so long as the higher level of skill is required for the performance of the jobs occupied by employees of both sexes, the fact that some of the duties assigned to employees of one sex require less skill than the employee must have for the job as a whole does not warrant any conclusion that the jobs are outside the purview of the equal pay standard. Such a conclusion would be especially inappropriate if the employees of the sex to whom the less skilled work was assigned received a higher rate of pay. There are, of course, situations in which a review of all the pertinent facts will clearly establish that the male and female employees in question are not performing equal work on jobs which are equal in their requirements of skill, effort, and responsibility, and which are performed under similar working conditions. Where it is clear that this is so, the existence or extent of a wage differential between employees of opposite sexes cannot of itself provide a basis for holding an employer liable for violations under the provisions of section 6(d) of the Act.

SECTION 800.123.—DETERMINING EQUALITY OF JOB CONTENT IN GENERAL

In determining whether differences in job content are substantial in order to establish whether or not employees are performing equal work within the meaning of the Act, the amounts of time which employees spend in the performance of different duties are not the sole criteria. It is also necessary to consider the degree of difference in terms of skill, effort, and responsibility. These factors are related in such a manner that a general standard to determine equality of jobs cannot be set up solely on the basis of a percentage of time. Consequently, a finding that one job requires employees to expend greater effort for a certain percentage of their working time than employees performing another job, would not in itself establish that the two jobs do not constitute equal work. Similarly, the performance of jobs on different machines or equipment would not necessarily result in a determination that the work so performed is unequal within the meaning of the statute if the equal pay provisions otherwise apply. If the difference in skill or effort required for the operation of such equipment is inconsequential, payment of a higher wage rate to employees of one sex because of a difference in machines or equipment would constitute a prohibited wage rate differential. Likewise, the fact that jobs are performed in different departments or locations within the establishment would not necessarily be sufficient to demonstrate that unequal work is involved where the equal pay standard otherwise applies. This is particularly true in the case of retail establishments, and unless a showing can be made by the employer that the sale of one article requires such a higher degree of skill or effort than the sale of another article as to render the equal pay standard inapplicable, it will be assumed that the salesmen and saleswomen concerned are performing equal work. Although the equal pay provisions apply on an establishment basis and the jobs to be compared are those in the particular establishment, all relevant evidence that may demonstrate whether the skill, effort, and responsibility required in the jobs at the particular establishment are equal should be considered, whether this relates to the performance of like jobs in other establishments or not.

SECTION 800.124.—COMPARING "EXEMPT" AND "NONEXEMPT" JOBS

Situations sometimes arise in which it is alleged that lower wages are being paid, in violation of the Act, to a nonexempt employee than to an exempt employee of the opposite sex for equal work on jobs said to be equal within the meaning of the Act. Usually it is necessary in such a case to scrutinize carefully the respective job requirements, working conditions, and pay arrangements before it is possible to reach an informed judgment as to the existence of any violation of the Act. To illustrate, suppose it is alleged that employees of opposite sexes are performing equal work within the meaning of the Act and that a wage discrimination on account of sex exists because one of such employees, but not the other, is paid the minimum compensation on a salary basis which is required for exemption as a bona fide executive or administrative employee and is treated by the employer as such an exempt employee under section 13(a)(1) of the Act and the regulations in 29 CFR Part 541. In such a case, regard must be had to the fact that the regulations define an employee employed in a bona fide executive or administrative capacity in terms of the coexistence of a number of factors, only one of which is the receipt of compensation in a specified minimum amount on a salary basis. The existence of all these factors must be verified to determine whether the employer is correct in treating the employee who receives such salary as exempt. Regard must also be had to the fact that an employee who qualifies for exemption, because all the factors required by the regulations coexist, may be required to work as many hours as the employer may be able to persuade him to work for the stated salary, without any necessity of compliance by the employer with the minimum wage, equal pay or overtime compensation requirements of the Act. This is important because the fact that another employee of the opposite sex doing similar work does not receive the salary requisite for an exemption under the regulations would not in all cases mean that such employee is being paid at a lower rate of pay. In fact, because the nonexempt employee must receive at least the minimum wage for every hour worked and the prescribed additional compensation at the specified multiple of the regular rate for every such hour in excess of the applicable maximum workweek, it is possible, depending on the length of the workweek, that the pay in the nonexempt job may exceed the salary paid in the exempt job for the identical number of hours worked. For these reasons, a comparison of exempt and nonexempt jobs requires careful examination of all the facts and does not lend itself to the application of any general rules.

EQUAL SKILL

SECTION 800.125.—JOBS REQUIRING EQUAL SKILL IN PERFORMANCE

The jobs to which the equal pay standard is applicable are jobs requiring equal skill in their performance. Where the amount or degree of skill required to perform one job is substantially greater than that required to perform another job, the equal pay standard cannot apply even though the jobs may be equal in all other respects. Skill includes consideration of such factors as experience, training, education, and ability. It must be measured in terms of the performance requirements of the job. If an employee must have essentially the same skill in order to perform either of two jobs, the jobs will qualify under the Act as jobs the performance of which requires equal skill, even though the employee in one of the jobs may not exercise the required skill as frequently or during as much of his working time as the employee in the other job. Possession of a skill not needed to meet requirements of the job cannot be considered in making a determination regarding equality of skill. The efficiency of the employee's performance in the job is not in itself an appropriate factor to consider in evaluating skill.

SECTION 800.126.—COMPARING SKILL REQUIREMENTS OF JOBS

As a simple illustration of the principle of equal skill, suppose that a man and a woman have jobs classified as typists. Both jobs require them to spend two-thirds of their working time in typing and related activities, such as proofreading and filing, and the remaining one-third in diversified tasks, not necessarily the same. Since there is no difference in the skills required for most of their work, whether or not these jobs require equal skill in performance will depend upon the nature of the work the employees must actually perform during this latter period to meet the requirements of the jobs. If it happens that the man, during the remaining one-third of the time, spends twice as much time operating a calculator as does the woman who prefers and is allowed to do most of the copying work required in the office, this would not preclude a conclusion that the tinction in the performance requirements of such jobs so far as the skills utilized in these tasks are concerned. Even if the man were required to do all of the calculating work in order to perform his job, it is not at all apparent that the jobs would require substantially different degrees of skill unless it should appear that operation of that calculator requires more training and can command a higher wage than the typing and related work performed by both the man and the woman, and that the work required to be done by the woman in the remaining one-third of the time requires less training and is recognized as commanding a lower wage whether perfomed by a man or a woman.

EQUAL EFFORT

SECTION 800.127.—JOBS REQUIRING EQUAL EFFORT IN PERFORMANCE

The jobs to which the equal pay standard is applicable are jobs that require equal effort to perform. Where substantial differences exist in the amount or degree of effort required to be expended in the performance of jobs, the equal pay standard cannot apply even though the jobs may be equal in all other respects. Effort is concerned with the measurement of the physical or mental exertion needed for the performance of a job. Where jobs are otherwise equal under the Act, and there is no substantial difference in the amount or degree of effort which must be expended in performing the jobs under comparison, the jobs may require equal effort in their performance even though the effort may be exerted in different ways on the two jobs. Differences only in the kind of effort required to be expended in such a situation will not justify wage differentials.

SECTION 800.128—COMPARING EFFORT REQUIREMENTS OF JOBS

To illustrate the principle of equal effort exerted in different ways, suppose that a male checker employed by a supermarket is required to spend part of his time carrying out heavy packages or replacing stock involving the lifting of heavy items whereas a female checker is required to devote an equal degree of effort during a similar portion of her time to performing fill-in work requiring greater dexterity—such as rearranging displays of spices or other small items. The difference in kind of effort required of the employees does not appear to make their efforts unequal in any respect which would justify a wage differential, where such differences in kind of effort expended to perform the job are not ordinarily considered a factor in setting wage levels. Further, the occasional or sporadic performance of an activity which may require extra physical or mental exertion is not alone sufficient to justify a finding of unequal effort. Suppose, however, that men and women are working side by side on a line assembling parts. Suppose further that one of the men who performs the operations at the end of the line must also lift the assembly, as he completes his part of it, and places it on a waiting pallet. In such a situation, a wage rate differential might be justified for the person (but only for the person) who is required to expend the extra effort in the performance of his job, provided that the extra effort so expended is substantial and is performed over a considerable portion of the work cycle. However, a serious question would be raised about the bona fides of a wage differential if it is paid to a male employee who is otherwise performing equal work with female employees on the basis that the male is required to do some heavy lifting, unless a similar distinction in wage rates is made in the establishment as between male employees only where some do heavy lifting and other do not. In general, a wage rate differential based on differences in the degree or amount of effort required for performance of jobs must be applied uniformly to men and women. For example, if all women and some of the men performing a particular type of job do not perform heavy lifting, and some men do, payment of a higher wage rate to all of the men than to the women would constitute a prohibited wage rate differential if the equal pay provisions otherwise apply.

EQUAL RESPONSIBILITY

SECTION 800.129.—JOBS REQUIRING EQUAL RESPONSIBILITY IN PERFORMANCE

The jobs to which the equal pay standard applies are jobs in the performance of which equal responsibility is required. Responsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation. Differences in the degree of responsibility required in the performance of otherwise equal jobs cover a wide variety of situations. The following illustration in section 800.130, which are by no means exhaustive, may suggest the nature or degree of differences in responsibility which will constitute unequal work.

SECTION 800.130.—COMPARING RESPONSIBILITY REQUIREMENTS OF JOBS

(a) There are many situations where one employee of a group performing jobs which are equal in other respects is required from time to time to assume supervisory duties for reasons such as the absence of the regular superivsor. Suppose, for instance, that it is the employer's practice to pay a higher wage rate to such a "relief" supervisor with the understanding that during the intervals in which he performs supervisory duties he is in training for a supervisory position. In such a situation, payment of the higher rate to him might well be based solely on the additional responsibility required to perform his job and the equal pay provisions would not require the same rates to be paid to an employee of the opposite sex in the group who does not have an equal responsibility. There would clearly be no question concerning such a wage rate differential if the employer pays the higher rate to both men and women who are called upon from time to time to assume such supervisory responsibilities.

(b) Other differences in responsibilities of employees in generally similar jobs may require similar conclusions. Sales clerks, for example, who are engaged primarily in selling identical or similar merchandise may be given different responsibilities. Suppose that one employee of such a group (who may be either a man or a woman) is authorized and required to determine whether to accept payment for purchases by personal checks of customers. The person having this authority to accept personal checks may have a considerable additional degree of responsibility which may materially affect the business operations of the employer. In this situation, payment of a higher wage rate to this employee would be permissible.

(c) On the other hand, there are situations where one employee of the group may be given some minor responsibility which the others do not have (e.g., turning out the lights in his department at the end of the business day) but which is not of sufficient consequence or importance to justify a finding of unequal responsibility. As another example of a minor difference in responsibility, suppose that office employees of both sexes work in jobs essentially alike but at certain intervals a male and female employee performing otherwise equal work within the meaning of the statute are responsible for the office payroll. One of these employees may be assigned the jobs of checking time cards and compiling the payroll list. The other, of the opposite sex, may be required to make out paychecks, or divide up cash and put the proper amounts into pay envelopes after drawing a payroll check. In such circumstances, although some of the employees' duties are occasionally dissimilar, the difference in responsibility involved would not appear to be of a kind that is recognized in wage administration as a significant factor in determining wage rates. Under such circumstances, this difference would seem insufficient to justify a wage rate differential between the man's and the woman's job if the equal pay provisions otherwise apply.

Similar Working Conditions

SECTION 800.131.—JOBS PERFORMED UNDER SIMILAR WORKING CONDITIONS

In order for the equal pay standard to apply, the jobs must be performed under similar working conditions. It should be noted that the statute adopts the flexible standard of similarity as a basis for testing this requirement. In determining whether the requirement is met, a practical judgment is required in the light of whether the differences in working conditions are the kind customarily taken into consideration in setting wage levels. The mere fact that jobs are in different departments of an establishment will not necessarily mean that the jobs are performed under dissimilar working conditions. This may or may not be the case.

SECTION 800.132.—DETERMINING SIMILARITY OF WORKING CONDITIONS

Generally, employees performing jobs requiring equal skill, effort, and responsibility are likely to be performing them under similar working conditoins. However, in situations where some employees performing work meeting these standards have working conditions substantially different from those required for the performance of other jobs the equal pay principle would not apply. For example, if some sales persons are engaged in selling a product exclusively inside a store and others employed by the same establishment spend a large part of their time selling the same product away from the establishment, the working conditions would be dissimilar. Also, where some employees do repair work exclusively inside a shop while others employed by the shop spend most of their time doing similar repair work in customers' homes, there would not be similarity in working conditions. On the other hand, slight or inconsequential differences in working conditions that are essentially similar would not justify a differential in pay. Such differences are not usually taken into consideration by employers or in collective bargaining in setting wage rates.

SECTIONS 800.133–800.139.—[RESERVED]

Exceptions to Equal Pay Standard

SECTION 800.140.—THE SPECIFIED EXCEPTIONS

Section 6(d)(1) of the Act provides three specific exceptions and one broad general exception to its general standard requiring that employees doing equal work be paid equal wages, regardless of sex. Under these exceptions, where it can be established that a differential in pay is the result of a wage payment made pursuant to a seniority system, a merit system, a system measuring earnings by quantity or quality of production, or that the differential is based on any other factor other than sex, the differential is expressly excluded from the statutory prohibition of wage discrimination based on sex. The legislative intent was stated to be that any discrimination based upon any of these exceptions shall be exempted from the operation of the statute. These exceptions recognize, as do the reports of the legislative committees, that there are factors other than sex that can be used to justify a wage differential, even as between employees of opposite sexes performing equal work on jobs which meet the statutory tests of equal skill, effort, and responsibility, and similar working conditions. (See H. Rept. No. 309, S. Rept. No. 176, 88th Congress 1st sess.)

SECTION 800.141.—ESTABLISHING APPLICATION OF AN EXCEPTION

(a) The facts necessary to establish that a wage differential has a basis specified in any of the foregoing exceptions are peculiarly within the knowledge of the employer. If he relies on the excepting language to exempt a differential in pay from the operation of the equal pay provisions, he will be excepted to show the necessary facts. Thus, such a showing will be required to demonstrate that a payment of wages to employees at a rate less than the rate at which he pays employees of the opposite sex is based on a factor other than sex where it appears that such payments are for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions within the meaning of the statute. After careful examination of the legislative history and the judicial precedents, this is believed to be the most reasonable construction of the law and the one which will be approved by the courts. However, because there is some legislative history that could support a different view, the reasons for reaching the foregoing conclusions are explained in some detail in paragraph (b) of this section.

(b) The legislative history of the Equal Pay Act amendments to the Fair Labor Standards Act includes some statements in the House debate, by a member of the House committee who was an active sponsor of the legislation in the form approved by the committee, expressing a view differing from that stated in paragraph (a) of this section. The opinion expressed in these statements appears to be that the burden of establishing a prima facie case of violation of the equal pay provisions includes not only a showing of the facts necessary to establish a failure to comply with the Act's general standard, but also a showing that no facts exist that could bring the wage differential within an exception. In this view, the employer would not have to show facts necessary to provide the exception as an affirmative defense (Daily Congressional Record, House, May 23, 1963, p. 8698). But if the exceptions are intended to have an exempting effect, as was indicated by House committee spokesmen (H. Rept. No. 309, 88th Cong., 1st sess., p. 3; statement of Subcommittee Chairman Thompson, Daily Congressional Record, House, May 23, 1963, p. 8685), it seems plain that a view such as that expressed above is not consistent with the general rule established by the courts that the application of an exemption under this Act is a matter of affirmative defense and the employer urging such an exemption has the burden of showing that it applies. (See *Philips* v. *Walling*, 334 U.S. 490; *Arnold* v. *Kanowsky*, 361 U.S. 388; *Walling* v. *General Industries Co.*, 330 U.S. 545; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290.) On balance, it would be difficult to conclude from the legislative history that it was the intent of Congress to supersede this established rule by applying a different rule to these provisions that to other exemptions from section 6 or 7. The House committee report emphasized that the "now familiar system of * * * administration, and enforcement, * * * will be utilized fully to complement the new provision" and many statements in the legislative debates as well as the report of the Senate committee further indicate a well-understood legislative intent to apply and enforce the equal pay provisions in a manner consistent with the familiar procedures traditionally followed under the Act in the administration and enforcement of its labor standards. (H. Rept. No. 309, S. Rept. No. 176, 88th Cong. 1st sess.; Daily Congressional Record, House, May 23, 1963, pp. 8692, 8705; Daily Congressional Record, Senate, May 28, 1963, pp. 9219–9220). Also pertinent is the understanding expressed by the House sponsors that a "bona fide program" that "does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination" (H. Rept. No. 309, 88th Cong. 1st sess.; Daily Congressional Record, House, May 23, 1963, p. 8685) and the clarifying remarks of the subcommittee chairman managing the House-passed legislation in the Senate, who said: "The employer's defense, if it is based on an employer's plan, must be a bona fide one; and the burden of demonstrating the legitimacy of that defense will rest upon the employer." (Daily Congressional Record, Senate, May 28, 1963, p. 9219). On review of the legislative history as a whole, therefore, the most reasonable conclusion appears to be that the position expressed in paragraph (a) of this section is the better view, and that it is consistent with the legislative intent to consider the statutory exceptions, like other exemptions from section 6, as matters of affirmative defense and to require an employer who believes he comes within them to show facts establishing that this is so.

SECTION 800.142.—SEX MUST NOT BE A FACTOR IN EXCEPTED WAGE DIFFERENTIALS

While differentials in the payment of wages are permitted when it can be shown that they are based on a seniority system, a merit system, a system measuring earnings by quantity or quality of production, or on any other factor other than sex, the requirements for such an exception are not met unless the factor of sex provides no part of the basis for the wage differential. If these conditions are met, the fact that application of the system for measuring earnings results in higher average earnings for employees of one sex than for employees of the opposite sex performing equal work would not constitute a prohibited wage differential. However, to come within the exempting provisions, any system or factor of the type described pursuant to which a wage rate differential is paid must be applied equally to men and women whose jobs require equal skill, effort, and responsibility, and are performed under similar working conditions. Any evaluation, incentive, or other payment plan which establishes separate and different "male rates" and "female rates" without regard to job content will be carefully examined to determine if these rate differentials are based on sex in violation of the equal pay requirements.

SECTION 800.143.—ESTABLISHING ABSENCE OF SEX AS A FACTOR

A showing that a wage differential is based on a factor other than sex, so as to come within one of the exceptions in section 6(d)(1), may sometimes be incomplete without a showing that there is a reasonable relationship between the amount of the differential and the weight properly attributable to the factor other than sex. To illustrate, suppose that male clerks who work 40 hours each week and female clerks who work 35 hours each week are performing equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. If they are paid weekly salaries for this work, a differential in the amounts could be justified as based on a difference in hours of work, a difference based on a factor other than sex which the chairman of the House subcommittee stated would "be exempted under this act." (Daily Congressional Record, House, p. 8685, May 23, 1963.) But if the difference in salaries paid is too great to be accounted for by the difference in hours of work, as where the male clerks are paid $90 for their 40-hour week (equal to $2.25 an hour) and the female clerks receive only $70 for their 35-hour week (equal to $2.00 an hour), then it would seem necessary to show some other factor other than sex as the basis for the unexplained portion of the wage differential before a conclusion that there is no wage discrimination based on sex would be warranted. To illustrate further, a compensation plan which provides for a higher rate of commission, "draw", advance or guarantee for sales employees of one sex than for employees of the opposite sex performing "equal work" would be in violation of the equal pay provisions of the Act unless the employer can establish that the differential in pay is pursuant to a seniority system, a merit system, or a system measuring earnings by quantity or quality of production, or is based on any other factor other than sex. A compensation plan which provides for a "draw" based on a percentage of each employee's earnings during a specified prior period would not be in violation of the equal pay provisions of the Act if the plan is applied equally to men and women. However, for all men to receive a higher draw, because it is the employer's experience that men generally earn more in commissions than women, would not be sufficient indication that the differential is based on a factor other than sex.

SECTION 800.144.—EXCEPTED "SYSTEMS"

The exceptions for a seniority "system", a merit "system", and a "system" for measuring earnings by quantity or quality of work are not restricted to, although they include, formal systems or systems or plans that are reduced to writing. Such formal or written systems or plans may, of course, provide better evidence of the actual factors which provide a basis for a wage differential, but any informal or unwritten system or plan which can be shown to provide the basis for differentials in wage rates because of seniority, merit, or quantity or quality of production may qualify under the statutory language if it can be demonstrated that the standards or criteria applied under it are applied pursuant to an established plan the essential terms and conditions of which have been communicated to the affected employees.

SECTION 800.145.—APPLICATION OF EXCEPTIONS ILLUSTRATED, IN GENERAL

When applied without distinction to employees of both sexes, shift differentials, incentive payments, production bonuses, performance and longevity raises and the like will not result in equal pay violations. For example, in an establishment where men and women are employed on a job, but only men work on the night shift for which a night shift differential is paid, such a differential would not be prohibited. However, the payment of a higher hourly rate to all men on that job for all hours worked because some of the men may occasionally work nights would result in a prohibited wage differential. The examples (in the sections following) illustrate a few applications of the exception provisions.

SECTION 800.146.—EXAMPLES—"RED CIRCLE" RATES, IN GENERAL

The term "red circle" rates describes certain unusual, higher than normal, wage rates which are maintained for many reasons. An example of the use of a "red circle" rate might arise in a situation where a company wishes to transfer a long-service male employee, who can no longer perform his regular job because of ill health, to different work which is now being performed by women. Under the "red circle" principle the employer may continue to pay the male employee his present salary, which is greater than that paid to the women employees, for the work both will be doing. Under such circumstances, maintaining an employee's established wage rate, despite a reassignment to a less demanding job, is a valid reason for the differential even though other employees performing the less demanding work would be paid at a lower rate, since the differential is based on a factor other than sex. However, where wage rate differentials have been or are being paid on the basis of sex to employees performing equal work, rates of the higher paid employees may not be "red circled" in order to comply with the Act. To allow this would only continue the inequities which the Act was intended to cure.

SECTION 800.147.—EXAMPLES—TEMPORARY REASSIGNMENTS

For a variety of reasons an employer may require an employee, for a short period, to perform the work of a job classification other than the empoloyee's regular classification. If the employee's rate for his regular job is higher than the rate usually paid for the work to which he is temporarily reassigned, the employer may continue to pay him the higher rate, under the "red circle" principle. For instance, an employer who must reduce help in a skilled job may transfer employees to less demanding work without reducing their pay, in order to have them available when they are again needed for their former jobs. Although employees traditionally engaged in performing the less demanding work would would be paid at a lower rate than those employees transferred from the more skilled jobs, the resultant wage differential would not constitute a violation of the equal pay provisions since the differential is based on factors other than sex. This would be true during the period of time for which the "red circle" rate is bona fide. (See sec. 800.146.) Temporary reassignments may also involve the opposite relationship of wage rates. Thus, an employee may be required, during the period of temporary reassignment, to perform work for which employees of the opposite sex are paid a higher wage rate than that paid for the duties of the employee's regular job classification. In such a situation, the employer may continue to pay the reassigned employee at the lower rate, if the rate is not based on quality or quantity of production, and if the reassignment is in fact a temporary one. If a piece rate is paid employees of the opposite sex who perform the work to which the employee in question is reassigned, failure to pay that employee the same piece rate paid such other employees would raise questions of discrimination based on sex. Also, failure to pay the higher rate to the reassigned employee after it becomes known that the reassignment will not be of a temporary nature would raise a question whether sex rather than the temporary nature of the assignment is the real basis for the wage differential. Generally, failure to pay the higher rate for a period longer than one month will raise questions as to whether the reassignment was in fact intended to be a temporary one.

SECTION 800.148.—EXAMPLES—TRAINING PROGRAMS

Employees employed under a bona fide training program may, in the furtherance of their training, be assigned from time to time to various types of work in the establishment. At such times, the employee in training status may be performing equal work with nontrainees of the opposite sex whose wages or wage rates may be unequal to those of the trainee. Under these circumstances, provided the rate paid to the employee in training status is paid, regardless of sex, under the training program, the differential can be shown to be attributable to a factor other than sex and no violation of the equal pay standard will result. Training programs which appear to be available only to employees of one sex will, however, be carefully examined to determine whether such programs are, in fact, bona fide. In an establishment where a differential is paid to employees of one sex because, traditionally, only they have been considered eligible for promotion to executive positions, such a practice, in the absence of a bona fide training program, would be a discrimination based on sex and result in a violation of the equal pay provisions, if the equal pay standard otherwise applies.

SECTION 800.149.—EXAMPLES—"HEAD OF HOUSEHOLD"

Sometimes differentials in pay to employees performing equal work are said to be based on the fact that one employee is head of a household and the other, of the opposite sex, is not. In general, such allegations have not been substantiated. Experience indicates that where such factor is claimed the wage differentials tend to be paid to employees of one sex only, regadless of the fact that employees of the opposite sex may bear equal or greater financial responsibility as head of a household or for the support of parents or other family dependents. Accordingly, since the normal pay practice in the United States is to set a wage rate in accordance with the requirements of the job itself and since a "head of household" or "head of family" status bears no relationship to the requirements of the job or to the individuals performance on the job, the general position of the Secretary of Labor and the Administrator is that they are not prepared to conclude that any differential allegedly based on such status is based on a "factor other than sex" within the intent of the statute.

SECTION 800.150.—EXAMPLES—TEMPORARY AND PART-TIME EMPLOYEES

The payment of different wage rates to permanent employees than to temporary employees such as may be hired during the Christmas season would not necessarily be a violation of the equal pay provisions even though equal work is performed by both groups of workers. For example, no violation would result where payment of such a differential conforms with the nature and duration of the job and with the customary practice in the industry and the establishment, and the pay practice is applied uniformly to both men and women. Generally, employment for a period longer than one month will raise questions as to whether the employment is in fact temporary. Likewise, the payment of a different wage to employees who work only a few hours a day than to employees of the opposite sex who work a full day will not necessarily involve noncompliance with the equal pay provisions, even though both groups of workers are performing equal work in the same establishment. No violation of the equal pay standards would result if, for example, the difference in working time is the basis for the pay differential, and the pay practice is applied uniformly to both men and women. However, if employees of one sex work 30 to 35 hours a week and employees of the other sex work 40 to 45 hours, a question would be raised as to whether the differential is not in fact based on sex since different rates for part-time work are usually for workweeks of 20 hours or less.

SECTION 800.151.—EXAMPLES—EMPLOYMENT COST FACTORS

A wage differential based on claimed differences between the average cost of employing the employer's women workers as a group and the average cost of employing the men workers as a group does not qualify as a differential based on any "factor other than sex," and would result in a violation of the equal pay provisions, if the equal pay standard otherwise applies. To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purpose of the Equal Pay Act. Wage differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed, because in any grouping by sex of the employees to which the cost data relates, the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual than a particular individual of the opposite sex under similar working conditions in jobs requiring equal skill, effort, and responsibility.

[31 F.R. 2657, Feb. 11, 1966]

SECTION 800.152–800.159.—[RESERVED]

RELATION TO OTHER LAWS

SECTION 800.160.—RELATION TO OTHER EQUAL PAY LAWS

The provisions of various State or other equal pay laws may differ from the equal pay provisions set forth in the Fair Labor Standards Act. There is also other Federal legislation which deals broadly with discrimination by employers against individuals because of sex, including discrimination on such grounds with respect to compensation for employment (see Civil Rights Act of 1964, 78 Stat. 241, Title VII). Where any such legislation and the equal pay provisions of the Fair Labor Standards Act both apply, the principle established in section 18 of the latter Act will be controlling. No provisions of the Fair Labor Standards Act will excuse noncompliance with any State or other law establishing equal pay standards higher than the equal pay standards provided by section 6(d) of the Fair Labor Standards Act. On the other hand, compliance with other applicable legislation will not excuse noncompliance with the equal pay provisions of the Fair Labor Standards Act.

SECTION 800.161.—HIGHER STATE MINIMUM WAGE

State laws providing minimum wage requirements may affect the application of the equal pay provisions of the Fair Labor Standards Act. If a higher minimum wage than that required under the Act is applicable to a particular sex pursuant to State law, and the employer pays the higher State minimum wage to male or female employees, he must also pay the higher rate to employees of the opposite sex for equal work in order to comply with the equal pay provisions of the Act.

SECTION 800.162.—OVERTIME PAYMENTS REQUIRED BY STATE LAW

The application of the equal pay provisions of the Act may also be affected by State legal requirements with respect to overtime pay. If as a result of a State law, female employees in an employer's establishment are paid overtime premiums for hours worked in excess of a prescribed maximum in any workday or workweek, the employer must pay male employees performing equal work in such establishment the same overtime premiums when they work such excess hours, in order to comply with the equal pay provisions of the Fair Labor Standards Act. This would be true even though both the male and the female employees performing equal work are otherwise qualified for exemption from the overtime pay requirements of section 7 of the Fair Labor Standards Act. It would not be true, however, unless the overtime requiring the premium pay is actually being worked by the women.

SECTION 800.163.—OTHER LAWS NOT APPLYING EQUALLY TO EMPLOYMENT OF BOTH SEXES

In making a determination as to the application of the equal pay provisions of the Fair Labor Standards Act, legal restrictions in State or other laws upon the employment of individuals of a specified sex, with respect to such matters as hours of work, weight-lifting, rest periods, or other conditions of such employment, will not be deemed to make otherwise equal work unequal or be considered per se as justification for an otherwise prohibited differential in wage rates. For example, under the Act, the fact that a State law limits the weights which women are permitted to lift would not justify a wage differential in favor of all men regardless of job content. The Act would not prohibit a wage differential paid to male employees whose weight-lifting activities required by the job involve so significant a degree of extra effort as to warrant a finding that their jobs and those of female employees doing similar work do not involve equal work within the meaning of the Act. However, the fact that there is an upper liimt set by State law on the weights that may be lifted by women would not justify a wage differential to male employees who are not regularly required to lift substantially greater weights or expend the extra effort necessary to make the jobs unequal. The requirement of equal pay in such situations depends on whether the employees involved are actually performing "equal work" as defined in the Act, rather than on legal restrictions which may vary from State to State.

ENFORCEMENT

SECTION 800.164.—INVESTIGATIONS AND COMPLIANCE ASSISTANCE

The Wage and Hour Division is charged with the administration of the Fair Labor Standards Act, including the equal pay provisions. Investigations under the Act will therefore include such inquiry as may be necessary to obtain compliance with the equal pay provisions in cases where they are applicable. As provided in section 11(a) of the Act, authorized representatives of the Division may investigate and gather data regarding the wages, hours and other conditions and practices of employment. They may enter establishments and inspect the premises and records, transcribe records, and interview employees. They may investigate whatever facts, conditions, practices, or matters are considered necessary to find out whether any person has violated any provisions of the Act or which may aid in enforcement of the Act. Wage-Hour investigators will advise employers regarding any changes necessary or desirable regarding payroll, recordkeeping and other personnel practices which will aid in achieving and maintaining compliance with the law. Complaints, records, and other information obtained from employers and employees are treated confidentially.

SECTION 800.165.—RECORDKEEPING REQUIREMENTS

Records required to be kept by employers having employees subject to the equal pay provisions under section 6(d) of the Act are set forth in sections 516.2, 516.6, and 516.29 of this chapter.

SECTION 800.166.—RECOVERY OF WAGES DUE; INJUNCTIONS; PENALTIES FOR WILLFUL VIOLATIONS

(a) Pursuant to section 6(d)(3) of the Act, wages withheld in violation of the equal pay provisions have the status of unpaid minimum wages or unpaid overtime compensation under the Fair Labor Standards Act. This is true both of the additional wages required by the Act to be paid to an employee to meet the equal pay standard, and of any wages that the employer should have paid an employee whose wages he reduced in violation of the Act in an attempt to equalize his pay with that of an employee of the opposite sex performing equal work, on jobs subject to the equal pay standards.

(b) The following methods are provided under sections 16 and 17 of the Act for recovery of unpaid wages: The Administrator of the Wage and Hour Division may supervise payment of the back wages and, in certain circumstances, the Secretary of Labor may bring suit for back pay upon the written request of the employee. The employee may sue for back pay and an additional sum, up to the amount of back pay, as liquidated damages, plus attorney's fees and court costs. The employee may not bring suit if he had been paid back wages under supervision of the Administrator, or if the Secretary has filed suit to collect the wages. The Secretary may also obtain a court injunction to restrain any person from violating the law, including the unlawful withholding by an employer of proper compensation. A 2-year statute of limitations applies to the recovery of unpaid wages, except that an action on a cause of action arising out of a willful violation may be commenced within 3 years after the cause of action accrued.

[32 F.R. 2381, February 3, 1967]

(c) Willful violations of the Act may be prosecuted criminally and the violator fined up to $10,000. A second conviction for such a violation may result in imprisonment.

(d) The equal pay provisions are an integral part of section 6 of the Act, violation of any provision of which by any person, including any labor organization or agent thereof, is unlawful, as provided in section 15(a) of the Act. Accordingly, any labor organization, or agent thereof, who violates any provision of section 6(d) of the Act is subject to injunction proceedings in accordance with the applicable provisions of section 17 of the Act. Any such labor organization, or agent thereof, who willfully violates the provisions of section 15 is also liable to the penalties set forth in section 16(a) of the Act.

> This is the text of Executive Order 11246, signed by President Johnson September 24, 1965, as amended by Executive Order 11375, signed October 13, 1967.
>
> Amended Part I was superseded by Executive Order 11478, signed by President Nixon August 8, 1969.
>
> Part II was amended to add sex as a prohibited basis of discrimination, effective October 13, 1968.

EXECUTIVE ORDER 11246

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the Unied States, it is ordered as follows:

PART I—NONDISCRIMINATION IN GOVERNMENT EMPLOYMENT

[Secs. 101–105, barring discrimination in federal employment on account of race, color, religion, sex, or national origin, were superseded by Executive Order 11478. These provisions called for affirmative-action programs for equal opportunity at the agency level under general supervision of the Civil Service Commission; establishment of complaint procedures at each agency with appeal to the Commission; and promulgation of regulations by CSC.]

PART II—NONDISCRIMINATION IN EMPLOYMENT BY GOVERNMENT CONTRACTORS AND SUBCONTRACTORS

SUBPART A—DUTIES OF THE SECRETARY OF LABOR

SEC. 201. The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

SUBPART B—CONTRACTORS' AGREEMENTS

SEC. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive

Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided*, however, That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

SEC. 203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

(b) Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any previous contract subject to the provisions of this Order, or any preceding similar executive order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

(c) Whenever the contractor or subcontractor has a collective bargaining agreement or other contract or understanding with a labor union or an agency referring workers or providing or supervising apprenticeship or training for such workers, the Compliance Report shall include such information as to such labor union's or agency's practices and policies affecting compliance as the Secretary of Labor may prescribe: *Provided*, That to the extent such information is within the exclusive possession of a labor union or an agency referring workers or providing or supervising apprenticeship or training and such labor union or agency shall refuse to furnish such information to the contractor, the contractor shall so certify to the contracting agency as part of its Compliance Report and shall set forth what efforts he has made to obtain such information.

(d) The contracting agency or the Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information, to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, religion, sex, or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this Order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the Order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the contracting agency or the Secretary of Labor may require.

SEC. 204. The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order. The Secretary of Labor may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: *Provided*, That such an exemption will not interfere with or impede the effectuation of the purposes of this Order: *And provided further*, That in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

SUBPART C—POWERS AND DUTIES OF THE SECRETARY OF LABOR AND THE CONTRACTING AGENCIES

SEC. 205. Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors. All contracting agencies shall comply with the rules of the Secretary of Labor in discharging their primary responsibility for securing compliance with the provisions of contracts and otherwise with the terms of this Order and of the rules, regulations and orders of the Secretary of Labor issued pursuant to this Order. They are directed to cooperate with the Secretary of Labor and to furnish the Secretary of Labor such information and assistance as he may require in the performance of his functions under this Order. They are further directed to appoint or designate, from among the agency's personnel compliance officers. It shall be the duty of such officers to seek compliance with the objectives of this Order by conference, conciliation, mediation, or persuasion.

SEC. 206. (a) The Secretary of Labor may investigate the employment practices of an Government contractor or subcontractor, or initiate such investigation by the appropriate contracting agency, to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor and the investigating agency shall report to the Secretary of Labor any action taken or recommended.

(b) The Secretary of Labor may receive and investigate or cause to be investigated complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order. If this investigation is conducted for the Secretary of Labor by a contracting agency, that agency shall report to the Secretary what action has been taken or is recommended with regard to such complaints.

SEC. 207. The Secretary of Labor shall use his best efforts, directly and through contracting agencies, other interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 or other provision of Federal law.

SEC. 208. (a) The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

(b) The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection (a) of this Section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 209(a)(6) shall be made without affording the contractor an opportunity for a hearing.

SUBPART D—SANCTIONS AND PENALTIES

SEC. 209. (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary or the appropriate contracting agency may:

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or the rules, regulations, and orders of the Secretary of Labor.

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964.

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) Cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the nondiscrimination provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

(b) Under rules and regulations prescribed by the Secretary of Labor, each contracting agency shall make reasonable efforts within a reasonable time limitation to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under Subsection (a)(2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under Subsection (a)(5) of this Section for failure of a contractor or subcontractor to comply with the contract provisions of this Order.

Sec. 210. Any contracting agency taking any action authorized by this Subpart, whether on its own motion, or as directed by the Secretary of Labor, or under the rules and regulations of the Secretary, shall promptly notify the Secretary of such action. Whenever the Secretary of Labor makes a determination under this Section, he shall promptly notify the appropriate contracting agency of the action recommended. The agency shall taken such action and shall report the results thereof to the Secretary of Labor within such time as the Secretary shall specify.

Sec. 211. If the Secretary shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor or, if the Secretary so authorizes, to the contracting agency.

Sec. 212. Whenever a contracting agency cancels or terminates a contract, or whenever a contractor has been debarred from further Government contracts, under Section 209(a)(6) because of noncompliance with the contract provisions with regard to nondiscrimination, the Secretary of Labor or the contracting agency involved, shall promptly notify the Comptroller General of the United States. Any such debarment may be rescinded by the Secretary of Labor or by the Contracting agency which imposed the sanction.

SUBPART E—CERTIFICATES OF MERIT

Sec. 213. The Secretary of Labor may provide for issuance of a United States Government Certificate of Merit to employers or labor unions, or other agencies which are or may hereafter be engaged in work under Government contracts, if the Secretary is satisfied that the personnel and employment practices of the employer, or that the personnel training, apprenticeship, membership, grievance and representation, upgrading, and other practices and policies of the labor union or other agency conform to the purposes and provisions of this Order.

Sec. 214. Any Certificate of Merit may at any time be suspended or revoked by the Secretary of Labor if the holder thereof in the judgment of the Secretary, has failed to comply with the provisions of this Order.

Sec. 215. The Secretary of Labor may provide for the exemption of any employer labor union, or other agency from any reporting requirements imposed under or pursuant to this Order if such employer, labor union, or other agency has been awarded a Certificate of Merit which has not been suspended or revoked.

PART III—NONDISCRIMINATION PROVISIONS IN FEDERALLY ASSISTED CONSTRUCTION CONTRACTS

SEC. 301. Each executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction contracts paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 203 of this Order or such modification thereof, preserving in substance the contractor's obligations thereunder, as may be approved by the Secretary of Labor, together with such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations. Each such applicant shall also undertake and agree (1) to assist and cooperate actively with the administering department or agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations and relevant orders of the Secretary, (2) to obtain and to furnish to the administering department or agency and to the Secretary of Labor such information as they may require for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor or the administering department or agency pursuant to Part II, Subpart D, of this Order, or extension or other modification of such a contract with a contractor debarred from Government contracts under Part II, Subpart D, of this Order.

SEC. 302. (a) "Construction contract" as used in this Order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

(b) The provisions of Part II of this Order shall apply to such construction contracts, and for purposes of such application the administering department or agency shall be considered the contracting agency referred to therein.

(c) The term "applicant" as used in this Order means an applicant for Federal assistance or, as determined by agency regulation, other program participant, with respect to whom an application for any grant, contract, loan, insurance, or guarantee is not finally acted upon prior to the effective date of this Part, and it includes such an applicant after he becomes a recipient of such Federal assistance.

SEC. 303. (a) Each administering department and agency shall be responsible for obtaining the compliance of such applicants with their undertakings under this Order. Each administering department and agency is directed to cooperate with the Secretary of Labor, and to furnish the Secretary such information and assistance as he may require in the performance of his functions under this Order.

(b) In the event an applicant fails and refuses to comply with his undertakings: the administering department or agency may take any or all of the following actions; (1) cancel, terminate, or suspend in whole or in part the agreement, contract, or other arrangement with such applicant with respect to which the failure and refusal occurred; (2) refrain from extending any further assistance to the applicant under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received from such applicant; and (3) refer the case to the Department of Justice for appropriate legal proceedings.

(c) Any action with respect to an applicant pursuant to Subsection (b) shall be taken in conformity with Section 602 of the Civil Rights Act of 1964 (and the regulations of the administering department or agency issued thereunder), to the extent applicable. In no case shall action be taken with respect to an applicant pursuant to Clause (1) or (2) of Subsection (b) without notice and opportunity for hearing before the administering department or agency.

SEC. 304. Any executive department or agency which imposes by rule, regulation, or order requirements of non-discrimination in employment, other than requirements imposed pursuant to this Order, may delegate to the Secretary of Labor by agreement such responsibilities with respect to compliance standards, reports, and procedures as would tend to bring the administration of such requirements into conformity with the administration of requirements imposed under this Order: *Provided,* That actions to effect compliance by recipients of Federal financial assistance with requirements imposed pursuant to Title VI of the Civil Rights Act of 1964 shall be taken in conformity with the procedures and limitations prescribed in Section 602 thereof and the regulations of the administering department or agency issued thereunder.

PART IV—MISCELLANEOUS

SEC. 401. The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the Government, any function or duty of the Secretary under Parts II and III of this Order, except authority to promulgate rules and regulations of a general nature.

SEC. 402. The Secretary of Labor shall provide administrative support for the execution of the program known as the "Plans for Progress."

SEC. 403. (a) Executive Orders Nos. 10590 (January 18, 1955), 10722 (August 5, 1957), 10925 (March 6, 1961), 11114 (June 22, 1963), and 11162 (July 28, 1964) are hereby superseded and the President's Committee on Equal Employment Opportunity established by Executive Order No. 10925 is hereby abolished. All records and property in the custody of the Committee shall be transferred to the Civil Service Commission and the Secretary of Labor, as appropriate.

(b) Nothing in this Order shall be deemed to relieve any person of any obligation assumed or imposed under or pursuant to any executive order superseded by this Order. All rules, regulations, orders, instructions, designations, and other directives issued by the President's Committee on Equal Employment Opportunity and those issued by the heads of various departments or agencies under or pursuant to any of the executive orders superseded by this Order, shall, to the extent that they are not inconsistent with this Order, remain in full force and effect unless and until revoked or superseded by appropriate authority. References in such directives to provisions of the superseded orders shall be deemed to be references to the comparable provisions of this Order.

SEC. 404. The General Services Administration shall take appropriate action to revise the standard Government contract forms to accord with the provisions of this Order and of the rules and regulations of the Secretary of Labor.

SEC. 405. This Order shall become effective 30 days after the date of this Order.

The Department of Labor is responsible for enforcement of this Executive Order. Contract compliance responsibilities have been assigned to the Department of Health, Education, and Welfare for HEW-assisted construction contractors and for government contractors in the following industries:

Insurance.
Insurance Agents.
Medical, Legal, and Education Services.
Museums, Art Galleries.
Non-Profit Organizations.
Certain State and Local Governments.

Within the Department of Health, Education, and Welfare, the contract compliance program is administered by:

Contract Compliance Division.
Office for Civil Rights, Washington, D.C. 20201.

HIGHER EDUCATION GUIDELINES—EXECUTIVE ORDER 11246

I. LEGAL PROVISIONS

The Office for Civil Rights (OCR) in the Department of Health, Education, and Welfare (HEW) is responsible for the enforcement in institutions of higher education of Executive Order 11246, as amended by Executive Order 11375 (Tab A), which imposes equal employment opportunity requirements upon Federal contractors, and upon construction contractors on projects receiving Federal assistance from HEW.

Executive Order 11246, as amended

In signing a Government contract or subcontract in excess of $10,000 the contractor agrees that it "will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin," and that it "will take affirmative action to ensure that applicants are employed and that employees are treated during employment" without regard to these factors. In the event of the contractor's noncompliance with the nondiscrimination clauses of the contract, or with the rules and regulations of the Secretary of Labor, the contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts.

Part II of the Executive Order sets forth other contractor obligations, enforcement procedures, and administrative responsibilities. Part III of the Executive Order describes the equal opportunity obligations of applicants for Federal assistance involving construction.

The equal employment opportunity obligations of Federal contractors apply to all employment by a contractor, and not solely to employment associated with the receipt or use of Federal funds. The specific obligations of nondiscrimination and affirmative action associated with the Executive Order apply and are enforceable by the Office for Civil Rights only in the case of contracts, not grants.[1]

Regulations of the Department of Labor

The requirements of the Executive Order are implemented by the regulations of the Department of Labor (41 Code of Federal Regulations Chapter 60). Part 60–1, "Obligations of Contractors and Subcontractors" (Tab B), sets forth matters of general applicability, including the scope of coverage of the Executive Order, the obligations of employers subject to that coverage, administrative requirements applicable to Federal agencies, steps in investigation and enforcement of compliance with the Order, and guidance for filing complaints of discrimination. Sanctions and OCR investigative procedures are discussed at Tab I.

Revised order No. 4 and non-public institutions

Revised Order No. 4 (Part 60–2) (Tab C), which implements and supplements Section 60–1.40 of Part 60–1, requires each private institution contractor with 50 or more employees and a contract in excess of $50,000 to develop and maintain a written affirmative action program within 120 days of receipt of such a contract. Section 60–1.40 and Revised Order No. 4 set forth the required contents of such a program, including directions for analyses of the contractor's work force and employment practices, steps to be taken to improve recruitment, hiring, and promotion of minority persons and women, and other specific procedures to assure equal employment opportunity.

Revised order No. 4 and public institutions

While all contractors, both public and private, are required to implement an affirmative action program, at present the basic requirement of Revised Order No. 4 that a contractor maintain a *written* affirmative action plan is not applicable to public institutions (those under state or local control) (see 41 CFR 60–1.5(a)(4)). Public institutions are nevertheless required to take action to ensure nondiscrimination and to comply with the Executive Order and regulations other than Order No. 4. In our judgment, a public institution can best carry out these obligations by conducting the kinds of analyses required of non-public institutions, and organizing in written form its plans to overcome problems of past discrimination.

In addition, the regulations which set forth the procedures for conducting compliance reviews of all contractors, including public institutions, require written commitments as to "the precise actions to be taken and dates for completion" to overcome any deficiencies which a compliance review identifies (41 CFR 60–1.20). These "precise actions" and "dates for completion," which must be provided in writing by a public institution following an HEW compliance review, will ordinarily be similar in content to the written affirmative action commitments required as a matter of regulation of non-public institutions (41 CFR 60–2.11).

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[1] Where a grantee of funds for construction participates in construction under the grant, its employment is subject to the requirements of the equal opportunity clause during the term of participation. When such grantee or applicant for Federal funds is an agency or instrumentality of a state or local government, only such agency or instrumentality is subject to the clause.

On October 4, 1972, the Department of Labor will announce in the Federal Register its intention to amend the regulations to remove the present exemption of public educational institutions from the requirement of maintaining a written affirmative action plan. When effective, all educational institutions, both public and private, will have the same affirmative action obligations under the Executive Order.

Nondiscrimination and affirmative action in the executive order

Executive Order 11246 embodies two concepts: nondiscrimination and affirmative action.

Nondiscrimination requires the elimination of all existing discriminatory conditions, whether purposeful or inadvertent. A universty contractor must carefully and systematcally examine all of its employment policies to be sure that they do not, if implemented as stated, operate to the detriment of any persons on grounds of race, color, religion, sex or national origin. The contractor must also ensure that the practices of those responsible in matters of employment, including all supervisors, are nondiscriminatory.

Affirmative action requires the contractor to do more than ensure employment neutrality with regard to race, color, religion, sex, and national origin. As the phrase implies, affirmative action requires the employer to make additional efforts to recruit, employ and promote qualified members of groups formerly excluded, even if that exclusion cannot be traced to particular discriminatory actions on the part of the employer. The premise of the affirmative action concept of the Executive Order is that unless positive action is undertaken to overcome the effects of systemic institutional forms of exclusion and discrimination, a benign neutrality in employment practices will tend to perpetuate the *status quo ante* indefinitely.

Who is protected by the executive order

The *nondiscrimination* requirements of the Executive Order apply to *all* persons, whether or not the individual is a member of a conventionally defined "minority group." In other words, *no* person may be denied employment or related benefits on grounds of his or her race, color, religion, sex, or national origin.

The *affirmative action* requirements of determining underutilization, setting goals and timetables and taking related action as detailed in Revised Order No. 4 were designed to further employment opportunity for women and minorities. Minorities are defined by the Department of Labor as Negroes, Spanish-surnamed, American Indians, and Orientals.

Goals and timetables

As a part of the affirmative action obligation, Revised Order No. 4 requires a contractor to determine whether women and minorities are "underutilized" in its employee work force and, if that is the case, to develop as a part of its affirmative action program specific goals and timetables designed to overcome that underutilization. (See Tab J) Underutilization is defined in the regulations as "having fewer women or minorities in a particular job than would reasonably be expected by their availability."

Goals are projected levels of achievement resulting from an analysis by the contractor of its deficiencies, and of what it can reasonably do to remedy them, given the availability of qualified minorities and women and the expected turnover in its work force. Establishing goals should be coupled with the adoption of genuine and effective techniques and procedures to locate qualified members of groups which have previously been denied opportunities for employment or advancement and to eliminate obstacles within the structure and operation of the institution (e.g. discriminatory hiring or promotion standards) which have prevented members of certain groups from securing employment or advancement.

The achievement of goals is not the sole measurement of a contractor's compliance, but represents a primary threshold for determining a contractor's level of performance and whether an issue of compliance exists. If the contractor falls short of its goals at the end of the period it has set, that failure in itself does not require a conclusion of noncompliance. It does, however, require a determination by the contractor as to why the failure occurred. If the goals were not met because the number of employment openings was inaccurately estimated, or because of changed employment market conditions or the unavailability of women and minorities with the specific qualifications needed, but the record discloses that the contractor followed its affirmative action program, it has complied with the letter and spirit of the Executive Order. If, on the other hand, it appears that the cause for failure was an inattention to the nondiscrimination and affirmative action policies and procedures set by the contractor, then the contractor may be found out of compliance. It should be emphasized that while goals are required, quotas are neither required nor permitted by the Executive Order. When used correctly, goals are an indicator of probable compliance and achievement, not a rigid or exclusive measure of performance.

Nothing in the Executive Order requires that a university contractor eliminate or dilute standards which are necessary to the successful performance of the institution's educational and research functions. The affirmative action concept does not require that a university employ or promote any persons who are unqualified. The concept does require, however, that any standards or criteria which have had the effect of excluding women and minorities be eliminated, unless the contractor can demonstrate that such criteria are conditions of successful performance in the particular position involved.

II. PERSONNEL POLICIES AND PRACTICES

An employer must establish in reasonable detail and make available upon request the standards and procedures which govern all employment practices in the operation of each organizational unit, including any tests in use and the criteria by which qualifications for appointment, retention, or promotion are judged. It should be determined whether such standards and criteria are valid predictors of job performance, including whether they are relevant to the duties of the particular position in question. This requirement should not ignore or obviate the range of permissible discretion which has characterized employment judgments, particularly in the academic area. Where such discretion appears to have operated to deny equality of opportunity, however, it must be subjected to rigorous examination and its discriminatory effects eliminated. There are real and proper limits on the extent to which criteria for academic employment can be explicitly articulated; however, the absence of any articulation of such criteria provides opportunities for arbitrary and discriminatory employment decisions.

Recruitment

Recruitment is the process by which an institution or department within an institution develops an applicant pool from which hiring decisions are made. Recruitment may be an active process, in which the institution seeks to communicate its employment needs to candidates through advertisement, word-of-mouth notification to graduate schools or other training programs, disciplinary conventions or job registers. Recruitment may also be the passive function of including in the applicant pool those persons who on their own initiative or by unsolicited recommendation apply to the institution for a position.

In both academic and nonacademic areas, universities must recruit women and minority persons as actively as they have recruited white males. Some universities, for example, have tended to recruit heavily at institutions graduating exclusively or predominantly non-minority males, and have failed to advertise in media which would reach the minority and female communities, or have relied upon personal contacts and friendships which have had the effect of excluding from consideration women and minority group persons.

In the academic area, the informality of word-of-mouth recruiting and its reliance on factors outside the knowledge or control of the university makes this method particularly susceptible to abuse. In addition, since women and minorities are often not in word-of-mouth channels of recruitment, their candidacies may not be advanced with the same frequency or strength of endorsement as they merit, and as their white male colleagues receive.

The university contractor must examine the recruitment activities and policies of each unit responsible for recruiting. Where such an examination reveals a significantly lower representation of women or minorities in the university's applicant pool than would reasonably be expected from their availability in the work force, the contractor must modify or supplement its recruiting policies by vigorous and systematic efforts to locate and encourage the candidacy of qualified women and minorities. Where policies have the effect of excluding qualified women or minorities, and where their effects cannot be mitigated by the implementation of additional policies, such policies must be eliminated.

An expanded search network should include not only the traditional avenues through which promising candidates have been located (e.g., in the case of academic appointments, direct letters to graduate departments, or in the case of nonacademic appointments, advertising in community newspapers). In addition, to the extent that it is necessary to overcome underutilization, the university should search in areas and channels previously unexplored.

Certain organizations such as those mentioned in Revised Order No. 4 may be prepared to refer women and minority applicants. For faculty and administrative appointments, disciplinary and professional associations, including committees and caucus groups, should be contacted and their facilities for employee location and referral used.

Particularly in the case of academic personnel, potentially fruitful channels of recruitment include the following:

(*a*) Advertisements in appropriate professional journals and job registries;

(*b*) Unsolicited applications or inquiries;

(*c*) Women teaching at predominantly women's colleges, minorities teaching at predominantly minority colleges;

(*d*) Minorities or women professionally engaged in nonacademic positions, such as industry, government, law firms, hospitals;

(*e*) Professional women and minorities working at independent research institutions and libraries;

(*f*) Professional minorities and women who have received significant grants or professional recognition;

(*g*) Women and minorities already at the institution and elsewhere working in research or other capacities not on the academic ladder;

(*h*) Minority and women doctoral recipients, from the contractor's own institution and from other institutions, who are not presently using their professional training;

(*i*) Women and minorities presently candidates for graduate degrees at the institution and elsewhere who show promise of outstanding achievement (some institutions have developed programs of support for completion of doctoral programs with a related possibility of future appointment); and

(*j*) Minorities and women listed in relevant professional files, registries and data banks, including those which have made a particularly conscientious effort to locate women and minority persons.

It should be noted that a contractor is required to make explicit its commitment to equal employment opportunity in all recruiting announcements or advertisements. It may do this by indicating that it is an "equal opportunity employer." It is a violation of the Executive Order, however, for a prospective employer to state that only members of a particular minority group or sex will be considered.

Where search committees are used to locate candidates for appointment, they can best carry out the above measures when they are composed of persons willing and able to explore new avenues of recruitment. Effective search committees should, if possible, include among their members women and minority persons.

Policies which exclude recruitment at predominantly minority colleges and universities restrict the pool of qualified minority faculty from which prospective appointees may be chosen. Even if the intent of such policies may be to prevent the so-called "raiding" of minority faculty by predominantly white institutions, such policies violate the nondiscrimination provision of the Executive Order since their effect is to deny opportunity for employment on grounds relating to race. Such policies have operated to the serious disadvantage of students and teachers at minority institutions by denying them notice of research and teaching opportunities, assistantships, endowed professorships and many other programs which might enhance their potential for advancement, whether they choose to stay at a predominantly minority institution or move to a nonminority institution.

Minorities and women are frequently recruited only for positions thought to be for minorities and women, such as equal employment programs, ethnic studies, or women's studies. While these positions may have a particular suitability for minority persons and women, institutions must not restrict consideration of women and minorities to such areas, but should actively recruit them for any position for which they may be qualified.

Hiring

Once a nondiscriminatory applicant pool has been established through recruitment, the process of selection from that pool must also carefully follow procedures designed to ensure nondiscrimination. In all cases, standards and criteria for employment should be made reasonably explicit, and should be accessible to all employees and applicants. Such standards may not overtly draw a distinction based on race, sex, color, religion, or national origin, nor may they be applied inconsistently to deny equality of opportunity on these bases.

In hiring decisions, assignment to a particular title or rank may be discriminatory. For example, in many institutions women are more often assigned initially to lower academic ranks than are men. A study by one disciplinary association showed that women tend to be offered a first appointment at the rank of Instructor rather than the rank of Assistant Professor three time more often than men with identical qualifications. Where there is no valid basis for such differential treatment, such a practice is in violation of the Executive Order.

Recruiting and hiring decisions which are governed by unverified assumptions about a particular individual's willingness or ability to relocate because of his or her race or sex are in violation of the Executive Order. For example, university personnel responsible for employment decisions should not assume that a woman will be unwilling to accept an offer because of her marital status, or that a minority person will be unwilling to live in a predominantly white community.

Institutional policies regarding the employment of an institution's own graduates must not be applied in any manner which would deny opportunities to women and minorities. A university must give equal consideration to its graduate students regardless of their race or sex for future faculty positions, if the institution employs its own graduates.

In the area of academic appointments, a nondiscriminatory selection process does not mean that an institution should indulge in "reverse discrimination" or "preferential treatment" which leads to the selection of unqualified persons over qualified ones. Indeed, to take such action on grounds of race, ethnicity, sex or religion constitutes discrimination in violation of the Executive Order.

It should also be pointed out that nothing in the Executive Order requires or permits a contractor to fire, demote or displace persons on grounds of race, color, sex, religion, or national origin in order to fulfill the affirmative action concept of the Executive Order. Again, to do so would violate the Executive Order. Affirmative action goals are to be sought through recruitment and hiring for vacancies created by normal growth and attrition in existing positions.

Unfortunately, a number of university officials have chosen to explain dismissals, transfers, alterations of job descriptions, changes in promotional potential or fringe benefits, and refusals to hire *not* on the basis of merit or some objective sought by the university administration aside from the Executive Order, but on grounds that such actions and other "preferential treatment regardless of merit" are now required by Federal law. Such statements constitute either a misunderstanding of the law or a willful distortion of it. In either case, where they actually reflect decisions not to employ or promote on grounds of race, color, sex, religion or national origin, they constitute a violation of the Executive Order and other Federal laws.

Anti-nepotism policies

Policies or practices which prohibit or limit the simultaneous employment of two members of the same family and which have an adverse impact upon one sex or the other are in violation of the Executive Order. For example, because men have traditionally been favored in employment over women, anti-nepotism regulations in most cases operate to deny employment opportunity to a wife rather than to a husband.

If an institution's regulations against the simultaneous employment of husband and wife are discriminatory on their face (e.g., applicable to "faculty wives"), or if they have in practice served in most instances to deny a wife rather than a husband employment or promotion opportunity, salary increases, or other employment benefits, they should be altered or abolished in order to mitigate their discriminatory impact.

Stated or implied presumptions against the consideration of more than one member of the same family for employment by the same institution or within the same academic department also tends to limit the opportunities available to women more than to men.

If an individual has been denied *opportunity* for employment, advancement or benefits on the basis of an anti-nepotism rule or practice, that action is discriminatory and is prohibited under the Executive Order. Institutional regulations which set reasonable restrictions on an individual's capacity to function as judge or advocate in specific situations involving a member of his or her immediate family are permissible where they do not have the effect of denying equal employment opportunity to one sex over the other.[2]

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[2] For an indication of what should constitute "reasonable restriction," see the policy statement of the American Association of University Professors on "Faculty Appointment and Family Relationship," which suggests that "faculty members should neither initiate or participate in institutional decisions involving a direct benefit (initial appointment, retention, promotion, salary, leave of absence, etc.) to members of their immediate families."

Placement, job classification, and assignment

A contractor must examine carefully its job category assignments and treatment of individuals within a single job classification. Experience shows that individuals of one sex or race frequently tend to be "clustered" in certain job classification, or in certain departments or diversions within an institution. Most often those classifications or departments in which women or minorities are found tend to be lower paid, and have less opportunity for advancement than those to which non-minority males are assigned.

Where there are no valid or substantial differences in duties or qualifications between different job classifications, and where persons in the classifications are segregated by race, color, religion, sex, or national origin, those separate classifications must be eliminated or merged. For example, where male administrative aides and female administrative assistants are performing the same duties and bear the same responsibilities, but are accorded different salaries and advancement opportunities, and where the separate classifications upon examination yield no valid distinctions, the separate classifications must be eliminated or merged.

In academic employment, minorities and women have sometimes been classified as "research associates," "lecturers" or similar categories of employment which do not carry with them the benefits and protections of regular academic appointment, and from which promotion is rare, while men with the same qualifications are appointed to regular faculty positions. Such sex- or minority-segregated classification is discriminatory and must be eliminated. In addition, appropriate remedies must be afforded those persons previously assigned to such classifications.

Training

To eliminate discrimination and assure equal opportunity in promotion, an employer should initiate necessary remedial, job training and work study programs aimed at upgrading specific skills. This is generally applicable in the case of nonacademic employees, but may also be relevant in the case of academic employees as, for example, in providing opportunities to participate in research projects, or to gain new professional skills through leave policies or special programs offered by the institution.

In institutions where in-service training programs are one of the ladders to administrative positions, minorities and women must be admitted into these programs on an equal basis with non-minority men. Furthermore, opportunities for training may not be limited to positions which are occupied by non-minorities and males.

The employment of students by an institution is subject to the same considerations of nondiscrimination and affirmative action as is all other employment in an institution.

Promotion

A contractor's policies and practices on promotion should be made reasonably explicit, and administered to ensure that women and minorities are not at a disadvantage. A contractor is also obligated to make special efforts to ensure that women and minorities in its work force are given equal opportunity for promotion. Specifically, 41 CFR 60–2.24 states that this result may be achieved through remedial, work study and job training programs; through career counseling programs; through the posting and announcement of promotion opportunities; and by the validation of all criteria for promotion.

Termination

Where action to terminate has a disproportionate effect upon women or minorities and the employer is unable to demonstrate reasons for the decision to terminate unrelated to race, religion, color, national origin or sex, such actions are discriminatory. Seniority is an acceptable standard for termination, with one exception: where an incumbent has been found to have been the victim of discrimination and as a result has less actual seniority than he or she would have had but for such discrimination, either seniority cannot be used as the primary basis for termination, or the incumbent must be presumed to have the seniority which he or she would have had in the absence of discrimination.

Conditions of work

A university employer must ensure nondiscrimination in all terms and conditions of employment, including work assignments, educational and training opportunities, research opportunities, use of facilities, and opportunities to serve on committees or decision-making bodies.

Intentional policy or practice which subjects persons of a particular sex or minority status to heavier teaching loads, less desirable class assignment, and fewer opportunities to serve on key decision-making bodies or to apply for research grants or leaves of absence for professional purposes, is in violation of the Executive Order.

Similarly, institutional facilities such as dining halls or faculty clubs have sometimes restricted their services to men only. Where such services are a part of the ordinary benefits of employment for certain classifications of employees, no members of such classifications can be denied them on the basis of race, color, national origin, sex, or religion.

Rights and benefits-salary

The Executive Order requires that universities adhere carefully to the concept of equal pay for equal work.

In many situations persons who hold the same or equivalent positions, with the same or equivalent qualifications, are not paid similar salaries, and disparities are identifiable along lines of race, color, national origin, sex, or religion.

An institution should set forth with reasonable particularity criteria for determining salary for each job classification and within each job classification. These criteria should be made available to all present and potential employees.

The question is often raised as to whether a person who applies for a position within a given job classification may be given a higher or lower rate of pay at entry based upon his or her pay in another position, or upon market factors defined outside the context of the institution's determination of rates of pay. Where reference to external market factors results in a disparate effect upon women or minority group persons, a reference to those rates of pay is prohibited. For example, if a minority or female applicant applies for a position as an Assistant Professor, and the salary range of those entering that position is from $10,000 to $12,000, the fact that the applicant's former position paid only $8,000 cannot be used to deny him or her the minimum pay for the new position, when nonminority men in a comparable situation are given an entry salary at or above the minimum stipulated area. In this example, the applicant's level of pay must be determined on the basis of capability and record of performance, not former salary.

Back pay

Back pay awards are authorized and widely used as a remedy under Title VII of the Civil Rights Act of 1964, the Equal Pay Act, and the National Labor Relations Act. Universities, like other employers, are subject to the provisions of these statutes.

This means that evidence of discrimination that would require back pay as a remedy will be referred to the appropriate Federal enforcement agency if the Office for Civil Rights is not able to negotiate a voluntary settlement with a university. At the direction of the Department of Labor, the Office for Civil Rights will continue to pursue back pay settlements only in cases involving employees who, while protected by the Executive Order, were not protected by the three statutes mentioned above at the time violation occurred.

Contractors continue to have the prospective obligation to include in an affirmative action program whatever payments are necessary to remove existing differentials in pay (based on race or sex) identified in the analyses required under the Executive Order.

Leave policies

A university contractor must not discriminate against employees in its leave policies, including paid and unpaid leave for educational or professional purposes, sick leave, annual leave, temporary disability, and leave for purposes of personal necessity.

Employment policies relating to pregnancy and childbirth

41 CFR 60-20 (Sex Discrimination Guidelines) (Tab D) provides that "women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing." Pregnancy and childbearing must be considered as a justification of a leave of absence for a female employee regardless of marital status, for a reasonable length of time, and for reinstatement following childbirth without loss of seniority or accrued benefits.

A. *Eligibility.*—If an employer has a policy on eligibility for leave, a female employee may not be required to serve longer than the minimum length of service required for other types of leave in order to qualify for maternity leave. If the employer has no leave policy, childbearing must nevertheless be considered as a justification for a leave of absence for a female employee for a reasonable length of time.

B. *Mandatory period of leave.*—Any policy requiring a mandatory leave of absence violates the Executive Order unless it is based on individual medical or job characteristics. In such cases the employer must clearly demonstrate an overriding need based on medical safety or "business necessity," i.e., that the successful performance of the position or job in question requires the leave. For example, service in a radiation laboratory may constitute a demonstrable hazard to the expectant mother or her child. A mandatory period of leave should not, however, be stipulated by the university; the length of leave, whether mandatory or voluntary, should be based on a bona fide medical need related to pregnancy or childbirth.

C. *Eligibility for and conditions of return.*—Following the end of leave warranted by childbirth, a female employee must be offered reinstatement to her original position or one of like status and pay without loss of seniority or accrued benefits.

D. *Other conditions of leave.*—Department of Labor guidelines provide that the conditions related to pregnancy leave, i.e., salary, accrual of seniority and other benefits, reinstatement rights, etc., must be in accordance with the employer's general leave policy.

On April 5, 1972, the Equal Employment Opportunity Commission, under Title VII of the Civil Rights Act of 1964, issued revised guidelines on sex discrimination, 37 Fed. Reg. 6835, which differ substantially from the present Department of Labor guidelines under the Executive Order. The Labor Department has not adopted the rules of the EEOC as its own, although universities are subject to them. However, serious consideration is now being given to revising the Labor Department guidelines to equate disabilities caused by pregnancy and childbirth with all other temporary disabilities for which an employer might provide leave time, insurance pay, and other benefits.

E. *Child care leave.*—If employees are generally granted leave for personal reasons, such as for a year or more, leave for purposes relating to child care should be considered grounds for such leave, and should be available to men and women on an equal basis. A faculty member should not be required to have such leave time counted toward the completion of a term as a probationary faculty member, unless personal leave for other reasons is so considered. Nor should such leave time be subtracted from a stated term of appointment, or serve as a basis for nonrenewal of contract.

Fringe benefits

Fringe benefits are defined to include medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave, and other terms and conditions of employment.

The university should carefully examine its fringe benefit programs for possible discriminatory effects. For example, it is unlawful for an employer to establish a retirement or pension plan which establishes different optional or mandatory retirement ages for men and for women.

Where an employer conditions benefits available to employees and their spouses and families on whether the employee is the "head of the household" or "principal wage-earner" in the family unit, such benefits cannot be made available only to male employees and their families. The employer also must not presume that a married man is the "head of the household" or "principal wage earner"; this is a matter which must be determined by the employee and his or her family.

It is also unlawful for an employer to make benefits available to the wives and families of male employees where the same benefits are not available to the husbands and families of female employees.

With regard to retirement benefits and insurance, pensions, and other welfare programs, Department of Labor Sex Discrimination Guidelines provide that benefits must be equal for both sexes, *or* that the employer's contribution must be equal for both sexes. This means that a diffrent rate of retirement benefits for men and women does not violate the Executive Order *if* the employer's contributions for both sexes are equal. It is not a violation of the Executive Order if the employer, in seeking to equalize benefits for men and women employees, contributes more for one sex than the other.[3]

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[3] Benefits which are different for men and women have been declared in violation of Title VII of the Civil Rights Act of 1964 in recent guidelines published by the Equal Employment Opportunity Commission. These guidelines also state that it is no defense against a charge of sex discrimination that the cost of such benefits is greater for one sex than for the other.

Child care

41 CFR 60–2.24 states that an employer should, as part of his affirmative action program, encourage child care programs appropriately designed to improve the employment opportunities of minorities and women. An increasing number of institutions have established child care programs for their male and female employees and students, and we commend such efforts to all institutions. As part of an affirmative action program, such programs may improve the employment opportunities of all employees, not only women and minorities, and contribute significantly to an institution's affirmative action profile.

Grievance procedures

As of March 1972 and pursuant to the provisions of the Equal Employment Opportunity Act of 1972, the Equal Employment Opportunity Commission has jurisdiction over individual complaints of discrimination by academic as well as non-academic employees of educational institutions.

Pursuant to formal agreement between OCR and EEOC, and to avoid duplication of effort, individual complaints of discrimination will be investigated and remedied by EEOC. Class complaints, groups of individual complaints or other information which indicates possible institutional *patterns* of discrimination (as opposed to isolated cases) will remain subject to investigation by OCR. In such cases, retrospective relief for individuals within such classes or groups will remain within the jurisdiction of EEOC.

Where an employer has established sound standards of due process for the hearing of employee grievances, and has undertaken a prompt and good faith effort to identify and provide relief for grievances, a duplicative assumption of jurisdiction by the Federal Government has not always proven necessary. We therefore urge the development of sound grievance procedures for all employees, academic and non-academic alike, in order to ensure the fair treatment of individual cases where discrimination is alleged, and to maintain the integrity of the employer's internal employment system.

Institutional grievance procedures which provide for prompt and equitable hearing of employee grievances relating to employment discrimination should be written and available to all present and prospective employees.

III. DEVELOPMENT OF AFFIRMATIVE ACTION PROGRAMS

Effective affirmative action programs shall cointain, but not necessarily be limited to, the following ingredients:

1. *Development or reaffirmation of the contractor's equal employment opportunity policy.*—Each institution should have a clear written statement over the signature of the chief administrative officer which sets forth the institution's legal obligation and policy for the guidance of all supervisory personnel, both academic and nonacademic, for all employees and for the community served by the institution. The policy statement should reflect the institution's affirmative commitment to esual employment opportunity, as well as its commitment to eliminate discrimination in employment on the basis of race, color, sex, religion and national origin.

2. *Dissemination of the policy.*—Internal communication of the institution's policy in writing to all supervisory personnel is essential to their understanding, cooperation and compliance. All persons responsible for personnel decisions must know what the law requires, what the institution's policy is, and how to interpret the policy and implement the program within the area of their responsibility. Formal and informal external dissemination of the policy is necessary to inform and secure the cooperation of organizations within the community, including civil rights groups, professional associations, women's groups, and various sources of referral within the recruitment area of the institution.

The employer should communicate to all present and prospective employees the existence of the affirmative action program, and make available such elements of the program as will enable them to know of and avail themselves of its benefits.

3. *Responsibility for implementation.*—An administrative procedure must be set up to organize and monitor the affirmative action program. 41 CFR 60–2.22 provides that an executive of the contractor should be appointed as director of EEO programs, and that he or she should be given "the necessary top management support and staffing to execute the assignment." (See the remainder of section 2.22 for details of the responsibilities of the Equal Employment Oppor-

tunity Officer.) This should be a person knowledgeable of and sensitive to the problems of women and minority groups. Depending upon the size of the institution, this may be his or her sole responsibility, and necessary authority and staff should be accorded the position to ensure the proper implementation of the program.

In several institutions the EEO officer has been assisted by one or more task forces composed in substantial part of women and minority persons. This has usually facilitated the task of the EEO officer and enhanced the prospects of success for the affirmative action program in the institution.

4. *Identification of problem areas by organizational units and job classifications.*—In this section the contractor should address itself to the issues discussed in sections I and II above. The questions involved in data gathering and analysis are treated in appendix J.

Once an inventory is completed, the data should be coded and controlled in strict confidence so that access is limited to those persons involved in administering and reviewing the Equal Employment Opportunity Program. Some state and local laws may prohibit the collection and retention of data relating to the race, sex, color, religion, or national origin of employees and applicants for employment. Under the principle of Federal supremacy, requirements for such inventories and recordkeeping under the Executive Order supersede any conflicting state or local law, and the existence of such laws is not an acceptable excuse for failure to collect or supply such information as required under the Executive Order.

5. *Internal audit and reporting systems.*—An institution must include in its administrative operation a system of audit and reporting to assist in the implementation and monitoring of the affirmative action program, and in periodic evaluations of its effectiveness. In some cases a reporting system has taken the form of a monitoring of all personnel actions, so that department heads and other supervisors must make periodic reports on affirmative action efforts to a central office. In most cases all new appointments must be accompanied by documentation of an energetic and systematic search for women and minorities.

Reporting and monitoring systems will differ from institution to institution according to the nature of the goals and programs established, but all should be sufficiently organized to provide a ready indication of whether or not the program is succeeding, and particularly whether or not good faith efforts have been made to ensure fair treatment of women and minority group persons before and during employment. Reporting systems should include a method of evaluating applicant flow; referral and hiring rate; and an application retention system to allow the development of an inventory of available skills.

At least once annually the institution must prepare a formal report to OCR on the results of its affirmative action compliance program. The evaluation necessary to prepare such a report will serve as a basis for updating the program, taking into consideration changes in the institution's work force (e.g., expansion, contraction, turnover), changes in the availability of minorities and women through improved educational opportunities, and changes in the comparative availability of women as opposed to men as a result of changing interest levels in different types of work.

6. *Publication of affirmative action programs.*—In accordance with 41 CFR 60-2.21(11), which states that the contractor should "communicate to his employees the existence of the contractor's affirmative action program and make available such elements of his program as will enable such employees to know of and avail themselves of its benefits," the Office for Civil Rights urges institutions to make public their affirmative action plans. University contractors should also be aware that affirmative action plans accepted by the Office for Civil Rights are subject to disclosure to the public under the Freedom of Information Act, 5 U.S.C. 552. Subject to certain exemptions, disclosure ordinarily will include broad utilization analyses, proposed remedial steps, goals and timetables, policies on recruitment, hiring, promotion, termination, grievance procedures and other affirmative measures to be taken. Other types of documents which must be released by the Government upon a request for disclosure include the contractor's validation studies of tests and other preemployment selection methods.

Exempt from disclosure are those portions of the plan which contain confidential information about employees, the disclosure of which may constitute an invasion of privacy, information in the nature of trade secrets, and confidential commercial or financial information within the meaning of 5 U.S.C. 552(b)(4). Compliance agencies also are not authorized to disclose the Standard Form 100 (EEO-1) or similar reporting forms or information about individuals.

7. *Developing a plan.*—The Office for Civil Rights recognizes that in an institution of higher education, and particularly in the academic staff, responsibility for matters concerning personnel decisions is diffused among many persons at a number of different levels. The success of a university's affirmative action program may be dependent in large part upon the willingness an dability of the faculty to assist in its development and implementation. Therefore, the Office for Civil Rights urges that university administrators involve members of their faculty, as well as other supervisory personnel in their work force, in the process of developing an information base, determining potential employee availability, the establishment of goals and time-tables, monitoring and evaluating the effectiveness of the plan, and in all other appropriate elements of a plan. A number of institutions have successfully established faculty or joint faculty-staff commissions or task forces to assist in the preparation and administration of its affirmative action obligations. We therefore recommend to university contractors that particular attention be given the need to bring into the deliberative and decision-making process those within the academic community who have a responsibility in personnel matters.

The Office for Civil Rights stands ready to the fullest extent possible to assist university contractors in meeting their equal employment opportunity obligations.

Office for civil rights compliance procedures

Section 206 of the Executive Order authorizes the Secretary of Labor to investigate the employment practices of any Government contractor to determine whether or not it is in compliance with the nondiscrimination and affirmative action provisions contained therein. The Secretary of Labor may also receive and investigate complaints from employees or prospective employees which allege discrimination in violation of the Executive Order. To implement these provisions, the Secretary of Labor has directed that Government agencies with compliance responsibility for specific types of Federal contractors institute programs for conducting regular compliances reviews, and institute a prompt investigation of each complaint filed with it or referred to it.

The Office of Civil Rights within the Department of Health, Education, and Welfare has been assigned responsibility by the Secretary of Labor for conducting reviews and investigations of institutions of higher education, *regardless of the agency which awards the contract* Reviews and investigations are undertaken by the ten Regional Offices for Civil Rights, which have the responsibility for determining in the first instance whether a contractor is in compliance, and of recommending possible enforcement action to the Director of the Office for Civil Rights in Washington.

Section 211 of the Executive Order provides that the Secretary of Labor may direct contracting agencies not to enter into contracts unless the prospective contractor has satisfactorily complied with the provisions of the Executive Order, or has submitted a program for compliance acceptable to the Secretary of Labor. To implement this directive, the Secretary of Labor has provided that no contract of $1 million or more shall be awarded unless a pre-award clearance has been conducted by the compliance agency at least 12 months prior to the award, and unless that review has found the prospective contractor to be in compliance or able to comply as the result of the submission of an acceptable affirmative action plan. Government contracting agencies may also be separately notified by the Secretary of Labor that a contractor or prospective contractor is unable to comply with the equal employment opportunity clause for the purpose of all future awards or extensions or renewals of existing contracts.

Types of reviews

There are a variety of circumstances which may prompt the Regional Office for Civil Rights to schedule a review or investigation of the employment practices of a college or university.

1. *Pre-award reviews.*—When any agency of the Federal Government identifies an institution of higher education as the prospective recipient of a contract of $1 million or more, the Office for Civil Rights is responsible for conducting a review of the institution's compliance status. The requirement applies in the case of a modification of an existing contract when the amount of additional funds is $1 million or more, as well as to the extension of an existing contract or award of a new contract in this amount.

2. *Reviews directed by Office of Federal Contract Compliance.*—The Director, Office of Federal Contract Compliance, Department of Labor, may direct the Office for Civil Rights to conduct a compliance review. For example, a specific

review may be requested as a part of a coordinated government-wide review of all contractors in a specific geographical area, or may be based on the receipt by the Director of information from public or private sources indicating that a specific problem of discrimination may exist within an institution's workforce.

3. *Complaint investigations.*—Until the summer of 1972, the Office for Civil Rights had been responsible for investigating complaints from professional employees against an institution received directly by the Office for Civil Rights, or referred to it by the Director, Office of Federal Contract Compliance. The U.S. Equal Employment Opportunity Commission, with its district offices throughout the nation, now has this responsibility. (See Guidelines, p. 14).

Institutions of higher education are subject to the provisions of Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment whether or not the employer receives Federal financial assistance. The Equal Employment Opportunity Commission is responsible for enforcing Title VII. The Office for Civil Rights continues to investigate complaints seeking relief for an affected class as well as general allegations of patterns of discrimination at an institution. Such class complaints or allegations may be factors in determining which institutions will be scheduled for review.

4. *Regular compliance reviews.*—Reviews are also undertaken as part of a systematic program of the Office for Civil Rights to examine the employment practices of contractors for which it is assigned responsibility. Most of these reviews are routinely scheduled, although it should be noted that they may be given a higher priority as a result of information received from either public or private sources that a specific problem of discrimination against a class or classes of persons exists within the institution.

Except for pre-award clearances, all reviews and investigations are scheduled by the Regional Offices on a quarterly basis. Since the number and location of pre-award reviews cannot be anticipated by the Office for Civil Rights sufficiently in advance to permit planned scheduling, they are scheduled as required.[4]

Access to information

In conducting a compliance review, the Office for Civil Rights must have adequate information about the contractor's employment practices. Such information includes data reflecting generally the employment status of existing employees and specific information on the contractor's recruitment and hiring patterns, and on its employment criteria, policies, and procedures.[5] It may also be necessary in particular instances to have access to specific information pertinent to employment decisions. It may also be necessary to compare the treatment of a number of individuals in order to determine factors which have affected relevant employment decisions.

Examination of individual records could conclusively demonstrate the existence of discrimination if, for example, there is overt mention in a personnel file that race, color, national origin, religion, or sex was improperly considered in an employment decision. In such a case, examination of more general statistical data might serve as a gauge of the extent of discrimination and the scope of the required remedy. A similar approach would be warranted where initial comparison of personnel files of similarly situated employees indicates significantly different treatment corresponding with the race, color, ethnicity, religion, or sex of the employees involved. Where the focal point of an investigation becomes an individual or class instance of discrimination, the examination of certain personnel records will in most cases be necessary.

It should be made clear that access by the Office of Civil Rights to personnel information is limited to its obligation to identify and eliminate discrimination prohibited by the Executive Order, and to secure required affirmative action. The Office has no intention or authority to seek information for any other purpose. With this in mind, we expect the full cooperation of institutions of higher education in providing the Office for Civil Rights information necessary to evaluate the contractor's compliance status. See 41 CFR Sections 60-1.7(a)(3) and 60-1.43, and paragraph (5) of the equal opportunity clause.

In addition, the Office for Civil Rights' investigative responsibilities require that it have access to employees of contractors, as sources of information. The Office is therefore authorized to interview any employee, without the presence of a contractor representative, in the course of investigation or compliance activities, subject, of course, to reasonable procedures on time, place, and manner. (See 41 CFR Sections 60–1.20, 60–1.24 and 60–1.32.)

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[4] Allegations of discrimination filed by campus organizations, or by advocacy groups such as NOW, WEAL, NAACP, and The National Urban League, which do not contain the signature of any alleged victim of the discrimination or of an authorized representative of such an individual will be handled as part of a general compliance review.

[5] See Appendix J on data requirements.

The Office will request information in reasonable form, and will not demand access to information and copying of records except during normal business hours. Failure to provide information or permit access to and copying of pertinent records constitutes noncompliance with the contractor's obligations under the Executive Order, and subjects the contractor to enforcement action, including a hearing before an independent hearing examiner. During the course of an enforcement hearing the contractor has an opportunity to contest the Office for Civil Rights' determination as to the necessity and pertinence of information it seeks.

Consistent with its limited responsibilities, the Office for Civil Rights will not publicly disclose information gathered during the course of a compliance review except as indicated in the guidelines.

Conduct of compliance reviews[6]

1. *Notice to the institution*

Once an institution has been selected and scheduled for review, a letter is sent by the Regional Civil Rights Director to the head of the institution advising him of the anticipated date for commencement of the review. This notification will be sent to the institution as far in advance as possble, but ordinarily at least six weeks prior to the initiation of the compliance review.[7] The notice will request the institution to prepare and make available either prior to or at the beginning of the review certain information which is necessary to a determination of compliance. This informaton ordinarily will consist of:

1. For private institutions which are subject to Revised Order No. 4, a copy of the original affirmative action program including all of the base data, analyses, documents and supporting data which were used in preparing the program. If the program has been in effect for more than six months, the updated affirmative action program and the evaluation of the program's operation since it was originally developed should be included, as well as all actions taken to correct any problems of discrimination or underutilization.

If either the original or updated program has been in effect for less than six months, and if the institution believes that actions taken under it would affect a determination of its compliance, the university may, of course, include such information in its report.

2. For public institutions specifically exempted from Order No. 4 and for private institutions which have not previously held contracts covered by the Executive Order, the notice will request that the institution prepare the basic employment information described. If such institutions have drawn conclusions from the data as to discrimination or underutilization, the institutions are free to include the information, and we strongly encourage them to do so. Information on any programs and policies which have been developed pursuant to the contractor's affirmative action obligations should also be included.

3. If the institution, whether public or private, has been previously reviewed by the Office for Civil Rights, a full report, both narrative and statistical, indicating all actions taken to correct any problems which may have been reported to the institution as a result of the prior review should be provided.

The Regional Office may request that the above described information be submitted to it prior to commencement of the on-site review, or it may request that it be available when its review team arrives to begin the on-site review. Although it would be preferable to schedule the review sufficiently in advance to permit the institution to prepare the information and forward it to the Regional Office, this will not always be possible, particularly in the case of a mandatory pre-award review.

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[6] This section describes procedures normally followed, in the absence of unforeseen circumstances.

[7] An exception to this minimum notice period will be in the case of a pre-award review where the anticipated date of award of the contract or modification will not permit such notice. In these circumstances, as much advance notice as possible will be given to the institution. We have found that the normal prior notice period can generally be no more than one week in these cases. However, in most circumstances, because an institution is directly involved in contract negotiations with the Government, it can anticipate the need for an Office for Civil Rights pre-award review sufficiently in advance of the receipt of notice to proceed with preparing the information necessary for the review.

2. *On-site review*

The purpose of a compliance review is to determine whether or not the institution is fulfilling its contractual obligations of nondiscrimination and affirmative action. In most instances, prior to any review, it is helpful for the Regional Office to have the benefit of the contractor's own analysis of its employment practices, its own evaluation of its utilization of minorities and females and its own plans and programs for overcoming problems which it has identified through these self-evaluation procedures. Indeed, if the contractor has fully complied with its obligations under 41 CFR 60-1, 60-2, 60-3 and 60-20, the review may consist of no more than an evaluation by the Regional Office of the adequacy of the contractor's analyses and conclusions and of the plans and programs which it has developed to overcome problems of discrimination and underutilization. The scope of the review will to a great extent depend on the quality of self-evaluation engaged in by the contractor prior to the on-site review.

On the basis of a review of the data prepared by the contractor, the Regional Office will select for review specific departments or other organizational units, specific job categories across departmental or organizational lines, and specific personnel practices or policies applicable within the institution as a whole. If the review team deems it necessary for the purpose of determining compliance, the review will involve the detailed examination of formal and informal personnel procedures and policies, as well as individual personnel records of employees, former employees and applicants for employment in the organizational units and job categories being analyzed. During the course of the review, the Regional Office team may wish to conduct interviews with employees, former employees and applicants for employment in those job categories or organizational units being examined and with personnel responsible for participating in the personnel decisions affecting the selected job categories or organizational units. Interviews may also be conducted with representatives of organizations active on the campus and community organizations which have an interest in equal employment opportunity. It should be emphasized that the organizational units, job categories and personnel procedures initially selected for examination may be expanded during the review if any information is developed which in the judgment of the Regional Office requires further evaluation and examination.

Based on the information gathered through these processes, preliminary findings will be developed by the review team and presented to the head of the institution or his designated representative at an exit conference. Suggestions will be offered as to how the institution can correct or remedy any problems of discrimination or underutilization discovered during the review. While it is expected that the review team will keep the contractor's representatives fully informed of problems as they are discovered during the review, the formal exit conference will assure that the contractor is fully apprised of the likely findings of the review.

The exit interview does not represent a formal presentation of the findings, but provides the contractor an opportunity to review and react to the probable findings, to submit any additional documentation, and to discuss any additional factors which may not have been brought to the reviewers' attention during the review.

3. *Compliance letter*

Within approximately 30 days of the on-site review and the exit conference, the head of the institution will receive a formal letter from the Regional Civil Rights Director. The letter will include an evaluation of the institution's compliance status in each organizational unit, job category or personnel policy or procedure examined during the review. The letter will include an identification and discussion of all facts considered. The letter may also indicate specifically what must be accomplished by the contractor, suggestions as to what additional actions the contractor might take, and a maximum period of time within which the remedy must be effected.

This letter may be presented either in person by a member of the Regional Office staff or mailed to the contractor. If major problems are found, the letter will be discussed in detail with the responsible administrative officers of the institution.

4. *Response by the contractor*

Within approximately 30 days of receipt of a compliance letter the contractor will be expected to respond in writing to the Regional Civil Rights Director.

This response must address itself to each citation contained in the compliance letter and indicate in detail what action has been taken or is planned by the contractor on each point, including the period within which he intends to take action. If the action differs from that set forth as acceptable in the compliance letter, a full justification for the alternative must be set forth, including evidence that the alternative will be effective. If the time limit for effective action differs from that indicated in the compliance letter, the contractor must also provide evidence to support his conclusion that the action cannot be effected within the time specified by the Regional Office.

If the contractor disagrees with a finding made by the Regional Civil Rights Director, its response must state in detail the basis for disagreement and provide evidence to refute the validity of the facts upon which the finding was based, or demonstrate that the finding itself was based on an erroneous interpretation of the facts. In any such case it is expected that the contractor will provide any additional documentation which it considers appropriate to support its position.

Exceptions to the exit conference, compliance letters and response procedures will in most cases be required in pre-award reviews which carry a requirement that notice be given to the Government contracting agency regarding the prospective contractor's compliance status within 30 days of the request for clearance. In such instances every effort will be made by the Regional Office to issue the formal letter within 3 weeks of the request, which would allow the contractor one week for response. If the contractor is unable for reasons beyond his control to respond within the one week period, an extension of the 30-day clearance period will be requested by the Office for Civil Rights from the contracting agency. However, if the contractor elects not to respond within the one week or an extension cannot be secured from the contracting agency, the Office for Civil Rights will be unable to make the positive certification required for the award.

5. *Evaluation of the response*

Within aproximately 30 days of receipt of the institution's response, the Regional Civil Rights Director will notify the head of the institution of the results of his evaluation of the response. If the response appears to the Regional Office to be satisfactory, or if the response is sufficient to alter a previous finding, the notification will indicate the Regional Office's tentative acceptance of the response and will advise the institution that it has been forwarded to the Washington Office with a recommendation for final acceptance.

If the response is not acceptable to the Regional Office, the notification will indicate the areas of unacceptability and usually will request a conference with the contractor to attempt to resolve the differences. If a resolution cannot be achieved within approximately 30 days following this notification, the matter will be forwarded to the Washington Office with appropriate recommendations for additional conciliation efforts or enforcement action. If such recommendations are made by a Regional Office, the head of the institution will be so advised in writing by the Regional Civil Rights Director. When a case is not resolved at the level of the Regional Office, the Washington Office may determine that additional conciliation efforts are necessary before taking enforcement action. In such cases, the Director of the Office for Civil Rights will inform the institution of its opportunity to meet with the Director or his representatives for further discussion of the unresolved issues.

Conduct of class complaint investigations

1. *Notice to the institution*

Within approximately 10 days of the filing of a class complaint, a notice will be sent by the Regional Civil Rights Director to the head of the institution advising him of the receipt of a complaint. This notice will include the date, place and circumstances of the alleged unlawful employment practice. Notification of a schedule review will be sent to the institution as far in advance as possible but at least two weeks prior to the initiation of the investigation.

2. *On-site investigation*

At the opening of an investigation a copy of the complaint will be provided to the institution, and the institution will be advised of the procedures to be followed by the reviewer conducting the investigation. The institution will also be advised at this time of the particular personnel processes and the organizational units or job categories which will be reviewed as a part of the investigation. The investigation may involve, according to the discretion of the compliance review team, an examination of relevant data and information concerning present employees, former employees or applicants for employment in the organization units and job categories associated with the complaint. It may also include an analysis of formal and informal personnel procedures and policies associated with the particular practice being examined; interviews with employees, former employees or applicants for employment.

Based on the information gathered during the investigation, preliminary findings will be developed by the investigative team and presented to the head of the institution or his designated representative at an exit conference. As in the case of regular reviews, the exit interview does not represent a formal presentation of the findings but provides the contractor an opportunity to submit any additional documentation and discuss any additional factors which may not have been brought to the reviewers' attention during the review and which it wishes the reviewers to consider in preparing their formal findings. If the preliminary finding is that the allegations are valid, the investigative team will advise the institution as to the specific corrective action which may be required by the contractor to remedy the discriminatory treatment, and of the date by which such actions should be taken. It should be noted that while a formal finding is not made at the exit conference, this should not preclude the contractor's acting to remedy a matter brought to his attention during the exit conference, prior to receipt of formal findings.

It should be emphasized that the law protects individuals who have complained of discrimination from harassment by the employer because of that complaint. Instances of harassment or reprisals brought to the attention of the Office for Civil Rights may be considered a basis for enforcement action. The same criteria apply to relatives of complainants and to those who aid in a Government inquiry.

Steps following non-compliance determinations

Show cause notices

When the Director of the Office for Civil Rights has reasonable cause to believe that a contractor has violated the equal opportunity clause, he may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement procedures or other appropriate action to ensure compliance should not be instituted. (See 41 CFR 60–1.28) A show cause notice will in all cases be issued to the contractor when it is found that a contractor does not have an affirmative action program or that the program is not acceptable under the standards contained in 41 CFR 60–2.10 through 60–2.32. The Department of action program (37 FR 17766). In other enforcement circumstances, a show cause notice be issued when there is a substantial deviation from an affirmative action program (37 FR 17766). In other enforcement circumstances, a show cause notice is not required and its use is at the sole discretion of the Director, Office of Federal Contract Compliance, Department of Labor.

Show cause notices may also be issued by the Regional Civil Rights Director as a part of letters of findings following either a compliance review or a complaint investigation if it is found that an institution which is required to have developed an affirmative action program has not done so, or that the affirmative action program which has been developed by the institution does not conform to the guidelines contained in 41 CFR 60–2.10 through 60–2.32.

Sanctions and penalties

The Executive Order authorizes the imposition of the following sanctions and penalties against contractors who have failed to comply with the provisions of the Executive Order and the implementing regulations:

1. Publication of the name of the non-complying contractor.
2. Cancellation, termination, and suspension of contracts or portions of contracts.
3. Debarment from future contracts or extensions or modifications of existing contracts.

In addition, the Director, Office of Federal Contract Compliance, may in some cases recommend to the Department of Justice or the Equal Employment Opportunity Commission the initiation of appropriate judicial proceedings, including criminal proceedings by the Department of Justice for providing false nformaton.

Prior to the imposition of any sanctions and penalties, reasonable efforts within a reasonable time must be made to secure compliance through conference, conciliation, mediation and persuasion, and the contractor must be afforded an opportunity for a hearing.—We have briefly described the processes of conference, conciliation, mediation and persuasion above in outlining the compliance review and complaint investigation procedures. When these efforts fail to produce corrective action adequate to overcome any instance of noncompliance, appropriate administrative proceedings leading to the imposition of sanctions and penalties will be initiated. The first step in this process will be a letter giving contractors 10 days in which to comply or request a hearing before an impartial hearing officer. The procedures for imposition of the sanctions and penalties are detailed in 41 CFR 60-1.26, 60-1.27, 60-1.30 and 60-1.31.

A hearing adjudicates whether the contractor is out of compliance with the requirements of the Executive Order and its regulations. Except to the extent that applicable law provides otherwise, the burden of proving noncompliance is on the Government. Hearings are conducted in accordance with the Department's rules for such proceedings, published at 45 CFR Part 82 and 37 Fed. Reg. 7323. These rules also prescribe the procedures for intervention of interested parties in these proceedings (section 82.6), and for review within the Department of the decision of the hearing officer (section 82.37).

The Office for Civil Rights is responsible for advising HEW contracting agencies as to whether contractors for which they are responsible can comply with the requirements of the equal employment opportunity clause contained in each Federal contract over $10,000. Such advice is binding upon the contracting officers in their determinations of the responsibility of prospective contractors. OFCC is responsible for advising other agencies on the contractor's compliance status. Such advice is ordinarily based upon the information and findings of the OCR review.

If the Office for Civil Rights has determined, pursuant to the review and enforcement procedures outlined in this and the preceding section, that a contractor is unable to comply with its equal employment opportunity obligations, the Director may so advise all contracting agencies.[8] This notification may or may not occur in the context of a response to a request for clearance of a new award or of the modification or extension of an existing contract.[9]

Notification of "inability to comply" to contracting agencies by the Director of the Office for Civil Rights has the effect of denying or deferring the extension of an existing contract or the award of a new contract which may arise. In such cases, the contractor is entitled to have an immediate hearing on its compliance status concurrent with the second denial or deferral of a contract award.

Procedures for a formal hearing, including those for cancellation or termination of existing contracts and debarment from further contracts, are set forth in detail in 41 CFR 60-1.26(b) (Tab B), and in Chapter 27-10 of the Department of Health, Education, and Welfare General Administration Manual (34 FR 1276).

Data gathering and analysis—Suggested procedures

A necessary prerequisite to the development of a meaningful affirmative action program is the identification and analysis of problem areas inherent in minority and female employment, and an evaluation of the opportunities for utilization of minorities and women in the contractor's workforce. (See Guidelines p. 2 for an explanation of the obligations of public contractors.)

The first step in the contractor's analysis of its workforce is to determine where policies and practices have had the effect of denying equal employment opportunity and benefits to certain groups of persons on a discriminatory basis. This will necessitate the development of a comprehensive inventory of all employees.

An employer must then organize this inventory so as to determine:

1. Any patterns of job classification and assignment identifiable by sex or minority group;

2. Any job classification or organizational unit where women and minorities are not employed or are underutilized (see Guidelines p. 3 for a definition of underutilization); and

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[8] 41 CFR 60-2.2 provides in part that "[Any contractor required . . . to develop an affirmative action program . . . who has not complied fully . . . is not in compliance with Executive Order 11246 . . ." and "is unable to comply with the equal employment opportunity clause" unless the government can "otherwise affirmatively determine that the contractor is able to comply with his equal employment obligations or, unless, upon review, it is determined by the Director [Office of Federal Contract Compliance] that substantial issues of law or fact exist as to the contractor's responsibility to the extent that a hearing is, in his sole judgment, required prior to a determination. . . ."

[9] 41 CFR 60-1.20(d) provides that contracts of $1 million or more, including modifications or extensions of existing contracts which involve the allocation of additional funds in the amount of $1 million or more, can not be awarded without a finding that the prospective contractor is complying with the provisions of the Executive Order and the implementing regulations.

3. Any patterns of difference in rate of pay, status, type of appointment, termination, or rates of advancement within job classifications or organizational units which are identifiable by sex or minority group.

The results of a contractor's analysis should be shared and discussed with personnel relations staff, with department and divisional heads and with other supervisors responsible for academic and nonacademic personnel to determine whether patterns suggesting deficiencies in equal employment exist and, if so, why. At this stage of evaluation, some institutions have set up task forces to assist in identifying discriminatory patterns and practices. This has proven particularly useful in the area of academic employment, where the faculty has traditionally had a principal responsibility for matter relating to faculty status.

A. *Basic data file*

The contractor must first establish a basic data file on its employees. This is the primary source material of the institution and need not be submitted to the Office for Civil Rights, although the contractor may be required at some time to supply OCR with this information in order to determine the accuracy in the compilation of the data.

The basic file should contain the following for each employee:

(1) Name and/or identification number (See discussion below);
(2) Sex;
(3) Ethnic identification (Negro, Spanish-surnamed, American Indian, Oriental. All others, including Caucasians, should be identified as "other");
(4) Year or date of birth, or age;
(5) Current salary (full-time annual equivalent);
(6) Current job family or generic job family;
(7) Current job title;
(8) Personnel action resulting in current job title (new hire, promotion, transfer, demotion);
(9) Date of personnel action resulting in current title (years in current job);
(10) Previous job title;
(11) Employment status (full-time, part-time, tenured, non-tenured, etc.);
(12) Educational level;
(13) Organizational unit where employed; and
(14) Date of hire.

The contractor may wish to compile this basic data in the form of a master list, or computer printout, arranged by department, within department by job classification, and within job classification by length of service and salary. The Office for Civil Rights will not normally require that these printouts be submitted, if the summaries described below are compiled in such a way as to be sufficient to determine compliance.

In collecting data on employees, it is not necessary to identify the employees by name. Where there is an objection raised by an individual to providing data on his or her race or sex, it should be made clear that individuals are not themselves legally bound to report such information. Where an inventory by voluntary submission of such data on the part of employees is not obtained, however, employers must rely on their superivsors to make identification on the basis of their "best knowledge" of employees. It is clear that no inventory method, and particularly the latter one, will provide perfect accuracy. Nevertheless, the institution must devise some method which will produce reasonably accurate data upon which to base its identification of problems or deficiencies and to develop a responsive affirmative action program.

B. *Organization*

The basic data on all employees must be summarized for ready analysis in the following manner:

1. by department, a list of each job classification in descending order (e.g. professor, associate professor; secretary 1, secretary 2, etc.) showing the numbers by sex for each racial and ethnic group, as well as cumulative figures for minorities and for females generally.

2. by job classification, within the entire institution, showing the numbers by sex for each ethnic group, as well as cumulative figures for minorities and for females generally. In order to satisfy this requirement an institution must establish an organization chart, broken down by career ladders; it must also classify all job titles and organize them into career ladders. The duties, educational requirements, experiential requirements and pay ranges for each position must be made reasonably explicit.

3. by department, the mean salary in each job classification, by sex for each racial and ethnic group.

4. by job classification, across department lines, the mean salary in each classification, by sex for each racial and ethnic group.

C. *Required Analysis*

1. *Availability of women and minorities.*—A unique aspect of equal employment opportunity under the Executive Order is the required compilation of availability data on women and minorities for use as a measure of the contractor's equal employment opportunity. By comparing availability data with current employees, the contractor has an indication of how representative its workforce is of the persons qualified for employment in its institution.

The Department of Labor's Revised Order No. 4 (41 CRF 60–2.11(a) (1 and 2)) contains explicit guidelines for constructing an availability index for minorities and an availability index for women. These indices are particularly applicable in the case of nonacademic personnel.

The demographic data needed to develop these estimates can generally by secured through the Census Bureau, the Department of Labor's Bureau of Labor Statistics and its Women's Bureau, and from city, county and state governments, including planning commissions and public employment agencies. Estimates concerning minority population, workforce and requisite skills may often be obtained from local Chambers of Commerce, union organizations, employer associations, local educational institutions, community organizations, and minority and women's advocacy groups such as the Urban League and NOW. The community organizations serving minorities and women will often be the closest to the situation and thus should be contacted by the contractor in preparing estimates of availability.

For academic personnel the development of availability figures is slightly different, because the recruiting area will vary from institution to institution. It may be a national or even international one. Because the skills required for a particular position are often quite specialized, accurate information on availability may be more difficult to obtain.

OCR recommends the following procedure for determining availability figures for women and minorities for academic positions:

Many disciplinary associations and professional groups have data that show percentages of racial and national origin minorities available in certain fields, and a 1968 study by the Ford Foundation (Office of Reports) provides percentages of Negroes holding doctorates. To determine the number of women available for senior level positions, the Office recommends that the contractor use data available from the National Register of Scientific and Technical Personnel prepared by the National Science Foundation, and the U.S. Office of Education's annual reports on earned degrees. Another source is the National Research Council of the National Academy of Science. This data has been compiled by sex, but is now being compiled by race, as well. The NSF data is broken down by sex, specialty and subspecialty, highest degree, years of professional experience, and primary work activity. The OE data is broken down by sex, degree earned, school granting degree, and specialty. For women in junior positions, the Office recommends that the contractor consider the OE annual report of earned degrees for the last 5 years and current graduate school enrollments.

To the extent that an institution makes a practice of employing its own graduates, the number and percentage of graduate degrees which it has itself awarded to women and minorities in the past ten years or so should be reflected in the goals which it sets for its future faculty appointments.

For academic employees the basic national data on earned doctoral degrees will provide the basis for a utilization analysis of a contractor's workforce, unless the contractor can otherwise demonstrate that the labor market upon which it draws is significantly different from this base. For example, some institutions appoint a large number of new faculty from a particular group of graduate schools: such institutions may use data obtained from these schools to determine the availability of women and minorities. If the annual output of women and minorities from the primary feeder schools exceeds the national average, the contractor will be expected to use the higher figures to determine availability. If the output from the feeder schools is less than the national average, the institution will be expected to justify its use of such recruitment sources, or use the higher figures to determine eligibility.

2. *Com arison of current workforce with availability data.*—The next step for the contractor is to compare the number of women and minorities in its current

workforce with their availability in the market from which it can reasonably recruit. This comparison must be by comparable job categories. Wherever the comparison reveals that a hiring unit of the university (a department or other section) is not employing minorities and women to the extent that they are available and qualified for work, it is then required to set goals to overcome this situation.

Goals should be set so as to overcome deficiencies in the utilization of minorities and women within a reasonable time. In many cases this can be accomplished within 5 years; in others more time or less time will be required.

Goals may be set in numbers or percentages, and should reflect not only the number of new hires but also the projected overall composition of the work force in the given unit.

It is necessary to set goals that will overcome underutilization in the institution's work force within a reasonable period of time, not merely to set goals for new hires based on current availability.

In many institutions the appropriate unit for goals is the school or division, rather than the department. While estimates of availability in academic employment can best be determined on a disciplinary basis, anticipated turnover and vacancies can usually be calculated on a wider basis. While a school, division or college may be the organizational unit which assumes responsibility for setting and achieving goals, departments which have traditionally excluded women or minorities from their ranks are expected to make particular efforts to recruit, hire and promote women and minorities. In other words, the Office for Civil Rights will be concerned not only with whether a school meets its overall goals, but also whether apparent general success has been achieved only by strenuous efforts on the part of a few departments.

3. *Salary analysis.*—A salary analysis is required for all employees. The basic question to be answered by such an analysis is whether there is a difference in the salary of employees with the same job title that can be attributed to their sex or minority status. However, before this analysis is done, job titles must be compared and overlapping ones merged so that persons doing the same work with different job titles benefit from the salary analysis.

The most effective means of undertaking a meaningful salary analysis may vary from institution to institution. Factors which are taken into consideration in determining salary may vary among and even within institutions. The purpose and function of every salary analysis should be to determine whether women or minority group persons are being paid lower wages for performing the same or essentially the same duties.

D. *Additional types of analyses which are useful in determining compliance*

1. *Locations analysis.*—In an attempt to prevent the development of segregated job titles in any physical location, a locations report is suggested. This report should examine the race-sex-national origin composition of each job title in each major organizational unit of the institution, e.g., athletic department, health services, hospitals, central administration, deans' offices, building and grounds, etc.

This analysis may not be revealing where the units involved are small or where the numbers of minorities or women in the job title are few. But where a university discovers that it has one minority or sex group clustered in any one unit, even though there are members of the opposite sex or of other minorities in the same job title clustered elsewhere, corrective action must be taken. If a university discovers the reason for this concentration, it can prevent it from recurring or continuing by altering its policies.

This type of analysis may also be useful in determining at what point in the organizational structure women or minorities cease to move upward, and what obstacles to upward mobility may exist within the contractor's organizational structure.

2. *Promotion analysis.*—A university may also compile data to determine the success or failure of women and minorities in attaining promotion or tenure. One possible method is to compare the time spent prior to gaining promotion or tenure by males and by females of similar experience or by minorities and by others of similar experience. Another comparison could show the percentage in each group eligible for and those granted promotion or tenure. Wide variance among sex-ethnic-racial groups would necessitate further analysis.

E. *Testing and test validation*

41 CFR 60-3 ("Employee Testing and Other Selection Procedures") requires all contractors to validate tests used as a basis for employment decisions, in

order to make certain they are not discriminatory, and provides that contractors may be required to validate other employee selection techniques.

The term "test" is defined as any paper-and-pencil or performance measure used as a basis for any employment decision and all other formal, scored, quantified or standardized techniques of assessing job suitability.

The latter techniques include personal history and background requirements which are specifically used as a basis for qualifying or disqualifying applicants or employees, specific educational or work history requirements, scored interviews, biographical information blanks, interviewer's rating scales, and scored application forms.

If a test or selection technique is determined to have a disproportionate impact on minority persons or women, such test or selection technique must be validated pursuant to the regulations cited above.

A testing report should contain the following data: name of test, publisher, and publication date of the test, the groups on whom it was validated and when and where, the groups to whom it is administered by the contractor and in what employment decisions it is used, the average score, the standard deviation for each race-sex group taking the test and the number of people in each race-sex group taking the test. Data should be kept indicating the scores, standard deviation, and number of people in each race-sex group who took the test and subsequently received a favorable personnel action (hired, promoted, placed in new job) in part because of their test scores. Based on the analysis of this data, the contractor must determine where tests must be eliminated or modified.

CODE OF FEDERAL REGULATIONS—TITLE 41

CHAPTER 60—OFFICE OF FEDERAL CONTRACT COMPLIANCE, EQUAL EMPLOYMENT OPPORTUNITY, DEPARTMENT OF LABOR

(NOTE. The President, by Executive Order 11246 (30 F.R. 2319), abolished the President's Committee on Equal Employment Opportunity and delegated the functions of the abolished Committee to the Secretary of Labor. By Order of the Secretary of Labor, 30 F.R. 13441, Oct. 22, 1965, all rules, regulations, orders, instructions, and other directives, issued by the abolished Committee, not inconsistent with E.O. 11246 remain in effect for the present as those of the Secretary of Labor. All references in this chapter to "Committee", "Chairman", "Vice-Chairman", and "Executive Vice-Chairman" shall mean the Director of the Office of Federal Contract Compliance of the United States Department of Labor, and all references to "a panel of the Committee" shall mean an appropriate panel of three appointed by the Director.)

Part

60-1 Obligations of contractors and subcontractors.
60-2 Affirmative action programs.
60-3 Employee testing and other selection procedures.
60-5 Washington Plan.
60-6 San Francisco Plan.
60-7 St. Louis Plan.
60-8 Atlanta Plan.
60-10 Camden Plan.
60-11 Chicago, Plan.
60-20 Sex discrimination guidelines.
60-30 Hearing rules for sanction proceedings.
60-40 Examination and copying of OFCC documents.
60-50 Guidelines on discrimination because of religion or national origin.
60-60 Contractor evaluation procedures for contractors for supplies and services.

PART 60-1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

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60-1.47 Effective date.

(AUTHORITY. The provisions of this Part 60-1 issued pursuant to sec. 201, E.O. 11246 (30 F.R. 12319)).

(SOURCE. The provisions of this Part 60-1 appear at 33 F.R. 7804, May 28, 1968, unless otherwise noted.)

SUBPART A—PRELIMINARY MATTERS; EQUAL OPPORTUNITY CLAUSE; COMPLIANCE REPORTS

§ 60-1.1 Purpose and application.

The purpose of the regulations in this part is to achieve the aims of Parts II, III, and IV of Executive Order 11246 for the promotion and insuring of equal opportunity for all persons, without regard to race, color, religion, sex, or national origin, employed or seeking employment with Government contractors or with contractors performing under federally assisted construction contracts. The regulations in this part apply to all contracting agencies of the Government and to contractors and subcontractors who perform under Government contracts, to the extent set forth in this part. The regulations in this part also apply to all agencies of the Government administering programs involving Federal financial assistance which may include a construction contract, and to all contractors and subcontractors performing under construction contracts which are related to any such programs. The procedures set forth in the regulations in this part govern all disputes relative to a contractor's compliance with his obligations under the equal opportunity clause regardless of whether or not his contract contains a "Disputes" clause. Failure of a contractor or applicant to comply with any provision of the regulations in this part shall be grounds for the imposition of any or all of the sanctions authorized by the order. The regulations in this part do not apply to any action taken to effect compliance with respect to employment practices subject to Title VI of the Civil Rights Act of 1964. The rights and remedies of the Government hereunder are not exclusive and do not affect rights and remedies provided elsewhere by law, regulation, or contract; neither do the regulations limit the exercise by the Secretary or Government agencies of powers not herein specifically set forth, but granted to them by the order.

[33 F.R. 7804, May 28, 1968, as amended at 34 F.R. 744, Jan. 17, 1969]

§ 60–1.2 Administrative responsibility.

Under the general direction of the Secretary, the Director has been delegated authority and assigned responsibility for carrying out the responsibilities assigned to the Secretary under the order, except the power to issue rules and regulations of a general nature. All correspondence regarding the order should be directed to the Director, Office of Federal Contract Compliance, U.S. Department of Labor, 14th and Constitution Avenue NW., Washington, D.C. 20210.

§ 60–1.3 Definitions.

(a) The term "administering agency" means any department, agency and establishment in the Executive Branch of the Government, including any wholly owned Government corporation, which administers a program involving federally assisted construction contracts.

(b) The term "agency" means any contracting or any administering agency of the Government.

(c) The term "applicant" means an applicant for Federal assistance involving a construction contract, or other participant in a program involving a construction contract as determined by regulation of an administering agency. The term also includes such persons after they become recipients of such Federal assistance.

(d) The term "Compliance Agency" means the agency designated by the Director on a geographical industry or other basis to conduct compliance reviews and to undertake such other responsibilities in connection with the administration of the order as the Director may determine to be appropriate. In the absence of such a designation, the Compliance Agency will be determined as follows:

(1) In the case of a prime contractor not involved in construction work, the Compliance Agency will be the agency whose contracts with the prime contractor have the largest aggregate dollar value;

(2) In the case of a subcontractor not involved in construction work, the Compliance Agency will be the Compliance Agency of the prime contractor with which the subcontractor has the largest aggregate value of subcontracts or purchase orders for the performance of work under contracts;

(3) In the case of a prime contractor or subcontractor involved in construction work, the Compliance Agency for each construction project will be the agency providing the largest dollar value for the construction project; and

(4) In the case of a contractor who is both a prime contractor and subcontractor, the Compliance Agency will be determined as if such contractor is a prime contractor only.

(e) The term "construction work" means the construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other onsite functions incidental to the actual construction.

(f) The term "contract" means any Government contract or any federally assisted construction contract.

(g) The term "contractinng agency" means any depart. agency, establishment, or instrumentality of the Executive Branch of the Government, including any wholly owned Government corporation, which enters into contracts.

(h) The term "contractor" means, unless otherwise indicated, a prime contractor or subcontractor.

(i) The term "Director" means the Director, Office of Federal Contract Compliance, U.S. Department of Labor or any person to whom he delegates authority under the regulations in this part.

(j) The term "equal opportunity clause" means the contract provisions set forth in § 60–1.4 (a) or (b), as appropriate.

(k) The term "federally assisted construction contract" means any agreement or modification thereof between any applicant and a person for construction work which is paid for in whole or in part with funds obtained from the Government or borrowed on the credit of the Government pursuant to any Federal program involving a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, or any application or modification thereof approved by the Government for a grant, contract, loan, insurance, or guarantee under which the applicant itself participates in the construction work.

(l) The term "Government" means the Government of the United States of America.

(m) The term "Government contract" means any agreement or modification thereof between any contracting agency and any person for the furnishing of supplies or services or for the use of real or personal property, including lease arrangements. The term "services", as used in this section includes, but is not limited to the following services: Utility, construction, transportation, research, insurance, and fund depositary. The term "Government contract" does not include (1) agreements in which the parties stand in the relationship of employer and employee, and (2) federally assisted construction contracts.

(n) The term "hearing officer" means the individual or board of individuals designated to conduct hearings.

(o) The term "modification" means any alteration in the terms and conditions of a contract, including supplemental agreements, amendments, and extensions.

(p) The term "Order" means Parts II, III, and IV of the Executive Order 1246 dated September 24, 1965 (30 F.R. 12319), any executive order amending such order, and any other Executive order superseding such order.

(q) The term "person" means any natural person, corporation, partnership, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

(r) The term "prime contractor" means any person holding a contract and, for the purposes of Subpart B of this part, any person who has held a contract subject to the order.

(s) The term "recruiting and training agency" means any person who refers workers to any contractor or subcontractor, or who provides or supervises apprenticeship or training for employment by any contractor or subcontractor.

(t) The term "rules, regulations, and relevant orders of the Secretary of Labor" used in paragraph (4) of the equal opportunity clause means rules, regulations, and relevant orders of the Secretary of Labor or his designee issued pursuant to the order.

(u) The term "Secretary" means the Secretary of Labor, U.S. Department of Labor.

(v) The term "site of construction" means the general physical location of any building, highway, or other change or improvement to real property which is undergoing construction, rehabilitation, alteration, conversion, extension, demolition, or repair and any temporary location or facility at which a contractor, subcontractor, or other participating party meets a demand or performs a function relating to the contract or subcontract.

(w) The term "subcontract" means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the furnishing of supplies or services or for the use of real or personal property, including lease arrangements, which, in whole or in part, is necessary to the performance of any one or more contractors; or

(2) Under which any portion of the contractor's obligation under any one or more contractors is performed, undertaken, or assumed.

(x) The term "subcontractor" means any person holding a subcontract and, for the purposes ofS ubpart B of this part, any person who has held a subcontract subject to the order. The term "First-tier subcontractor" refers to a subcontractor holding a subcontract with a prime contractor.

(y) The term "United States" as used herein shall include the several States, thte District of Columbia, the Commonwealth of Puerto Rico, the Panama Canal Zone, and the possessions of the United States.

(z) The term "minority group" as used herein shall include, where appropriate, female employees and prospective female employees.

[33 F.R. 7804, May 28, 1968, as amended at 34 F.R. 745, Jan. 17, 1969]

§ 60–1.4 Equal opportunity clause.

(a) *Government contracts.*—Except as otherwise provided, each contracting agency shall include the following equal opportunity clause contained in section 202 of the order in each of its Government contracts (and modifications thereof if not included in the original contract):

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be

limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however,* That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

(b) *Federally assisted construction contracts.*—(1) Except as otherwise provided, each administering agency shall require the inclusion of the following language as a condition of any grant, contract, loan, insurance, or guarantee involving federally assisted construction which is not exempt from the requirements of the equal opportunity clause:

The applicant hereby agrees that it will incorporate or cause to be incorporated into any contract for construction work, or modification thereof, as defined in the regulations of the Secretary of Labor at 41 CFR Chapter 60, which is paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the following equal opportunity clause:

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of

compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The contractor will include the portion of the sentence immediately preceeding paragraph (1) and the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: *Provided, however*, That in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency the contractor may request the United States to enter into such litigation to protect the interests of the United States.

The applicant further agrees that it will be bound by the above equal opportunity clause with respect to its own employment practices when it participates in federally assisted construction work: *Provided*, That if the applicant so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

The applicant agrees that it will assist and cooperate actively with the administering agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor, that it will furnish the administering agency and the Secretary of Labor such information as they may require for the supervision of such compliance, and that it will otherwise assist the administering agency in the discharge of the agency's primary responsibility for securing compliance.

The applicant further agrees that it will refrain from entering into any contract or contract modification subject to Executive Order 11246 of September 24, 1965, with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to the Executive order and will carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by the administering agency or the Secretary of Labor pursuant to Part II, Subpart D of the Executive order. In addition, the applicant agrees that if it fails or refuses to comply with these undertakings, the administering agency may take any or all of the following actions: Cancel, terminate, or suspend in whole or in part this grant (contract, loan, insurance, guarantee); refrain from extending any further assistance to the applicant under the program with respect to which the failure or refund occurred until satisfactory assurance of future compliance has been received from such applicant; and refer the case to the Department of Justice for appropriate legal proceedings.

(2) State and local governments intending to impose affirmative action hiring and/or training requirements on federally assisted construction already subject to federal minority hiring and/or training plans established pursuant to the Order shall submit such requirements to the Director prior to their inclusion in any federally assisted construction contracts. Such State or local government requirements will be deemed applicable to federally assisted construction contracts unless the Director, or in the case of an appeal of the Director's determination, the Assistant Secretary for Employment Standards, determines that such requirements are inconsistent with the Order or incompatible with the effective implementation of the federal minority hiring and/or training plan (either voluntary or imposed) in the area. The State or local government affirmative action hiring and/or training requirements shall not be included in federally assisted construction contracts until the Director, or, in the case of an appeal, the Assistant Secretary, has had an opportunity to make a determination in accordance with this paragraph. The Director shall make his determination within 60 days of his receipt of the State or local government's submission, which should include the pertinent affirmative action hiring and/or training requirements and supporting data. The Director may also request the State or local government to supply information and data necessary for his determination. The Director's determination shall be communicated directly to the State or local governmental body by registered mail, return receipt requested, together, in the case of an adverse determination, with a notification of its right to appeal to the Assistant Secretary. The Director's determination shall also be announced in a Federal Register notice, which shall also indicate that the State or local government, and any other persons or groups affected by the Director's determination, including construction trades contractors, labor organizations, associations or other organizations of construction trades contractors and/or labor organizations, and minority community groups, may appeal such determination to the Assistant Secretary by requesting a hearing within 21 days of the publication of the Federal Register notice.

Following this appeal period, if any requests for a hearing have been filed with the Assistant Secretary, the Department of Labor shall then designate an administrative law judge who shall conduct a hearing to make proposed findings and a recommended decision to the Assistant Secretary upon the basis of the record before him. The administrative law judge shall give reasonable notice of the opportunity to participate in such hearing by registered mail, return receipt requested, to those requesting the hearing and shall also give reasonable notice of such hearing in the FEDERAL REGISTER to inform all other persons, organizations and other entities affected by the Director's determination of their opportunity to participate in the hearing. Each participant shall have the right to counsel and a fair opportunity to present his case, including such cross-examination as the administrative law judge may deem appropriate in the circumstances. Within 80 days of the close of the appeal period for requesting a hearing, the Assistant Secreteary shall make a final decision on the basis of the record before him, which shall consist of the record for recommended decision, the rulings and recommended decision of the administrative law judge, and the exceptions and briefs filed subsequent to the administrative law judge's decision.

In determining whether State or local government affirmative action hiring and/or training requirements are inconsistent with the Order or incompatible with the effective implementation of the applicable federal minority hiring and/or training plan in the area, at least the following factors shall be considered under this subparagraph: (i) The impact of the State or local government requirements on the successful implementation of the federal plan in the area; (ii) the minority population in the area to be covered by the State or local government plan; (iii) the minority manpower utilization in the area construction industry, on a trade-by-trade basis; (iv) the availability of minorities for employment in the area construction industry; (v) the need and availability of training programs in the area construction industry; (vi) the projected growth and attrition factors of the area construction industry in the near future; (vii) available procedures to ensure that contractors, subcontractors and others are provided with notice and a full opportunity to contest allegations of noncompliance; and (viii) assurances that the State or local government minority hiring and/or training requirements are not intended and shall not be used to discriminate against any qualified person on the basis of race, color, religion, sex or national origin. State and local governments are encouraged: to participate in the formulation and implementation of federal minority hiring and/or training plans consonant with the aforementioned criteria in areas currently without such plans; to enforce their fair employment practices laws with respect to acts of discrimination affecting federally assisted construction; and to assist the administering federal agency in monitoring the compliance of contractors and subcontractors performing on federally assisted projects. For purposes of this subparagraph, "Assistant Secretary" means the Assistant Secretary for Employment Standards or his designee.

(c) *Subcontracts.*—Each nonexempt prime contractor or subcontractor shall include the equal opportunity clause in each of its nonexempt subcontracts.

(d) *Incorporation by reference.*—The equal opportunity clause may be incorporated by reference in Government bills of lading, transportation requests, contracts for deposit of Government funds, contracts for issuing and paying U.S. savings bonds and notes, contracts and subcontracts less than $50,000 and such other contracts as the Director may designate.

(e) *Incorporation by operation of the order and agency regulations.*—By operation of the order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contracts. The clause may also be applied by agency regulations to every nonexempt contract where there is no written contract between the agency and the contractor.

(f) *Adaptation of language.*—Such necessary changes in language may be made in the equal opportunity clause as shall be appropriate to identify properly the parties and their undertakings.

[33 F.R. 7804, May 28, 1968, as amended at 34 FR 744, Jan. 17, 1969; 39 FR 2365, Jan. 21, 1974]

§ 60-1.5 Exemptions.

(a) *General*—(1) *Transactions of $10,000 or under.*—Contracts and subcontracts not exceeding $10,000, other than Government bills of lading, are exempt from the requirements of the equal opportunity clause. In determining the applicability of this exemption to any federally assisted construction contract, or subcontract thereunder, the amount of such contract or subcontract rather than the amount of the Federal financial assistance shall govern. No agency, contractor, or subcontractor shall procure supplies or services in less than usual quantities to avoid applicability of the equal opportunity clause.

(2) *Contracts and subcontracts for indefinite quantities.*—With respect to contracts and subcontracts for indefinite quantities (including, but not limited to, open end contracts, requirement-type contracts, Federal Supply Schedule contracts, "call-type" contracts, and purchase notice agreements), the equal opportunity clause shall be included unless the purchaser has reason to believe that the amount to be ordered in any year under such contract will not exceed $10,000. The applicability of the equal opportunity clause shall be determined by the purchaser at the time of award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the equal opportunity clause shall be applied to such contract whenever the amount of a single order exceeds $10,000. Once the equal opportunity clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

(3) *Work outside the United States.*—Contracts and subcontracts are exempt from the requirements of the equal opportunity clause with regard to work performed outside the United States by employees who were not recruited within the United States.

(4) *Contracts with State or local governments.*—The requirements of the equal opportunity clause in any contract or subcontract with a State or local government (or any agency, instrumentality or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract or subcontract. In addition, any agency, instrumentality or subdivision of such government, except

for educational institutions and medical facilities, are exempt from the requirements of filing the annual compliance report provided for by § 60–1.7(a)(1) and maintaining a written affirmative action compliance program prescribed by § 60–1.40 and Part 60–2 of this chapter.

(b) *Specific contracts and facilities*.—(1) *Specific contracts.*—The Director may exempt an agency or any person from requiring the inclusion of any or all of the equal opportunity clause in any specific contract or subcontract when he deems that special circumstances in the national interest so require. The Director may also exempt groups or categories of contracts or subcontracts of the same type where he finds it impracticable to act upon each request individually or where group exemptions will contribute to convenience in the administration of the order.

(2) *Facilities not connected with contracts.*—The Director may exempt from the requirements of the equal opportunity clause any of a prime contractor's or subcontractor's facilities which he finds to be in all respects separate and distinct from activities of the prime contractor or subcontractor related to the performance of the contract or subcontract, provided that he also finds that such an exemption will not interfere with or impede the effectuation of the order.

(c) *National security.*—Any requirement set forth in these regulations in this part shall not apply to any contract or subcontract whenever the head of an agency determines that such contract or subcontract is essential to the national security and that its award without complying with such requirement is necessary to the national security. Upon making such a determination, the head of the agency will notify the Director in writing within 30 days.

(d) *Withdrawal of exemption.*—When any contract or subcontract is of a class exempted under this section, the Director may withdraw the exemption for a specific contract or subcontract or group of contracts or subcontracts when in his judgment such action is necessary or appropriate to achieve the purposes of the order. Such withdrawal shall not apply to contracts or subcontracts awarded prior to the withdrawal, except that in procurements entered into by formal advertising, or the various forms of restricted formal advertising, such withdrawal shall not apply unless the withdrawal is made more than 10 calendar days before the date set for the opening of the bids.

[33 F.R. 7804, May 28, 1968, as amended at 38 F.R. 1932, Jan. 29, 1973]

§ 60–1.6 Duties of agencies.

(a) *General responsibility.*—Each agency shall be primarily responsible for obtaining compliance with the equal opportunity clause, the order, the regulations in this part, and orders issued pursuant thereto. Each agency shall cooperate with the Director and shall furnish him such information and assistance as he may require in the performance of his functions under the order. Such information shall include compliance review reports, schedules of compliance reviews and any other information relevant to the administration of the order.

(b) *Agency program.*—The head of each agency shall, subject to the prior approval of the Director, establish a program and promulgate procedures to carry out the agency's responsibilities for obtaining compliance with the order and regultaions and orders issued pursuant thereto. Each agency head shall also designate a Contract Compliance Officer, who (unless otherwise approved by the Director) shall be appointed by the head of the agency from among the agency's executive personnel to whom the Executive Schedule applies, and such officer shall be subject to the immediate supervision of the head of the agency. All compliance reviews required pursuant to the regulations in this part and such other compliance reviews as the Contract Compliance Officer determines to be appropriate shall be conducted by him or his designee. The head of the agency or the Contract Compliance Officer may also designate a Deputy Contract Compliance Officer to assist the Contract Compliance Officer in the performance of his duties. The names of the Contract Compliance Officers and the Deputy Contract Compliance Officers, their addresses and telephone numbers, and any changes made in their designation shall be furnished to the Director.

(c) *Agency regulation.*—The head of each agency shall prescribe regulations for the administration of the order and the regulations in this part. Agency regulations, directives and orders for such purpose must be submitted to the Director prior to issuance and may be enforced upon approval of the Director or 60 days after submission if not disapproved by the Director.

(d) [Reserved]

(e) *Evaluations.*—The Director may from time to time evaluate the programs, procedures, and policies of agencies in order to assure their compliance with the order and the regulations in this part and the compliance of prime contractors and subcontractor with the equal opportunity clause.

[33 F.R. 7804, May 28, 1968, as amended at 35 F.R. 10660, July 1, 1970]

§ 60–1.7 Reports and other required information.

(a) *Requirements for prime contractors and subcontractors.*—(1) Each agency shall require each prime contractor and each prime contractor and subcontractor shall cause its subcontractors to file annually, on or before the 31st day of March, complete and accurate reports on Standard Form 100 (EEO–1) promulgated jointly by the Office of Federal Contract Compliance, the Equal Employment Opportunity Commission and Plans for Progress or such form as may hereafter be promulgated in its place if such prime contractor or subcontractor (i) is not exempt from the provisions of these regulations in accordance with § 60–1.5; (ii) has 50 or more employees; (iii) is a prime contractor or first tier subcontractor; and (iv) has a contract, subcontract or purchase order amounting to $50,000 or more or serves as a depository of Government funds in any amount, or is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes: *Provided*, That any subcontractor below the first tier which performs construction work at the site of construction shall be required to file such a report if it meets requirements of subdivisions (i), (ii), and (iv) of this subparagraph.

(2) Each person required by § 60–1.7(a)(1) to submit reports shall file such a report with the contracting or administering agency within 30 days after the award to him of a contract or subcontract, unless such person has submitted such a report within 12 months preceding the date of the award. Subsequent reports shall be submitted annually in accordance with § 60–1.7(a)(1), or at such other intervals as the agency or the Director may require. The agency with the approval of the Director may extend the time for filing any report.

(3) The Director, the agency or the applicant, on their own motions, may require a contract to keep employment or other records and to furnish, in the form requested, within reasonable limits, such information as the Director, agency or the applicant deems necessary for the administration of the order.

(4) Failure to file timely, complete and accurate reports as required constitutes noncompliance with the prime contractor's or subcontractor's obligations under the equal opportunity clause and is ground for the imposition by the agency, the Director, an applicant, prime contractor or subcontractor, of any sanctions as authorized by the order and the regulations in this part. Any such failure shall be reported in writing to the Director by the agency as soon as practicable after it occurs.

(b) *Requirements for bidders or prospective contractors*—(1) *Certification of compliance with Part 60–2: Affirmative Action Programs.*—Each agency shall require each bidder or prospective prime contractor and proposed subcontractor, where appropriate, to state in the bid or in writing at the outset of negotiations for the contract: (i) Whether it has developed and has on file at each establishment affirmative action programs pursuant to Part 60–2 of this chapter; (ii) whether it has participated in any previous contract or subcontract subject to the equal opportunity clause; (ii) whether it has filed with the Joint Reporting Committee, the Director, an agency, or the Equal Employment Opportunity Commission all reports due under the applicable filing requirements.

(2) *Additional information.*—A bidder or prospective prime contractor or proposed subcontractor shall be required to submit such information as the agency or the Director requests prior to the award of the contract or subcontract. When a determination has been made to award the contract or subcontract to a specific contractor, such contractor shall be required, prior to award, or after the award, or both, to furnish such other information as the agency, the applicant, or the Director requests.

(c) *Use of reports.*—Reports filed pursuant to this section shall be used only in connection with the administration of the order, the Civil Rights Act of 1964, or in furtherance of the purposes of the order and said Act.

[33 F.R. 7804, May 28, 1968, as amended at 34 F.R. 745, Jan. 17, 1969; 35 F.R. 10660, July 1, 1970]

§ 60–1.8 Segregated facilities.

(a) *General.*—In order to comply with his obligations under the equal opportunity clause, a prime contractor or subcontractor must ensure that facilities provided for employees are provided in such a manner that segregation on the basis of race, color, religion, sex, or national origin cannot result. He may neither require such segregated use by written or oral policies nor tolerate such use by employee custom. His obligation extends further to ensuring that his employees are not assigned to perform their services at any location, under his control, where the facilities are segregated. This obligation extends to all contracts containing the equal opportunity clause regardless of the amount of the contract. The term "facilities" as used in this section means waiting rooms, work areas, restaurants and other eating areas, time clocks, restrooms, wash rooms, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees.

(b) *Certification by prime contractors and subcontractors.*—Prior to the award of any nonexempt Government contract of subcontract or federally assisted construction contract or subcontract, each agency or applicant shall require the prospective prime contractor and each prime contractor and subcontractor shall require each subcontractor to submit a certification, in the form approved by the Director, that the prospective prime contractor or subcontractor does not and will not maintain any facilities he provides for his employees in a segregated manner, or permit his employees to perform their services at any location, under his control, where segregated facilities are maintained; and that he will obtain a similar certification in the form approved by the Director, prior to the award of any nonexempt subcontract.

[33 F.R. 7804, May 28, 1968, as amended at 34 F.R. 744, Jan. 17, 1969]

§ 60–1.9 Compliance by labor unions and by recruiting and training agencies.

(a) Whenever compliance with the equal opportunity clause may necessitate a revision of a collective bargaining agreement, the labor union or unions which are parties to such an agreement shall be given an adequate opportunity to present their views to the Director.

(b) The Director shall use his best efforts, directly and through agencies, contractors, subcontractors, applicants, State and local officials, public and private agencies, and all other available instrumentalities, to cause any labor union, recruiting and training agency or other representative of workers who are or may be engaged in work under contracts and subcontracts to cooperate with, and to comply in the implementation of, the purposes of the order.

(c) In order to effectuate the purposes of paragraph (a) of this section, the Director may hold hearings, public or private, with respect to the practices and policies of any such labor union or recruiting and training agency.

(d) The Director may notify any Federal, State, or local agency of his conclusions and recommendations with respect to any such labor organization or recruiting and training agency which in his judgment has failed to cooperate with himself, agencies, prime contractors, subcontractors, or applicants in carrying out the purposes of the order. The Director also may notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever he has reason to believe that the practices of any such labor organization or agency violates Title VII of the Civil Rights Act of 1964 or other provisions of Federal law.

SUBPART B—GENERAL ENFORCEMENT; COMPLIANCE REVIEW AND COMPLAINT PROCEDURE

§ 60–1.20 Compliance reviews.

(a) The purpose of a compliance review is to determine if the prime contractor or subcontractor maintains nondiscriminatory hiring and employment practices and is taking affirmative action to ensure that applicants are employed and that employees are placed, trained, upgraded, promoted, and otherwise treated during employment without regard to race, color, religion, sex, or national origin. It shall consist of a comprehensive analysis and evaluation of each aspect of the aforementioned practices, policies, and conditions resulting therefrom. Where necessary, recommendations for appropriate sanctions shall be made.

(b) Where deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion. Before the contractor can be found to be in compliance with the order, it must make a specific commitment, in writing, to correct any such deficiencies. The commitment must include the precise action to be taken and dates for completion. The time period allotted shall be no longer than the minimum period necessary to effect such changes.

Upon approval of the Contract Compliance Office, appropriate Deputy or the agency head of such commitment, the contractor may be considered in compliance, on condition that the commitments are faithfully kept. The contractor shall be notified that making such commitments does not preclude future determinations of noncompliance based on a finding that the commitments are not sufficient to achieve compliance.

(c) The Compliance Agency shall have the primary responsibility for the conduct of compliance reviews. Agencies shall institute programs for the regular conduct of compliance reviews in accordance with the Director's guidelines, and shall also conduct compilance reviews in accordance with any special requests or instructions of the Director. Compliance reviews may also be conducted by the Director. Compliance reviews should be conducted by qualified specialists regularly involved in equal opportunity programs.

(d) Each agency shall include in the invitation for bids for each formally advertised nonconstruction contract or state at the outset of negotiations for each negotiated contract, that if the award, when let, should exceed the amount of $1 million or more, the prospective contractor and his known first-tier subcontractors with subcontracts of $1 million or more will be subject to a compliance review before the award of the contract. No such contract shall be awarded unless a preaward compliance review of the prospective contractor and his known first-tier $1 million subcontractors has been conducted by the compliance agency within 12 months prior to the award. If an agency other than the awarding agency is the compliance agency, the awarding agency will notify the compliance agency and request appropriate action and findings in accordance with this subsection. Compliance agencies will provide awarding agencies with written reports of compliance within 30 days following the request. In order to qualify for the award of a contract, a contractor and such first-tier subcontractors must be found to be in compliance pursuant to paragraph (b) of this section, and with Part 60–2 of these regulations.

[33 F.R. 7804, May 28, 1968, as amended at 34 F.R. 744, Jan. 17, 1969; 35 F.R. 19660, July 1, 976]

§ 60–1.21 Who may file complaints.

Any employee of any contractor or applicant for employment with such contractor may, by himself or by an authorized representative, file in writing a complaint of alleged discrimination in violation of the equal opportunity clause. Such complaint is to be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the agency or the Director upon good cause shown.

§ 60–1.22 Where to file.

Complaints may be filed with the agency or with the Director. Those filed with the Director may be referred to the agency for processing, or they may be processed in accordance with § 60–1.25.

§ 60–1.23 Contents of complaint.

(a) The complaint should include the name, address, and telephone number of the complainant, the name and address of the prime contractor or subcontractor committing the alleged discrimination, a description of the acts considered to be discriminatory, and any other pertinent information which will assist in the investigation and resolution of the complaint. The complaint shall be signed by the complainant or his authorized representative.

(b) Where a complaint contains incomplete information, the agency or the Director shall seek promptly the needed information from the complainant. In the event such information is not furnished to the agency or the Director within 60 days of the date of such request, the case may be closed.

§ 60–1.24 Processing of matters by agencies.

(a) *Complaints.*—Where complaints are filed with the agency, the Contracts Compliance Officer shall transmit a copy of the complaint to the Director within 10 days after the receipt thereof.

(b) *Investigations.*—The agency or Compliance Agency shall institute a prompt investigation of each complaint filed with it or referred to it, and shall be responsible for developing a complete case record. A complete case record consists of the name and address of each person interviewed, and a summary of his statement, copies or summaries of pertinent documents, and a narrative summary of the evidence disclosed in the investigation as it relates to each violation revealed.

When a complaint is filed against a prime contractor or subcontractor who has contracts involving more than one agency, unless otherwise provided, the Compliance Agency shall conduct the investigation and make such findings and determinations as shall be appropriate for the administration of the order.

(c) *Resolution of matters.*—(1) If the complaint investigation by the agency pursuant to paragraph (b) of this section shows no violation of the equal opportunity clause, the agency shall so inform the Director. The Director may review the findings of the agency, and he may request further investigation by the agency or may undertake such investigation as he may deem appropriate.

(2) If any complaint investigation or compliance review indicates a violation of the equal opportunity clause, the matter should be resolved by informal means whenever possible. Such informal means may include the holding of a compliance conference by the agency. Each prime contractor and subcontractor shall be advised that the resolution is subject to review by the Director and may be disapproved if he determines that such resolution is not sufficient to achieve compliance.

(3) Where any complaint investigation or compliance review indicates a violation of the equal opportunity clause and the matter has not been resolved by informal means, the Director or the agency, with the approval of the Director, shall afford the contractor an opportunity for a hearing. If the final decision reached in accordance with the provisions of § 60–1.26 is that a violation of the equal opportunity clause has taken place, the Director, or the agency with the approval of the Director, may cause the cancellation, termination, or suspension of any contract or subcontract, cause a contractor to be debarred from further contracts or subcontracts, or may impose such other sanctions as are authorized by the order.

(4) When a prime contractor or subcontractor, without a hearing, shall have complied with the recommendations or orders of an agency or the Director and believes such recommendations or orders to be erroneous, he shall, upon filing a request therefor within ten days of such compliance, be afforded an opportunity for a hearing and review of the alleged erroneous action by the agency or the Director.

(5) For reasonable cause shown, the Director or an agency head may reconsider or cause to be reconsidered any matter on his motion or pursuant to a requset.

(d) *Reports to the Director.*—(1) Within 60 days from receipt of a complaint by the agency, or within such additional time as may be allowed by the Director for good cause shown, the agency or the Compliance Agency shall process the complaint and submit to the Director the case record and a summary report containing the following information:

(i) Name and address of the complainant;

(ii) Brief summary of findings, including a statement as to the agency's conclusions regarding the contractor's compliance or noncompliance with the requirements of the equal opportunity clause;

(iii) A statement of the disposition of the case, including any corrective action taken and any sanctions or penalties imposed or, whenever appropriate, the recommended corrective action and sanctions or penalties.

(2) A written report of every preaward compliance review required by this regulation or otherwise required by the Director, including findings, will be forwarded to the Director within 10 days after the award for a postaward review.

(3) A written report of every other compliance review or any other matter processed by the agency involving an apparent violation of the equal opportunity clause shall be submitted to the Director. Such report shall contain a brief summary of the findings, including a statement of conclusions regarding the contractor's compliance or noncompliance with the requirements of the order, and a statement of the disposition of the case, including any corrective action taken or recommended and any sanctions or penalties imposed or recommended.

§ 60–1.25 Assumption of jurisdiction by or referrals to the Director.

The Director may inquire into the status of any matter pending before an agency or a Compliance Agency, including complaints and matters arising out of reports, reviews, and other investigations. Where he considers it necessary or appropriate to the achievement of the purposes of the order, he may assume jurisdiction over the matter and proceed as provided herein. Whenever the Director assumes jurisdiction over any matter, or an agency refers any matter, he may conduct, or have conducted, such investigations, hold such hearings, make such findings, issue such recommendations and directives, order such sanctions and penalties, and take such other action as may be necessary or appropriate to achieve the purposes of the order. The Director shall promptly notify the agency of any corrective action to be taken or any sanctions to be taken or any sanction to be imposed by the agency. The agency shall take such action, and report the results thereof to the Director within the time specified.

§ 60–1.26 Hearings.

(a) *Informal hearings*—(1) *Purpose.*—The Director or any agency head with the approval of the Director may convene such informal hearings as may be deemed appropriate for the purpose of inquiring into the status of compliance by any prime contractor or subcontractor with the terms of the equal opportunity clause.

(2) *Notice.*—Contractors and subcontractors shall be advised in writing as to the time and place of the informal hearing and may be directed to bring specific documents and records, or furnish other relevant information concerning their compliance status. When so requested, the prime contractor or subcontractor shall attend and bring requested documents and records, or other requested information.

(3) *Conduct of hearing.*—The hearing shall be conducted by hearing officers appointed by the Director or an agency head. Parties to informal hearings may be represented by counsel and shall have a fair opportunity to present any relevant material. Formal rules of evidence will not apply to such proceedings.

(b) *Formal hearings*—(1) *General procedure.*—In accordance with procedures prescribed by the Secretary or other agency head, the Director or an appropriate official of any agency, with the approval of the Director, may convene formal hearings pursuant to Subpart B of this part for the purpose of determining whether the sanctions set forth in section 209(a) (5) and (6) of the order shall be invoked against any prime contractor or subcontractor. Reasonable notice of a hearing shall be sent by registered mail, return receipt requested, to the last known address of the prime contractor or subcontractor complained against. Such notice shall contain the time, place, and nature of the hearing and a statement of the legal authority pursuant to which the hearing is to be held. Copies of such notice shall be sent to all agencies. Hearings shall be held before a hearing officer designated by or under the direction of the Secretary or other agency head. Each party shall have the right to counsel; a fair opportunity to present evidence and argument and to cross-examine. Whenever a formal hearing is based in whole or in part on matters subject to the collective bargaining agreement and compliance may necessitate a revision of such agreement, any labor organization which is a signatory to the agreement shall have the right to participate as a party. Any other person or organization shall be permitted to participate upon a showing that such person or organization has an interest in the proceedings and may contribute materially to the proper disposition thereof. The hearing officer shall make his proposed findings and conclusions upon the basis of the record before him.

(2) *Cancellation, termination, and debarment.*—No order for cancellation or termination of existing contracts or subcontracts or for debarment from further contracts or subcontracts pursuant to section 209 of the order shall be made without affording the prime contractor or subcontractor an opportunity for a hearing. When cancellation, termination, or debarment is proposed, the following procedure shall be observed:

> (i) *Notice of proposed cancellation or termination.*—Whenever the Director or his designee, or an appropriate official of any agency, upon prior notification to the Director, proposes to request the Secretary or other agency head to cancel or terminate, or cause to be canceled or terminated, in whole or in part, a contract or contracts, or to require cancellation or termination of a subcontract or subcontracts, a notice of the proposed action, in writing and signed by the Director or his designee, or an appropriate agency official, shall be sent to the last known address of the prime contractor or subcontractor. A copy of such notice shall be published in the Federal Register. The notice shall contain a concise jurisdictional statement, a short and plain statement of the matters furnishing a basis for the imposition of sanctions, an enumeration of the sanctions being requested, and a citation of the provisions of the order and regulations pursuant to which the requested action may be taken.
>
> (ii) *Notice of proposed ineligibility.*—Whenever the Director or his designee, or an appropriate official of any agency upon prior notification to the Director, proposes to request the Secretary or other agency head to

declare a prime contractor or subcontractor ineligible for further contracts or subcontracts under section 209 of the order, a notice of the proposed action, in writing and signed by the Director or his designee, or appropriate agency official, shall be sent to the last known address of the prime contractor or subcontractor. A copy of such notice shall be published in the Federal Register. The notice shall contain a concise jurisdictional statement, a short and plain statement of the matters furnishing a basis for the imposition of sanctions, a citation of the provisions of the order and regulations pursuant to which the requested action may be taken, and a statement that the debarment sanction is being sought.

(iii) *Answer and hearing request.*—The prime contractor or subcontractor shall be afforded at least 14 days from receipt of the notice of proposed cancellation, termination, or ineligibility in which to file an answer to the notice and a request for a hearing with the Director or his designee, or the agency. The answer shall admit or deny specifically, and in detail, matters set forth in each allegation of the notice unless the prime contractor or subcontractor is without knowledge, in which case the answer shall so state, and the statement shall be deemed a denial. Matters not specifically denied shall be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered. The hearing request shall be included as a separate paragraph of the answer.

(iv) *Suspension during pendency of hearing.*—Whenever the prime contractor or subcontractor requests a hearing in accordance with these provisions, his contracts or subcontracts may be suspended, in the discretion of the Director, during the pendency of the hearing. However, no Government contract, or portion thereof, with any employer shall be suspended where such employer has an affirmative action plan which has previously been accepted by the Government for the facility at issue within the past 12 months without first according such employer full hearing and adjudication unless such employer has deviated substantially from such previously agreed to affirmative action plan: *Provided*, That for the purposes of this sentence an affimative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within 45 days thereafter the Office of Federal Contract Compliance has disapproved such plan.

(v) *Imposition of sanctions without a hearing.*—If at the end of the 14-day period referred to in subdivision (iii) of this subparagraph, no answer including a hearing request has been filed, or the answer does not raise issues of fact or law, the Secretary or other agency head may cancel, suspend or terminate or cause to be canceled, suspended or terminated any one or more contracts or subcontracts, or parts thereof, held by the prime contractor or subcontractor complained against, or enter an order declaring such contractor or subcontractor ineligible for further contracts, subcontracts, or extensions or other modifications of existing contracts, until the contractor or subcontractor has satisfied the Secretary that he has established and will carry out personnel and employment policies and practices in compliance with the provisions of the equal opportunity clause and the order.

(vi) *Decision following hearing.*—When the hearing is conducted by an agency, the hearing officer shall make recommendations to the head of the agency who shall make a decision whether sanctions will be invoked against the contractor or subcontractor. No decision by the head of the agency, or his representative, shall be final without the prior approval of the Director. When the hearing is conducted by a hearing officer appointed by or under the direction of the Secretary the hearing officer shall make recommendations to the Secretary, who shall make the final decision whether sanctions will be invoked against the contractor or subcontractor. Parties shall be furnished with copies of the hearing officer's recommendations, and shall be given an opportunity to submit their views.

[33 FR 7804, May 28, 1968, as amended at 37 FR 20536, Sept. 30, 1972]

§ 60–1.27 Sanctions and penalties.

The sanctions described in subsections (1), (5), and (6) of section 209(a) of the order may be exercised only by or with the approval of the Director. Referral of any matter arising under the order to the Department of Justice or to the Equal Employment Opportunity Commission shall be made by the Director.

§ 60–1.28 Show cause notices.

When the Director has reasonable cause to believe that a contractor has violated the equal opportunity clause he may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings or other appropriate action to ensure compliance should not be instituted.

§ 60–1.29 Preaward notices.

(a) *Preaward compliance reviews.*—Upon the request of the Director, agencies shall not enter into contracts or approve the entry into contracts or subcontracts with any bidder, prospective prime contractor, or proposed subcontractor named by the Director until a preaward compliance review has been conducted and the Director or designated agency head or his designee has approved a determination that the bidder, prospective prime contractor or proposed subcontractor will be able to comply with the provisions of the equal opportunity clause.

(b) *Other special preaward procedures.*—Upon the request of the Director, agencies shall not enter into contracts or approve the entry into subcontracts with any bidder; prospective prime contractor or proposed subcontractor specified by the Director until the agency has complied with the directions contained in the request.

§ 60–1.30 Contract ineligibility list.

The Director shall distribute periodically a list to all executive departments and agencies giving the names of prime contractors and subcontractors who have been declared ineligible under the regulations in this part and the order.

§ 60–1.31 Reinstatement of ineligible prime contractors and subcontractors.

Any prime contractor or subcontractor declared ineligible for further contracts or subcontracts under the order may request reinstatement in a letter directed to the Director. In connection with the reinstatement proceedings, the prime contractor or subcontractor shall be required to show that it has established and will carry out employment policies and practices in compliance with the equal opportunity clause.

§ 60–1.32 Intimidation and interference.

The sanctions and penalties contained in Subpart D of the order may be exercised by the agency or the Director against any prime contractor, subcontractor or applicant who fails to take all necessary steps to ensure that no person intimidates, threatens, coerces, or discriminates against any individual for the purpose of interfering with the filing of a complaint, furnishing information, or assisting or participating in any manner in an investigation, compliance review, hearing, or any other activity related to the administration of the order or any other Federal, State, or local laws requiring equal employment opportunity.

SUBPART C—ANCILLARY MATTERS.

§ 60–1.40 Affirmative action compliance programs.

(a) *Requirements of programs.*—Each agency or applicant shall require each prime contractor who has 50 or more employees and a contract of $50,000 or more and each prime contractor and subcontractor shall require each subcontactor who has 50 or more employees and a subcontact of $50,000 or more to develop a written affirmative action compliance program for each of its establishments. A necessary prerequisite to the development of a satisfactory affirmative action program is the identification and analysis of problem areas inherent in minority employment and an evaluation of opportunities for utilization of minority group personnel. The contractor's program shall provide in detail for specific steps to guarantee equal employment opportunity keyed to the problems and needs of members of minority groups, including, when there are deficiencies, the development of specific goals and time tables for the prompt achievement of full and equal employment opportunity. Each contractor shall include in his affirmative action compliance program a table of job classifications. This table should include but need not be limited to job titles, principal duties (and auxiliary duties, if any), rates of pay, and where more than one rate of pay applies (because of length of time in the job or other factors) the applicable rates. The affirmative action compliance program shall be signed by an executive official of the contractor.

(b) *Utilization evaluation.*—The evaluation of utilization of minority group personnel shall include the following:

(1) An analysis of minority group representation in all job categories.

(2) An analysis of hiring practices for the past year, including recruitment sources and testing, to determine whether equal employment opportunity is being afforded in all job categories.

(3) An analysis of upgrading, transfer and promotion for the past year to determine whether equal employment opportunity is being afforded.

(c) *Maintenance of program.*—Within 120 days from the commencement of the contract, each contractor shall maintain a copy of separate affirmative action compliance programs for each establishment, including evaluations of utilization of minority group personnel and the job classification tables, at each local office responsible for the personnel matters of such establishment. An affirmative action compliance program shall be part of the manpower and training plans for each new establishment and shall be developed and made available prior to the staffing of such establishment. A report of the results of such program shall be compiled annually and the program shall be updated at that time. This information shall be made available to representatives of the agency or Director upon request and the contractor's affirmative action program and the result it produces shall be evaluated as part of compliance review activities.

§ 60–1.41 Solicitations or advertisements for employees.

In solicitations or advertisements for employees placed by or on behalf of a prime contractor or subcontractor, the requirements of paragraph (2) of the equal opportunity clause shall be satisfied whenever the prime contractor or subcontractor complies with any of the following:

(a) States expressly in the solicitations or advertising that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin;

(b) Uses display or other advertising, and the advertising includes an appropriate insignia prescribed by the Director. The use of the insignia is considered subject to the provisions of 18 U.S.C. 701;

(c) Uses a single advertisement, and the advertisement is grouped with other advertisements, under a caption which clearly states that all employers in the group assure all qualified applicants equal consideration for employment without regard to race, color, religion, sex, or national origin;

(d) Uses a single advertisement in which appears in clearly distinguishable type the phrase "an equal opportunity employer."

[33 F.R. 7804, May 28, 1968, as amended at 34 F.R. 744, Jan. 17, 1969]

§ 60–1.42 Notices to be posted.

(a) Unless alternative notices are prescribed by the Director or by the agency with the approval of the Director, the notices which prime contractors and subcontractors are required to post by paragraphs (1) and (3) of the equal opportunity clause will contain the following language and will be provided by the contracting or administering agencies:

EQUAL EMPLOYMENT OPPORTUNITY IS THE LAW—DISCRIMINATION IS PROHIBITED BY THE CIVIL RIGHTS ACT OF 1964 AND BY EXECUTIVE ORDER NO. 11246

Title VII of the Civil Rights Act of 1964—Administered by The Equal Employment Opportunity Commission.

Prohibits discrimination because of Race, Color, Religion, Sex, or National Origin by Employers with 75 or more employees, by Labor Organizations with a hiring hall of 75 or more members, by Employment Agencies, and by Joint Labor-Management Committees for Apprenticeship or Training. After July 1, 1967, employers and labor organizations with 50 or more employees or members will be covered; after July 1, 1968, those with 25 or more will be covered.

ANY PERSON WHO BELIEVES HE OR SHE HAS BEEN DISCRIMINATED AGAINST SHOULD CONTACT THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

1800 G. Street NW., Washington, D.C. 20506

Executive Order No. 11246—Administered by The Office of Federal Contract Compliance.

Prohibits discrimination because of Race, Color, Religion, Sex, or National Origin, and requires affirmative action to ensure equality of opportunity in all aspects of employment.

By all Federal Government Contractors and Subcontractors, and by Contractors Performing Work Under a Federal Assisted Construction Contract, regardless of the number of employees in either case.

ANY PERSON WHO BELIEVES HE OR SHE HAS BEEN DISCRIMINATED AGAINST SHOULD CONTACT THE OFFICE OF FEDERAL CONTRACT COMPLIANCE

U.S. Department of Labor, Washington, D.C. 20210

(b) The requirements of paragraph (3) of the equal opportunity clause will be satisfied whenever the prime contractor or subcontractor posts copies of the notification prescribed by or pursuant to paragraph (a) of this section in conspicuous places available to employees, applicants for employment and representatives of each labor union or other organization representing his employees with which he has a collective bargaining agreement or other contract or understanding.

[33 F.R. 7804, May 28, 1968, as amended at 34 F.R. 745, Jan. 17, 1969]

§ 60–1.43 Access to records and site of employment.

Each prime contractor and subcontractor shall permit access during normal business hours to its premises for the purpose of conducting on-site compilance reviews and inspecting and copying such books, records, accounts, and other material as may be relevant to the matter under investigation and pertinent to compliance with the Order, and the rules and regulations promulgated pursuant thereto by the agency, or the Director. Information obtained in this manner shall be used only in connection with the administration of the Order, the administration of the Civil Rights Act of 1964 (as amended) and in furtherance of the purposes of the Order and that Act. (See 41 CFR Part 60–60, Contractor Evaluation Procedures for Nonconstruction Contractors; 41 CFR Part 60–40, Examination and Copying of OFCC Documents.)

(Sec. 201, E.O. 11246, 30 FR 12319, and E.O. 1375, 32 FR 14303) [38 FR 34464, Dec. 14, 1973]

§ 60–1.44 Rulings and interpretations.

Rulings under or interpretations of the order or the regulations contained in this part shall be made by the Secretary or his designee.

§ 60–1.45 Existing contracts and subcontracts.

All contracts and subcontracts in effect prior to October 24, 1965, which are not subsequently modified shall be administered in accordance with the nondiscrimination provisions of any prior applicable Executive orders. Any contract or subcontract modified on or after October 24, 1965, shall be subject to Executive Order 11246. Complaints received by and violations coming to the attention of agencies regarding contracts and subcontracts which were subject to Executive Order 10925 and 11114 shall be processed as if they were complaints regarding violations of this order.

§ 60–1.46 Delegation of authority by the Director.

The Director is authorized to redelegate the authority given to him by the regulations in this part. The authority redelegated by the Director pursuant to the regulations in this part shall be exercised under his general direction and control.

§ 60–1.47 Effective date.

The regulations contained in this part shall become effective July 1, 1968, for all contracts, the solicitations, invitations for bids, or requests for proposals which were sent by the Government or an applicant on or after said effective date, and for all negotiated contracts which have not been executed as of said effective date. Notwithstanding the foregoing, the regulations in this part shall become effective as to all contracts executed on and after the 120th day following said effective date. Subject to any prior approval of the Secretary, any agency may defer the effective date of the regulations in this part, for such period of time as the Secretary finds to be reasonably necessary. Contracts executed prior to the effective date of the regulations in this part shall be governed by the regulations promulgated by the former President's Committee on Equal Employment Opportunity which appear at 28 F.R. 9812, September 2, 1963, and at 28 F.R. 11305, October 23, 1963, the temporary regulations which appear at 30 F.R. 13441, October 22, 1965, and the orders at 31 F.R. 6881, May 10, 1966, and 32 F.R. 7439, May 19, 1967.

PART 60-2—AFFIRMATIVE ACTION PROGRAMS

SUBPART A—GENERAL

Sec.

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SUBPART D—MISCELLANEOUS

60-2.30 Use of goals.
60-2.31 Preemption.
60-2.32 Supersedure.

AUTHORITY. 5 U.S.C. 553(a)(3)(B); 29 CFR [illegible].7; section 201, E.O. 11246, 30 FR 12319, and E.O. 11375, 32 FR 14303.

SOURCE. 36 F.R. 23152, Dec. 4, 1971.

SUBPART A—GENERAL

§ 60-2.1 Title, purpose and scope.

This part shall also be known as "Revised Order No. 4," and shall cover nonconstruction contractors. Section 60-1.40 of this Chapter, Affirmative Action Compliance Programs, requires that within 120 days from the commencement of a contract each prime contractor or subcontractor with 50 or more employees and a contract of $50,000 or more develop a written affirmative action compliance program for each of its establishments, and such contractors are now further required to revise existing written affirmative action programs to include the changes embodied in this order within 120 days of its publication in the Federal Register. A review of agency compliance surveys indicates that many contractors do not have affirmative action programs on file at the time an establishment is visited by a compliance investigator. This part details the agency review procedure and the results of a contractor's failure to develop and maintain an affirmative action program and then set forth detailed guidelines to be used by contractors and Government agencies in developing and judging these programs as well as the good faith effort required to transform the programs from paper commitments to equal employment opportunity. Subparts B and C are concerned with affirmative action plans only.

Relief for members of an affected class who, by virtue of past discrimination, continue to suffer the present effects of that discrimination shall be provided in the conciliation agreement entered into pursuant to § 60-60.6 of this title. An "affected class" problem must be remedied in order for a contractor to be considered in compliance. Section 60-2.2 herein pertaining to an acceptable affirmative action program is also applicable to the failure to remedy discrimination against members of an "affected class."

[36 FR 23152, Dec. 4, 197[illegible] amended at 39 FR 5630, Feb. 14, 1974]

§ 60–2.2 Agency action.

(a)(1) Any contractor required by § 60–1.40 of this chapter to develop an affirmative action program at each of his establishments who has not complied fully with that section is not in compliance with Executive Order 11246, as amended (30 FR 12319). Until such programs are developed and found to be acceptable in accordance with the standards and guidelines set forth in §§ 60–2.10 through 60–2.32, the contractor is unable to comply with the employment opportunity clause. An affirmative action plan shall be deemed to have been accepted by the Government at the time appropriate compliance agency has accepted such plan unless within 45 days thereafter the Office of Federal Contract Compliance has disappoved such plan.

(2) The appropriate compliance agency shall notify the contractor and the Office of Federal Contract Compliance when it has accepted an affirmative action plan.

(b) If, in determining such contractor's responsibility for an award of a contract it comes to the contracting officer's attention, through sources within his agency or through the Office of Federal Contract Compliance or other Government agencies, that the contractor has not developed an acceptable affirmative action program at each of his establishments or has substantially deviated from such an approved affirmative action program, the contracting officer shall notify the Director and declare the contractor-bidder nonresponsible unless he can otherwise affirmatively determine that the contractor is able to comply with his equal employment obligations or, unless upon review, it is determined by the Director that substantial issues of law or fact exist as to the contractor's responsibility to the extent that a hearing is, in his sole judgment, required prior to a determination that the contractor is nonresponsible: *Provided*, That during any preaward conferences every effort shall be made through the processes of conciliation, mediation and persuasion to develop an acceptable affirmative action program meeting the standards and guidelines set forth in §§ 60–2.10 through 60–2.32 so that, in the performance of his contract, the contractor is able to meet his equal employment obligations in accordance with the equal opportunity clause and applicable rules, regulations, and orders: *Provided further*, That when the contractor-bidder is declared nonresponsible more than once for inability to comply with the equal employment opportunity clause a notice setting a timely hearing date shall be issued concurrently with the second nonresponsibility determination in accordance with the provisions of § 60–1.26 proposing to declare such contractor-bidder ineligible for future contracts and subcontracts.

(c) Immediately upon finding that a contractor has no affirmative action program or has deviated substantially from an approved affirmative action program or that his program is not acceptable, the contracting officer, the compliance agency representative or the representative of the Office of Federal Contract Compliance, whichever has made such a finding, shall notify officials of the appropriate compliance agency and the Office of Federal Contract Compliance of such fact. The compliance agency shall issue a notice to the contractor giving him 30 days to show cause why enforcement proceedings under section 209(b) of Executive Order 11246, as amended, should not be instituted.

(1) If the contractor fails to show good cause for his failure or fails to remedy that failure by developing and implementing an acceptable affirmative action program within 30 days, the compliance agency, upon the approval of the Director, shall immediately issue a notice of proposed cancellation or termination of existing contracts or subcontracts and debarment from future contracts and subcontracts pursuant to § 60–1.26(b) of this chapter, giving the contractor 14 days to request a hearing. If a request for hearing has not been received within 14 days from such notice, such contractor will be declared ineligible for future contracts and current contracts will be terminated for default.

(2) During the "show cause" period of 30 days every effort shall be made by the compliance agency through conciliation, mediation, and persuasion to resolve the deficiencies which led to the determination of nonresponsibility. If satisfactory adjustments designed to bring the contractor into compliance are not concluded, the compliance agency, with the prior approval of the Director, shall promptly commence formal proceedings leading to the cancellation or termination of existing contracts or subcontracts and debarment from future contracts and subcontracts under § 60–1.26(b) of this chapter.

(d) During the "show cause" period and formal proceedings, each contracting agency must continue to determine the contractor's responsibility in considering whether or not to award a new or additional contract.

[38 FR 2970, Jan. 31, 1973]

§ 60-2.10 Purpose of affirmative action program.

An affirmative action program is a set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith effort. The objective of those procedures plus such efforts is equal employment opportunity. Procedures without effort to make them work are meaningless; and effort, undirected by specific and meaningful procedures, is inadequate. An acceptable affirmative action program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractors good faith efforts must be directed to correct the deficiencies and, thus to achieve prompt and full utilization of minorities and women, at all levels and in all segments of his work force where deficiencies exist.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 5630, Feb. 14, 1974]

§ 60-2.11 Required utilization analysis.

Based upon the Government's experience with compliance reviews under the Executive order programs and the contractor reporting system, minority groups are most likely to be underutilized in departments and jobs within departments that fall within the following Employer's Information Report (EEO-1) designations: officials and managers, professionals, technicians, sales workers, office and clerical and craftsmen (skilled). As categorized by the EEO-1 designations, women are likely to be underutilized in departments and jobs within departments as follows: officials and managers, professionals, technicians, sales workers (except over-the-counter sales in certain retail establishments), craftsmen (skilled and semi-skilled). Therefore, the contractor shall direct special attention to such jobs in his analysis and goal setting for minorities and women. Affirmative action progrgams must contain the following information:

(a) Workforce analysis which is defined as a listing of each job title as appears in applicable collective bargaining agreements or payroll records (not job group) ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision. If there are separate work units or lines of progression within a department a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line. Where there are no formal progression lines or usual promotional sequences, job titles should be listed by department, job families, or disciplines, in order of wage rates or salary ranges. For each job title, the total number of incumbents, the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups must be given: Blacks, Spanish-surnamed Americans, American Indians, and Orientals. The wage rate or salary range for each job title must be given. All job titles, including all managerial job titles, must be listed.

(b) An analysis of all major job groups at the facility, with explanation if minorities or women are currently being underutilized in any one or more job groups ("job groups" herein meaning one or a group of jobs having similar content, wage rates and oportunities). "Underutilization" is defined as having fewer minorities or women in a particular job group than would reasonably be expected by their availability. In making the utilizaton analysis, the contractor shall conduct such analysis separately for minorities and women.

(1) In determining whether minorities are being underutilized in any job group the contractor will consider at least all of the following factors:

(i) The minority population of the labor area surrounding the facility;

(ii) The size of the minority unemployment force in the labor area surrounding the facility;

(iii) The percentage of the minority work force as compared with the total work force in the immediate labor area;

(iv) The general availability of minorities having requisite skills in the immediate labor area;

(v) The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;

(vi) The availability of promotable and transferable minorities within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

(b) In determining whether women are being underutilized in any job group, the contractor will consider at least all of the following factors:

(i) The size of the female unemployment force in the labor area surrounding the facility;

(ii) The percentage of the female work force as compared with the total workforce in the immediate labor area;

(iii) The general availability of women having requisite skills in the immediate labor area;

(iv) The availability of women having requisite skills in an area in which the contractor can reasonably recruit;

(v) The availability of women seeking employment in the labor or recruitment area of the contractor;

(vi) The availability of promotable and transferable female employees within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to women.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 5630, Feb. 14, 1974]

§ 60–2.12 Establishment of goals and timetables.

(a) The goals and timetables developed by the contractor should be attainable in terms of the contractor's analysis of his deficiencies and his entire affirmative action program. Thus, in establishing the size of his goals and the length of his timetables, the contractor should consider the results which could reasonably be expected from his putting fort every good faith effort to make his overall affirmative action program work. In determining levels of goals, the contractor should consider at least the factors listed in § 60–2.11.

(b) Involve personnel relations staff, department and division heads, and local and unit managers in the goal setting process.

(c) Goals should be significant, measurable and attainable.

(d) Goals should be specific for planned results, with timetables for completion.

(e) Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.

(f) In establishing timetables to meet goals and commitments, the contractor will consider the anticipated expansion, contraction and turnover of and in the work force.

(g) Goals, timetables and affirmative action commitments must be designed to correct any identifiable deficiencies.

(h) Where deficiencies exist and where numbers or percentages are relevant in developing corrective action, the contractor shall establish and set forth specific goals and timetables separately for minorities and women.

(i) Such goals and timetables, with supporting data and the analysis thereof shall be a part of the contractor's written affirmative action program and shall be maintained at each establishment of the contractor.

(j) Where the contractor has not established a goal, his written affirmative action program must specifically analyze each of the factors listed in § 60–2.11 and must detail his reason for a lack of a goal.

(k) In the event it comes to the attention of the compliance agency or the Office of Federal Contract Compliance that there is a substantial disparity in the utilization of a particular minority group or men or women of a particular minority group, the compliance agency or OFCC may require separate goals and timetables for such minority group and may further require, where appropriate, such goals and timetables by sex for such group for such job classifications and organizational units specified by the compliance agency or OFCC.

(l) Support data for the required analysis and program shall be compiled and maintained as part of the contractor's affirmative action program. This data will include but not be limited to progression line charts, seniority rosters, applicant flow data, and applicant rejection ratios indicating minority and sex status.

(m) Copies of affirmative action programs and/or copies of support data shall be made available to the compliance agency or the Office of Federal Contract Compliance, at the request of either, for such purposes as may be appropriate to the fulfillment of their responsibilities under Executive Order 11246, as amended.

§ 60–2.13 Additional required ingredients of affirmative action programs.

Effective affirmative action programs shall contain, but not necessarily be limited to, the following ingredients:

(a) Development or reaffirmation of the contractor's equal employment opportunity policy in all personnel actions.

(b) Formal internal and external dissemination of the contractor's policy.

(c) Establishment of responsibilities for implementation of the contractor's affirmative action program.

(d) Identification of problem areas (deficiencies) by organizational units and job group.

(e) Establishment of goals and objectives by organizational units and job groups including timetables for completion.

(f) Development and execution of action oriented programs designed to eliminate problems and further designed to attain established goals and objectives.

(g) Design and implementation of internal audit and reporting systems to measure effectiveness of the total program.

(h) Compliance or personal policies and practices with the Sex Discrimination Guidelines (41 CFR Part 60–20).

(i) Active support of local and national community action programs and community service programs, designed to improve the employment opportunities of minorities and women.

(j) Consideration of minorities and women not currently in the work force having requisite skills who can be recruited through affirmative action measures.

§ 60–2.14 Compliance status.

No contractor's compliance status shall be judged alone by whether or not he reaches his goals and meets his timetables. Rather, each contractor's compliance posture shall be reviewed and determined by reviewing the contents of his program, the extent of his adherence to this program, and his good faith efforts to make his program work toward the realization of the program's goals within the timetables set for completion. There follows an outline of examples of procedures that contractors and Federal agencies should use as a guideline for establishing, implementing, and judging an acceptable affirmative action program.

SUBPART C—METHODS OF IMPLEMENTATING THE REQUIREMENTS OF SUBPART B

§ 60–2.20 Development or reaffirmation of the equal employment opportunity policy.

(a) The contractor's policy statement should indicate the chief executive officers' attitude on the subject matter, assign overall responsibility and provide for a reporting and monitoring procedure. Specific items to be mentioned should include, but not be limited to:

(1) Recruit, hire, train, and promote persons in all job titles, without regard to race, color, religion, sex, or national origin, except where sex is a bona fide occupational qualification. (The term "bona fide occupational qualification" has been construed very narrowly under the Civil Rights Act of 1964. Under Executive Order 11246 as amended and this part, this term will be construed in the same manner.)

(2) Base decisions on employment so as to further the principle of equal employment opportunity.

(3) Insure that promotion decisions are in accord with principles of equal employment opportunity by imposing only valid requirements for promotional opportunities.

(4) Insure that all personnel actions such as compensation, benefits, transfers, layoffs, return from layoff, company sponsored training, education, tuition assistance, social and recreation programs, will be administered without regard to race, color, religion, sex, or national origin.

§ 60–2.21 Dissemination of the policy.

(a) The contractor should disseminate this policy internally as follows:

(1) Include it in contractor's policy manual.

(2) Publicize it in company newspaper, magazine, annual report and other media.

(3) Conduct special meetings with executive, management, and supervisory personnel to explain intent of policy and individual responsibility for effective implementation, making clear the chief executive officer's attitude.

(4) Schedule special meetings with all other employees to discuss policy and explain individual employee responsibilities.

(5) Discuss the policy thoroughly in both employee orientation and management training programs.

(6) Meet with union officials to inform them of policy, and request their cooperation.

(7) Include nondiscrimination clauses in all union agreements, and review all contractual provisions to ensure they are nondiscriminatory.

(8) Publish articles covering EEO programs, progress reports, promotions, etc., of minority and female employees, in company publications.

(9) Post the policy on company bulletin boards.

(10) When employees are featured in product or consumer advertising, employee handbooks or similar publications both minority and nonminority, men and women should be pictured.

(11) Communicate to employees the existence of the contractors affirmative action program and make available such elements of his program as will enable such employees to know of and avail themselves of its benefits.

(b) The contractor should disseminate his policy externally as follows:

(1) Inform all recruiting sources verbally and in writing of company policy, stipulating that these sources actively recruit and refer minorities and women for all positions listed.

(2) Incorporate the Equal Opportunity clause in all purchase orders, leases, contracts, etc., covered by Executive Order 11246, as amended, and its implementing regulations.

(3) Notify minority and women's organizations, community agencies, community leaders, secondary schools and colleges, of company policy, preferably in writing.

(4) Communicate to prospective employees the existence of the contractor's affirmative action program and make available such elements of his program as will enable such prospective employees to know of and avail themselves of its benefits.

(5) When employees are pictured in consumer or help wanted advertising, both minorities and nonminority men and women should be shown.

(6) Send written notification of company policy to all subcontractors, vendors and suppliers requesting appropriate action on their party.

§ 60-2.22 Responsibility for implementation.

(a) An executive of the contractor should be appointed as director or manager of company Equal Opportunity Programs. Depending upon the size and geographical alignment of the company, this may be his or her sole responsibility. He or she should be given the necessary top management support and staffing to execute the assignment. His or her identity should appear on all internal and external communications on the company's Equal Opportunity Programs. His or her responsibilities should include, but not necessarily be limited to:

(1) Developing policy statements, affirmative action programs, internal and external communication techniques.

(2) Assisting in the identification of problem areas.

(3) Assisting line management in arriving at solutions to problems.

(4) Designing and implementing audit and reporting systems that will:

(i) Measure effectiveness of the contractor's programs.

(ii) Indicate need for remedial action.

(iii) Determine the degree to which the contractor's goals and objectives have been attained.

(5) Serve as liaison between the contractor and enforcement agencies.

(6) Serve as liaison between the contractor and minority organizations, women's organizations and community action groups concerned with employment opportunities of minorities and women.

(7) Keep management informed of latest developments in the entire equal opportunity area.

(b) Line responsibilities should include, but not be limited to, the following:

(1) Assistance in the identification of problem areas and establishment of local and unit goals and objectives.

(2) Active involvement with local minority organizations, women's organizations, community action groups and community service programs.

(3) Periodic audit of training programs, hiring and promotion patterns to remove impediments to the attainment of goals and objectives.

(4) Regular discussions with local managers, supervisors and employees to be certain the contractor's policies are being followed.

(5) Review of the qualifications of all employees to insure that minorities and women are given full opportunities for transfers and promotions.

(6) Career counseling for all employees.

(7) Periodic audit to insure that each location is in compliance in area such as:

(i) Posters are properly displayed.

(ii) All facilities, including company housing, which the contractor maintains for the use and benefit of his employees, are in fact desegregated, both in policy and use. If the contractor provides facilities such as dormitories, locker rooms and rest rooms, they must be comparable for both sexes.

(iii) Minority and female employees are afforded a full opportunity and are encouraged to participate in all company sponsored educational, training, recreational and social activities.

(8) Supervisors should be made to understand that their work performance is being evaluated on the basis of their equal employment opportunity efforts and results, as well as other criteria.

(9) It shall be a responsibility of supervisors to take actions to prevent harassment of employee placed through affirmative action efforts.

§ 60-2.23 Identification of problem areas by organizational units and job classifications.

(a) An in-depth analysis of the following should be made, paying particular attention to trainees and those categories listed in § 60-2.11(d).

(1) Composition of the work force by minority group status and sex.

(2) Composition of applicant flow by minority group status and sex.

(3) The total selection process including position descriptions, position titles, worker specifications, application forms, interview procedures, test administration, test validity, referral procedures, final selection process, and similar factors.

(4) Transfer and promotion practices.

(5) Facilities, company sponsored recreation and social events, and special programs such as educational assistance.

(6) Seniority practices and seniority provisions of union contracts.

(7) Apprenticeship programs.

(8) All company training programs, formal and informal.

(9) Work force attitude.

(10) Technical phases of compliance, such as poster and notification to labor unions, retention of applications, notification to subcontractors, etc.

(b) If any of the following items are found in the analysis, special corrective action should be appropriate.

(1) An "underutilization" of minorities or women in specific job groups.

(2) Lateral and/or vertical movement of minority or female employees occurring at a lesser rate (compared to work force mix) than that of nonminority or male employees.

(3) The selection process eliminates a significantly higher percentage of minorities or women than nonminorities or men.

(4) Application and related preemployment forms not in compliance with Federal legislation.

(5) Position descriptions inaccurate in relation to actual functions and duties.

(6) Tests and other selection techniques not validated as required by the OFCC Order on Employee Testing and other Selection Procedures.

(7) Test forms not validated by location, work performance and inclusion of minorities and women in sample.

(8) Referral ratio of minorities or women to the hiring supervisor or manager indicates a significantly higher percentage are being rejected as compared to nonminority and male applicants.

(9) Minorities or women are excluded from or are not participating in company sponsored activities or programs.

(10) De facto segregation still exists at some facilities.

(11) Seniority provisions contribute to overt or inadvertent discrimination, i.e., a disparity by minority group status or sex exists between length of service and types of job held.

(12) Nonsupport of company policy by managers, supervisors or employees.

(13) Minorities or women underutilized or significantly underrepresented in training or career improvement programs.

(14) No formal techniques established for evaluating effectiveness of EEO programs.

(15) Lack of access to suitable housing inhibits recruitment efforts and employment of qualified minorities.

(16) Lack of suitable transportation (public or private) to the work place inhibits minority employment.

(17) Labor unions and subcontractors not notified of their responsibilities.

(18) Purchase orders do not contain EEO clause.

(19) Posters not on display.

§ 60–2.24 Development and execution of programs.

(a) The contractor should conduct detailed analyses of position descriptions to insure that they accurately reflect position functions, and are consistent for the same position from one location to another.

(b) The contractor should validate worker specifications by division, department, location or other organizational unit and by job title using job performance criteria. Special attention should be given to academic, experience and skill requirements to insure that the requirements in themselves do not constitute inadvertent discrimination. Specifications should be consistent for the same job title in all locations and should be free from bias as regards to race, color, religion, sex or national origin, except where sex is a bona fide occupational qualification. Where requirements screen out a disproportionate number of minorities or women, such requirements should be professionally validated to job performance.

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((5 U.S.C. 553(a)(3)(B)) 29 CFR 2.7 section 201, Executive Order 11246, 30 FR 12319, and Executive Order 11375, 32 FR 14303.)

(c) Approved position descriptions and worker specifications, when used by the contractor, should be made available to all members of management involved in the recruiting, screening, selection, and promotion process. Copies should also be distributed to all recruiting sources.

(d) The contractor should evaluate the total selection process to insure freedom from bias and, thus, aid the attainment of goals and objectives.

(1) All personnel involved in the recruiting, screening, selection, promotion, disciplinary, and related processes should be carefully selected and trained to insure elimination of bias in all personnel actions.

(2) The contractor shall observe the requirements of the OFCC Order pertaining to the validation of employee tests and other selection procedures.

(3) Selection techniques other than tests may also be improperly used so as to have the effect of discriminating against minority groups and women. Such techniques include but are not restricted to, unscored interviews, unscored or casual application forms, arrest records, credit checks, considerations of marital status or dependency or minor children. Where there exist data suggesting that such unfair discrimination or exclusion of minorities or women exists, the contractor should analyze his unscored procedures and eliminate them if they are not objectively valid.

(e) Suggested techniques to improve requirement and increase the flow of minority or female applicants follow:

(1) Certain organizations such as the Urban League, Job Corps, Equal Opportunity Programs, Inc., Concentrated Employment Programs, Neighborhood Youth Corps, Secondary Schools, Colleges, and City Colleges with high minority enrollment, the State Employment Service, specialized employment agencies, Aspira, LULAC, SER, the G.I. Forum, the Commonwealth of Puerto Rico are normally prepared to refer minority applicants. Organizations prepared to refer women with specific skills are: National Organization for Women, Welfare Rights Organizations, Women's Equity Action League, Talent Bank from Business and Professional Women (including 26 women's organizations), Professional Women's Caucus, Intercollegiate Association of University Women, Negro Women's sororities and service groups such as Delta Sigma Theta, Alpha Kappa Alpha, and Zeta Phi Beta, National Council of Negro Women, American Association of University Women, YWCA, and sectarian groups such as Jewish Women's Groups, Catholic Women's Groups and Protestant Women's Groups, and women's colleges. In addition community leaders as individuals shall be added to recruiting sources.

(2) Formal briefing sessions should be held, preferably on company premises, with representatives from these recruiting sources. Plant tours, pres-

sentations by minority and female employees, clear and concise explanations of current and future job openings, position descriptions, worker specifications, explanations of the company's selection process, and recruiting literature should be an integral part of the briefings. Formal arrangements should be made for referral of applicants, followup with sources, and feedback on disposition of applicants.

(3) Minority and female employees, using procedures similar to subparagraph (2) of this paragraph should be actively encouraged to refer applicants.

(4) A special effort should be made to include minorities and women on the Personnel Relations staff.

(5) Minority and female employees should be made available for participation in Career Days, Youth Motivation Programs, and related activities in their communities.

(6) Active participation in "Job Fairs" is desirable. Company representatives so participating should be given authority to make on-the-spot commitments.

(7) Active recruiting programs should be carried out at secondary schools, junior colleges, and colleges with predominant minority or female enrollments.

(8) Recruiting efforts at all schools should incorporate special efforts to reach minorities and women.

(9) Special employment programs should be undertaken whenever possible. Some possible programs are:

(i) Technical and nontechnical co-op programs with predominately Negro and women's colleges.

(ii) "After school" and/or work-study jobs for minority youths, male and females.

(iii) Summer jobs for underprivileged youth, male and female.

(iv) Summer work-study programs for male and female faculty members of the predominantly minority schools and colleges.

(v) Motivation, training and employment programs for the hard-core unemployed, male and female.

(10) When recruiting brochures pictorially present work situations, the minority and female members of the work force should be included, especially when such brochures are used in school and career programs.

(11) Help wanted advertising should be expanded to include the minority news media and women's interest media on a regular basis.

(f) The contractor should insure that minority and female employees are given equal opportunity for promotion. Suggestions for achieving this result include:

(1) Post or otherwise announce promotional opportunities.

(2) Make an inventory of current minority and female employees to determine academic, skill and experience level of individual employees.

(3) Initiate necessary remedial, job training and workstudy programs.

(4) Develop and implement formal employee evaluation programs.

(5) Make certain "worker specifications" have been validated on job performance related criteria. (Neither minority nor female employees should be required to possess higher qualifications than those of the lowest qualified incumbent.)

(6) When apparenty qualified minority or female employees are passed over for upgrading, require supervisory personnel to submit written justification.

(7) Establish formal career counseling programs to include attitude development, education aid, job rotation, buddy system and similar programs.

(8) Review seniority practices and seniority clauses in union contracts to insure such practices or clauses are nondiscriminatory and do not have a discriminatory effect.

(g) Make certain facilities and company-sponsored social and recreation activities are desegregated. Actively encourage all employees to participate.

(h) Encourage child care, housing and transportation programs appropriately designed to improve the employment opportunities for minorities and women.

§ 60-2.25 Internal audit and reporting systems.

(a) The contractor should monitor records of referrals, placements, transfers, promotions and terminations at all levels to insure nondiscriminatory policy is carried out.

(b) The contractor should require formal reports from unit managers on a schedule basis as to degree to which corporate or unit goals are attained and timetables met.

(c) The contractor should review report results with all levels of management.

(d) The contractor should advise top management of program effectiveness and submit recommendations to improve unsatisfactory performance.

§ 60-2.26 Support of action programs.

(a) The contractor should appoint key members of management to serve on Merit Employment Councils, Community Relations Boards and similar organizations.

(b) The contractor should encourage minority and female employees to participate actively in National Alliance of Businessmen programs for youth motivation.

(c) The contractor should support Vocational Guidance Institutes, Vestibule Training Programs and similar activities.

(d) The contractor should assist secondary schools and colleges in programs designed to enable minority and female graduates of these institutions to compete in the open employment market on a more equitable basis.

(e) The contractor should publicize achievements of minority and female employees in local and minority news media.

(f) The contractor should support programs developed by such organizations as National Alliance of Businessmen, the Urban Coalition and other organizations concerned with employment opportunities for minorities or women.

SUBPART D—MISCELLANEOUS

§ 60-2.30 Use of goals.

The purpose of a contractor's establishment and use of goals is to insure that he meet his affirmative action obligation. It is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin.

§ 60-2.31 Preemption.

To the extent that any State or local laws, regulations or ordinances, including those which grant special benefits to persons on account of sex, are in conflict with Executive Order 11246, as amended, or with the requirements of this part, we will regard them as preempted under the Executive order.

§ 60-2.32 Supersedure.

All orders, instructions, regulations, and memoranda of the Secretary of Labor, other officials of the Department of Labor and contracting agencies are hereby superseded to the extent that they are inconsistent herewith including a previous "Order No. 4" from this Office dated January 30, 1970. Nothing in this part is intended to amend 41 CFR 60-3 published in the Federal Register on October 2, 1971 or Employee Testing and Other Selection Procedures or 41 CFR 60-20 on Sex Discrimination Guidelines.

Effective date. This part shall become effective on the date of its publication in the Federal Register (12-4-71).

Part 60-3—Employee Testing and Other Selection Procedures

Sec.
60-3.1 Purpose and scope.
60-3.2 Test defined.
60-3.3 Violations of the Executive order.
60-3.4 Evidence of validity; meaning of technically feasible.
60-3.5 Minimum standards for validation.
60-3.6 Presentation of evidence of validity.
60-3.7 Use of other validity studies.
60-3.8 Assumption of validity.
60-3.9 Continued use of tests.
60-3.10 Employment agencies and state employment services.
60-3.11 Disparate treatment.
60-3.12 Retesting.
60-3.13 Other selection techniques.
60-3.14 Affirmative action.
60-3.15 Recordkeeping.
60-3.16 Sanctions.

Sec.
60–3.17 Exemptions.
60–3.18 Effect on other rules and regulations.

Authority: The provisions of this Part 60–3 are issued under secs. 201, 205, 206(a), 301, 303(a), 303(b), and 403(b) of Executive Order 11246, as amended, 30 F.R. 12319; 32 F.R. 14303; 34 F.R. 12986; § 60–1.2 of Part 60–1 of this chapter.

§ 60–3.1 Purpose and scope.

(a) This order is based on the belief that properly validated and standardized employee selection procedures can significantly contribute to the implementation of nondiscriminatory personal policies, as required by Executive Order 11246, as amended. It is also recognized that professionally developed tests, when used in conjunction with other tools of personnel assessment and complemented by sound programs of job design, may significantly aid in the development and maintenance of an efficient work force and, indeed, aid in the utilization and conservation of human resource generally.

(b)(1) An examination of charges of discrimination filed with the Office of Federal Contract Compliance and an evaluation of the results of its compliance activities has revealed a decided increase in total test usage and a marked increase in testing practices which have discriminatory effects. In many cases, contractors have come to rely almost exclusively on tests as the basis for making the decision to hire, to promote, to transfer, to train, or to retain with the result that candidates are selected or rejected on the basis of test scores. Where tests are so used, minority candidates frequently experience disproportionately high rates of rejection by failing to attain score levels that have been established as minimum standards for qualification.

(2) It has also become clear that in many instances contractors are using tests as the basis for employment decisions without evidence that they are valid predictors of employee job performance. Where evidence in support of presumed relationships between test performance and job behavior is lacking, the possibility of discrimination in the application of test results must be recognized. A test lacking demonstrated validity, i.e., having no known significant relationship to job behavior, and yielding lower scores for classes protected by Executive Order 11246, as amended, may result in the rejection of many who have necessary qualifications for successful work performance.

(c) Section 202 of Executive Order 11246, as amended, requires each Government contractor and subcontractor to take affirmative action to insure that he will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. This order is designed to serve as a set of standards for contractors and subcontractors subject to Executive Order 11246, as amended, in determining whether their use of tests conforms with the requirements of the Executive Order.[1]

§ 60–3.2 Test defined.

For the purpose of this order, the term "test" is defined as any paper-and-pencil or performance measure used as a basis for any employment decision. This order applies, for example, to ability tests which are designed to measure eligibility for hire, transfer, promotion, training, or retention. This definition includes, but is not restricted to, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interests; and attitudes, personality or temperament. The term "test" also covers all other formal, scored, quantified or standardized techniques of assessing job stability including, for example, personal history and background requirements which are specifically used as a basis for qualifying or disqualifying applicants or employees, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales and scored application forms. The term "test" shall not including other selection techniques discussed in § 60–3.13.

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[1] Except for the necessary differences in language arising from the different legal authority of the two agencies and for reasons of clarity, this order and the Guidelines on Employee Selection Procedures, issued earlier by the Equal Employment Opportunity Commission (35 F.R. 12333, Aug. 1, 1970) are intended to impose the same basic requirements on persons and contractors covered by each of them.

§ 60-3.3 Violation of Executive order.

A contractor regularly using a test which has adversely affected the opportunities of minority persons or women for hire, transfer, promotion, training, or retention violates Executive Order 11246, as amended, unless he can demonstrate that he has validated the test pursuant to the requirements of this part.

§ 60-3.4 Evidence of validity; meaning of technically feasible.

(a) Each contractor using tests to select from among candidates for hire, transfer, promotion, training, or retention shall have available for inspection evidence that the test is being used in a manner which does not violate § 60-3.3.

(b) Where technically feasible, a test should be validated for each minority group with which it is used; that is, any differential rejection rates that may exist, based on a test, must be relevant to performance on the jobs in question.

(c) The term "technically feasible" as used in paragraph (b) of this section and elsewhere in this part means having or obtaining a sufficient number of minority individuals to achieve findings of statistical and practical significance, the opportunity to obtain unbiased job performance criteria, etc. It is the responsibility of the persons claiming absence of technical feasibility to demonstrate evidence of this absence.

(1) Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.

(2) If job progression structures and seniority provisions are so established that new employees will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level, it may be considered that candidates are being evaluated for jobs at that higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it shall be considered that candidates are being evaluated for a job at or near the entry level. This point is made to underscore the principle that attainment of or performance at a higher level job is a relevant criterion in validating employment tests only when there is a higher probability that persons employed will in fact attain that higher level job within a reasonable period of time.

(3) Where a test is to be used in different units of a multiunit organization and no significant differences exist between units, jobs, and applicant populations, evidence obtained in one unit may suffice for the others. Similarly, where the validation process requires the collection of data throughout a multiunit organization, evidence of validity specific to each unit may not be required. There may also be instances where evidence of validity is appropriately obtained from other companies in the same industry. Both in this instance and in the use of data collected throughout a multiunit organization, evidence of validity specific to each unit or company may not be required provided that no significant differences exist between companies, units, jobs, and applicant populations.

§ 60-3.5 Minimum standards for validation.

(a) For the purpose of satisfying the requirements of this part, empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion-related validity, such as those described in "Standards for Educational and Psychological Tests and Manuals," published by the American Psychological Association, 1200 17th Street NW., Washington, DC 20036. Evidence of content or construct validity, as defined in that publication, may also be appropriate where criterion-related validity is not feasible. However, evidence for content or construct validity should be accompanied by sufficient information from job analyses to demonstrate the relevance of the content, in the case of job knowledge or proficiency tests, or the construct, in the case of trait measures. Evidence of content validity alone will be acceptable for well-developed tests that consist of suitable samples of the essential knowledge, skills or behaviors composing the job in question. The types of knowledge, skills or behaviors contemplated here do not include those which can be acquired in a brief orientation to the job. In the case of personal history, background, educational, and work history requirements which are specifically used as a basis for qualifying or disqualifying applicants (see § 60-3.2), evidence of content or construct validity may be sufficient.

(b) Although any appropriate validation strategy may be used to develop such empirical evidence, the following minimum standards, as applicable, must be met in the research approach and in the presentation of results which constitute evidence of validity:[1]

(1) Where a validity study is conducted in which tests are administered to applicants, with criterion data collected later, the sample of subjects must be representative of the normal or typical candidates group for the job or jobs in question. This further assumes that the applicant sample is representative of the minority population available for the job or jobs in question in the local labor market. Where a validity study is conducted in which tests are administered to present employees, the sample must be representative of the minority groups currently included in the applicant population. If it is not technically feasible to include minority employees in validation studies conducted on the present work force, the conduct of a validation study without minority candidates does not relieve any contractor of his subsequent obligation for validation when inclusion of minority candidates becomes technically feasible.

(2) Tests must be administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of test scores and to insure that scores do not enter into any judgments of employee adequacy that are to be used as criterion measures.

(3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.

(4) In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be carefully developed, and the ratings should be closely examined for evidence of bias. In addition, minorities or women might obtain unfairly low performance criterion scores for reasons other than supervisors' prejudice, as when, as new employees, they have had less opportunity to learn job skills. In general, all criteria must be examined to ensure freedom from factors which would unfairly depress the scores of minority groups or women.

(5) Data must be generated and results separately reported for minority and nonminority groups wherever technically feasible. Where a minority group is sufficiently large to constitute an identifiable factor in the local labor market, but validation data have not been developed and presented separately for that group, evidence of satisfactory validity based on other groups will be regarded as only provisional compliance with this order pending separate validation of the test for the minority group in question (see § 60–3.9). A test which is differentially valid may be used in groups for which it is valid but not for those in which it is not valid. In this regard, where a test is valid for two groups but one group characteristically obtains higher test scores than the other without a corresponding difference in job performance, test results must be applied so as to predict the same probability of job success in both groups.

(c) In assessing the utility of a test the following considerations will be applicable:

(1) The relationship between the test and at least one relevant criterion must be statistically significant. This ordinarily means that the relationship should be sufficiently high as to have a probability of no more than 1 to 20 to have occurred by change. However, the use of a single test as the sole selection device, when that test is valid against only one component of job performance, will be scrutinized closely.

(2) In addition to statistical significance, the practical significance of the relationship between the test and criterion should also be considered. The magnitude of the relationship needed for practical significance or usefulness is affected by several factors, including:

(i) The larger the proportion of applicants who are hired for or placed on the job, the higher the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few job vacancies are available;

(ii) The larger the proportion of applicants who become satisfactory employees when not selected on the basis of the test, the higher the relationship needs to be between the test and a criterion of job success for the test to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few applicants turn out to be satisfactory;

(iii) The smaller the economic and human risks involved in hiring an unqualified applicant relative to the risks entailed in rejecting a qualified applicant, the greater the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when the former risks are relatively high.

§ 60–3.6 Presentation of evidence of validity.

(a) *Criterion-related validity.*—Reports of criterion-related validity of tests and other selection methods, where required by this chapter, are to contain the following information:

(1) *Firm or organization and location(s) and date(s) of study.*—If study is longitudinal, both testing dates and criterion collection dates or the time range within which these dates occurred must be shown (Essential). If study was conducted at several locations, names of cities and states should be shown in addition to plant identification.

(2) *Problem and setting.*—Explicit definition of purposes and brief discussion of the situation in which the study was conducted should be provided. Include description of existing selection procedures and cutting scores, if any, which were used.

(3) *Job analysis.*—A full description of all important duties and tasks involved in each of the jobs on which research has been conducted and for which the test will be used must be provided (Essential). Unless a general measure of job behavior (such as turnover or tenure) is used as a criterion, it is expected that the description of the duties performed by the incumbents on the job will also detail the level of difficulty at which the duties are performed, and those duties which are critical (i.e., must be performed competently if the job is to be performed in a satisfactory manner). This job analysis also should describe on what bases duties were determined to be critical, such as the proportion of time spent on the respective duties, their levels of difficulty, their importance, their frequency of performance, and other relevant factors. If a duty which occupies a high proportion of time is not deemed critical, the reasons therefore must be set forth. Published descriptions from industry sources or Volume I of the *Dictionary of Occupational Titles* are satisfactory if they adequately and completely described the job. If necessary a brief supplement to the published descriptions may be provided. (The requirements in this section are not intended to specify a particular method of job analysis. Any professionally recognized product and/or process oriented method of job analysis is acceptable if it is comprehensive and otherwise appropriate for the specific validation strategy used.) If two or more jobs are grouped for a validation study, a justification for this grouping as well as a description of each of the jobs should be provided.

(4) *Job titles and codes.*—It is desirable that the job title used in company terminology plus the corresponding job title and code from United States Employment Service *Dictionary of Occupational Titles* (Third Edition) Volumes I and II, United States Government Printing Office, 1965, be provided. Where appropriate DOT codes and titles do not exist, a notation to that effect should be made.

(5) *Criteria.*—Provide a description of all criteria of job related behaviors collected (including a rationale for what were selected as final criteria) and means by which they were observed, recorded, evaluated and quantified (Essential). (To the extent possible this description should parallel the content validity justification described under "content validity" below.) An indication of the reliability coefficients and how they were established is desirable.

(6) *Sample.*—A description of the ethnic and sex composition of the sample must be provided. (Minority group categories shown on EEO–1 should be used.) Also required is a description of how the research sample was selected and how it compares with employees in the job and with current applicants. Description of educational levels, length of service, and age is also desirable.

(7) *Number of cases.*—Indicate the number of people in the sample, and the number of people in each of the subsamples (Essential).

(8) *Predictors.*—Commercially available tests should be described by title, form and publisher (Essential). Other predictors, including privately constructed tests, interviewer's ratings, educational and experience levels and composites of test batteries should be explicitly described (Essential). The inclusion of a rationale for each predictor studied is desirable.

(9) *Techniques and results.*—Methods used in evaluating data must be described (essential). Any statistical adjustments such as for less than perfect

reliability or for restriction of score range in the test or criterion or both must be described and uncorrected coefficients must also be shown (Essential). Statistical results must be summarized in graphical or tubular form (by ethnic and/or subgroup, if feasible) and statements regarding statistical significance of results must be made (Essential). Where the statistical technique used categorizes continuous data (such as biserial correlation and phi coefficient) the cut-offs used and their bases must be described (Essential). Where more than one predictor and/or more than one criterion is used, all predictor-criterion correlations must be reported regardless of magnitude or direction. Average scores (e.g. means) and measures of dispersion (e.g. standard deviations and ranges) for all test and criteria must be reported for all relevant subgroups, including minoritiy and nonminority groups and males and females, where feasible (Essential).

(10) *Uses and applications.*—A description of the way in which the test is to be used (e.g., as a screening device with a cut-off score, combined with other tests in a battery) and application of the test (e.g., selection, transfer, upgrading) must be provided so as to permit judgments of the test's utility in making predictions of future work behavior (Essential). Where cut-off scores are to be used, both the cut-off scores and the way in which they were determined must be described (Essential). It is expected that each operational cut-off score will be reasonable and consistent with normal expectations of proficiency within the work force or group on which the study was conducted.) The specific way the test or test battery is used operationally must be described and validity data must support this particular use (Essential). If predictor weights are used, the weights and the validity of the weighted composite must be reported (Essential).

(11) *Source data.*—Each contractor must maintain, and make available upon request, records showing all pertinent information about individual sample members in studies involving the validation of tests. These data must include test scores, criterion scores, age, sex, minority group status, and experience on the specific job on which the validation study is being conducted and may also include such things as education, training and prior job experience. If the contractor chooses to submit along with a report on validation a worksheet showing the pertinent information about the individual sample members, specific identifying information such as name and social security number should NOT be shown. Submittal with the validation report is encouraged as it may prevent delays in approval in the event that errors are noted.

(12) *Contact person.*—It would be desirable for the contractor to provide the name, address and telephone number of person currently working for the company or consulting firm who may be contacted for further information about the validation study.

(b) *Content validity.*—Content validity is an appropriate type of validity to demonstrate for skills tests (that is, tests to determine whether an individual already possesses needed skills or knowledge and certain other selection procedures, but it is not ordinarily an appropriate type of validity to fully support aptitude or intelligence tests (that is, tests to determine whether an individual can learn needed skills or knowledge). Also, content validity sometimes may be accepted as provisional compliance where criterion related is preferred but is not technically reasible. Frequently ,the contnt validity of a selection procedure can be demonstrated to the satisfaction of the compliance officer by the contractor, either orally or in writing, without the need to prepare a formal report in accordance with these guidelines.

NOTE.—It is important to distinguish between face validity which involves an apparent but superficial correspondence between test content and the job (not an acceptable type of validity) and content validity, which involves a demonstration that the test content samples important elements of job tasks. Formal reports of the content validity of tests and other selection methods, where required by this chapter (i.e., disproportionate rejection rate and request of compliance officer), are to contain the following information:

(1) *Job analysis.*—The essential foundation of a content validity study is a reliable and comprehensive job analysis. The analysis must define the duties performed by incumbents on the job, the level of difficulty at which the duties are performed, and those duties which are critical (i.e., those which must be performed competently if the job is to be performed in a satisfactory manner (Essential). The job analysis shsould describe on what bases duties were determined to be critical, such as the proportion of time spent on the respective duties, their levels of difficulty, their importance, their frequency of performance, and other relevant factors. If a duty which occupies a high proportion of time is not

deemed critical, the reasons therefore must be set forth. (The level, breadth, degree and/or type of skills or knowledge to be learned on the job or in the job related training must be identified because selection standards must not require this level, breadth, degree and/or type of skills or knowledge.) Citation of actual occurrences of ineffective behavior resulting from the absence of a particular knowledge, skill or personal characteristic would be desirable.

(2) *Job title and code.*—It is desirable that the job title used in company terminology plus the corresponding job title and code from United States Employment Service *Dictionary of Occupational Titles* (Third Edition) Volumes I and II, United States Government Printing Office, 1965 be provided. Where appropriate DOT codes and titles do not exist, a notation to that effect should be made.

(3) *Predictors.*—Privately constructed tests, specific training requirements, composites of test batteries and other predictors should be explicitly described (Essential). Commercially available tests, if used, should be described by title, form and publisher (Essential). (The predictor content must be restricted to measurement of the knowledge and skills identified in the job analysis.)

(4) *Techniques and results.*—Describe the way in which the correspondence between the predictor content and the job content was established (Essential). (This includes both content area and relative emphasis given to each area.) The validity demonstration must include a clear description of the depth and scope of primary characteristics required of the worker in performing these specific tasks. Specify the way in which these tasks, knowledge, skills and personal characteristics were determined and their relative importance. Describe qualifications of subject matter experts and/or job experts who review predictor content and job requirements. If any steps were taken to reduce racial, cultural or sex bias in the predictor content, describe these steps. Explain how time limits were established and how these are related to speed with which tasks must be accomplished on the job. Describe studies, if any, to estimate the reliability of the predictors or, if relevant reliability studies have been described in the literature, these should be referenced.

(5) *Normative data.*—As appropriate, it is desirable that average scores (e.g. means) and measures of dispersion (e.g. standard deviations and ranges) on the predictors be reported for one or more samples of applicants or other relevant samples. If feasible, these data should be reported separately for minority subgroups and separately for males and females.

(6) *Cut-off scores.*—The rationale for minimum requirements, if any, must be provided (Essential). (It is expected that each operational cut-off score or level of skill sought will be reasonable and consistent with normal expectations of proficiency within the work force.)

If the test is used to rank individuals who are above minimum levels, or if preference is given to individuals who score significantly above the minimum levels, a rational for this procedure must be provided (Essential).

(7) *Uses and applications.*—A description of the way in which the test is to be used (e.g. as a screening device with a cut-off score, combined with other tests in a battery) and application of the test (e.g. selection, transfer, upgrading) must be provided (Essential).

(8) *Contact person.*—It would be desirable for the contractor to provide the name, mailing address and telephone number of person currently working for the company or consulting firm who may be contacted for further information about the validation study.

NOTE. Previously written company or consultant reports on criterion-related validity or content validity are acceptable if they are reasonably complete in regard to the above information. If the previously written reports are not complete, the additional information may be appended. If necessary information (all items except those identified as desirable) is not available, the report may still be submitted but approval will be limited to provisional compliance. Reports should not be submitted if any Essential items are missing.

[39 FR 2095, Jan. 17, 1974]

§ 60-3.7 Use of other validity studies.

In cases where the validity of a test cannot be determined pursuant to §§ 60-3.4 and 60-3.5 (e.g., the number of subjects is less than that required for a technically adequate validation study, or an appropriate criterion measure cannot be developed), evidence from validity studies conducted in other organizations, such as that reported in test manuals and professional literature, may be considered acceptable when: (a) The studies pertain to jobs which are comparable (i.e., have basically the same task elements), and (b) there are no major differences in contextual variables or sample composition which are likely to affect significantly validity. Any contractor citing evidence from other validity studies as evidence of test validity for his own jobs must demonstrate that he meets requirements in paragraphs (a) and (b) of this section.

§ 60–3.8 Assumption of validity.

(a) Under no circumstances will the general reputation of a test, its author or its publisher, or casual reports of test utility be accepted in lieu of evidence of validity. Specifically ruled out are: Assumptions of validity based on test names or descriptive labels; all forms of promotional literature; data bearing on the frequency of a test's usage; testimonial statements of sellers, users, or consultants; and other nonempirical or anecdotal accounts of testing practices or testing outcomes.

(b) Although professional supervision of testing activities may help greatly to insure technically sound and nondiscriminatory test usage, such involvement alone shall not be regarded as constituting satisfactory evidence of test validity.

§ 60–3.9 Continued use of tests.

Under certain conditions where validation is required by this order, a contractor may be permitted to continue the use of a test which is not at the moment fully supported by the required evidence of validity. If, for example, evidence of criterion-related validity in a specific setting is technically feasible and required but not yet obtained, the use of the test may continue: *Provided:* (a) The contractor can cite substantial evidence of validity as described in § 60–3.7 (a) and (b); and (b) he has in progress validation procedures which are designed to produce, within a reasonable time, the additional data required. It is expected also that the contractor may have to alter or suspend test cutoff scores so that score ranges broad enough to permit the identification of criterion-related validity will be obtained.

§ 60–3.10 Employment agencies and state employment services.

A contractor utilizing the services of any private employment agency, state employment agency or any other person, agency or organization engaged in the selection or evaluation of personnel which makes its selections or evaluations of personnel wholly or partially on the basis of the results of any test shall have available evidence that any test used by such person, agency or organization is in conformance with the requirements of this order.

§ 60–3.11 Disparate treatment.

The principle of disparate or unequal treatment must be distinguished from the concept of test validation. Disparate treatment, for example, occurs where members of a group protected by Executive Order 11246, as amended, have been denied the same opportunities for hire, transfer or promotion as have been made available to other employees or applicants. Those employees or applicants who can be shown to have been denied equal treatment because of prior discriminatory practices or policies must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, no new test or other employee selection standard can be imposed upon an individual or class of individuals protected by Executive Order 11246, as amended, who, but for this prior discrimination, would have been granted the opportunity to qualify under less stringent selection standards previously in force.

§ 60–3.12 Retesting.

Contractors should provide an opportunity for retesting and reconsideration to earlier "failure" candidates who have availed themselves of more training or experience. In particular, if any applicant or employee during the course of an interview or other employment procedure claims more education or experience, that individual should be retested.

§ 60–3.13 Other selection techniques.

Selection techniques other than tests, as defined in § 60–3.2, may be improperly used so as to have the effect of discriminating against minority groups or women. Such techniques include, but are not restricted to, unscored or casual interviews, unscored application forms and unscored personal history and background requirements not used uniformly as a basis for qualifying or disqualifying applicants. Where there are data suggesting employment discrimination, the contractor may be called upon to present evidence concerning the validity of his unscored procedures regardless of whether tests are also used, the evidence of validity being of the same types referred to in §§ 60–3.4 and 60–3.5. Data suggesting the possibility of discrimination exists, for example, when there are higher rates of rejection of minority candidates than of nonminority candidates for the same job or group of jobs or when there is an underutilization of minority group personnel among present employees in certain types of jobs. If the contractor is unable or unwilling to perform such validation studies, he has the option of adjusting employment procedures so as to eliminate the conditions suggestive of employment discrimination.

§ 60–3.14 Affirmative action.

Nothing in this order shall be interpreted as diminishing a contractor's obligation under both title VII of the Civil Rights Act of 1964 and Executive Order 11246, as amended, to take affirmative action to ensure that applicants or employees are treated without regard to race, color, religion, sex, or national origin. Specifically, where substantially equally valid tests can be used for a given purpose, the contractor will be expected to use the test or battery of tests which will have the least adverse effect on the employment opportunities of minorities or women. Further, the use of tests which have been validated pursuant to this order does not relieve contractors of their obligation to take affirmative action to afford employment and training opportunities to members of classes protected by Executive Order 11246, as amended.

§ 60–3.15 Recordkeeping.

Each contractor shall maintain, and submit upon request, such records and documents relating to the nature and use of tests, the validation of tests, and test results, as may be required under the provisions of this chapter and under the orders and directives issued by the Office of Federal Contract Compliance.

§ 60–3.16 Sanctions.

(a) The use of tests and other selection techniques by contractors as qualification standards for hire, transfer, promotion, training or retention shall be examined carefully for possible indications of noncompliance with the requirements of Executive Order 11246, as amended.

(b) A determination of noncompliance pursuant to the provisions of this part shall be grounds for the imposition of sanctions under Executive Order 11246, as amended.

§ 60–3.17 Exemptions.

(a) Requests for exemptions from this order or any part thereof must be made in writing to the Director, Office of Federal Contract Compliance, Washington, D.C., and must contain a statement of reasons supporting the request. Such request shall be forwarded through and shall contain the endorsement of the head of the contracting agency. Exemption may be granted for good cause.

(b) The requirements of this part shall not apply to any contract when the head of the contracting agency determines that such contract is essential to the national security and that its award without complying with such requirements is necessary to the national security. Upon making such a determination, the agency head will notify the Director, in writing, within 30 days.

§ 60–3.18 Effect of this part on other rules and regulations.

(a) All orders, instructions, regulations, and memoranda of the Secretary of Labor, other officials of the Department of Labor and contracting agencies are hereby superseded to the extent that they are inconsistent herewith.

(b) Nothing in this part shall be interpreted to diminish the present contract compliance review and complaint investigation programs.

PART 60–5—WASHINGTON PLAN

NOTE. An amendment at 39 FR 19943, June 5, 1974, extended the expiration date of the Washington Plan until June 30, 1974. As noted at 39 FR 24648, July 5, 1974, the expiration date was further extended until July 31, 1974.

PART 60-20—SEX DISCRIMINATION GUIDELINES

Sec.
60-20.1 Title and purpose.
60-20.2 Recruitment and advertisement.
60-20.3 Job policies and practices.
60-20.4 Seniority system.
60-20.5 Discriminatory wages.
60-20.6 Affirmative action.

AUTHORITY: The provisions of this Part 60-20 issued under sec. 201, E.O. 11246, 30 F.R. 12319, and E.O. 11375, 32 F.R. 14303.

SOURCE: The provisions of this Part 60-20 appear at 35 F.R. 8888, June 9, 1970, unless otherwise noted.

§ 60-20.1 Title and purpose.

The purpose of the provisions in this part is to set forth the interpretations and guidelines of the Office of Federal Contract Compliance regarding the implementation of Executive Order 11375 for the promotion and insuring of equal opportunities for all persons employed or seeking employment with Government contractors and subcontractors or with contractors and subcontractors performing under federally assisted construction contracts, without regard to sex. Experience has indicated that special problems related to the implementation of Executive Order 11375 require a definitive treatment beyond the terms of the order itself. These interpretations are to be read in connection with existing regulations, set forth in Part 60-1 of this chapter.

§ 60-20.2 Recruitment and advertisement.

(a) Employers engaged in recruiting activity must recruit employees of both sexes for all jobs unless sex is a bona fide occupational qualification.

(b) Advertisement in newspapers and other media for employment must not express a sex preference unless sex is a bona fide occupational qualification for the job. The placement of an advertisement in columns headed "Male" or "Female" will be considered an expression of a preference, limitation, specification, or discrimination based on sex.

§ 60-20.3 Job policies and practices.

(a) Written personnel policies relating to this subject area must expressly indicate that there shall be no discrimination against employees on account of sex. If the employer deals with a bargaining representative for his employees and there is a written agreement on conditions of employment, such agreement shall not be inconsistent with these guidelines.

(b) Employees of both sexes shall have an equal opportunity to any available job that he or she is qualified to perform, unless sex is a bona fide occupational qualification.

NOTE: In most Government contract work there are only limited instances where valid reasons can be expected to exist which would justify the exclusion of all men or all women from any given job.

(c) The employer must not make any distinction based upon sex in employment opportunities, wages, hours, or other conditions of employment. In the area of employer contributions for insurance, pensions, welfare programs and other similar "fringe benefits" the employer will not be considered to have violated these guidelines if his contributions are the same for men and women or if the resulting benefits are equal.

(d) Any distinction between married and unmarried persons of one sex that is not made between married and unmarried persons of the opposite sex will be considered to be a distinction made on the basis of sex. Similarly, an employer must not deny employment to women with young children unless it has the same exclusionary policies for men; or terminate an employee of one sex in a particular job classification upon reaching a certain age unless the same rule is applicable to members of the opposite sex.

(e) The employer's policies and practices must assure appropriate physical facilities to both sexes. The employer may not refuse to hire men or women, or deny men or women a particular job because there are no restroom or associated facilities, unless the employer is able to show that the construction of the facilities would be unreasonable for such reasons as excessive expense or lack of space.

(f)(1) An employer must not deny a female employee the right to any job that she is qualified to perform in reliance upon a State "protective" law. For example, such laws include those which prohibit women from performing in certain types of occupations (e.g., a bartender or a core-maker); from working at jobs requiring more than a certain number of hours; and from working at jobs that require lifting or carrying more than designated weights.

(2) Such legislation was intended to be beneficial, but, instead, has been found to result in restricting employment opportunities for men and/or women. Accordingly, it cannot be used as a basis for denying employment or for establishing sex as a bona fide occupational qualification for the job.

(g)(1) Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. When, under the employer's leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time. For example, if the female employee meets the equally applied minimum length of service requirements for leave time, she must be granted a reasonable leave on account of childbearing. The conditions applicable to her leave (other than the length thereof) and to her return to employment, shall be in accordance with the employer's leave policy.

(2) If the employer has no leave policy, childbearing must be considered by the employer to be a justification for a leave of absence for a female employee for a reasonable period of time. Following childbirth, and upon signifying her intent to return within a reasonable time, such female employee shall be reinstated to her original job or to a position of like status and pay, without loss of service credits.

(h) The employer must not specify any differences for male and female employees on the basis of sex in either mandatory or optional retirement age.

(i) Nothing in these guidelines shall be interpreted to mean that differences in capabilities for job assignments do not exist among individuals and that such distinctions may not be recognized by the employer in making specific assignments. The purpose of these guidelines is to insure that such distinctions are not based upon sex.

§ 60-20.4 Seniority system.

Where they exist, seniority lines and lists must not be based solely upon sex. Where such a separation has existed, the employer must eliminate this distinction.

§ 60-20.5 Discriminatory wages.

(a) The employer's wages schedules must not be related to or based on the sex of the employees.

Note. The more obvious cases of discrimination exist where employees of different sexes are paid different wages on jobs which require substantially equal skill, effort and responsibility and are performed under similar working conditions.

(b) The employer may not discriminatorily restrict one sex to certain job classifications. In such a situation, the employer must take steps to make jobs available to all qualified employees in all classifications without regard to sex. (Example: An electrical manufacturing company may have a production division with three functional units: One (assembly) all female; another (wiring), all male; and a third (circuit boards), also all male. The highest wage attainable in the assembly unit is considerably less than that in the circuit board and wiring units. In such a case the employer must take steps to provide qualified female employees opportunity for placement in job openings in the other two units.)

(c) To avoid overlapping and conflicting administration the Director will consult with the Administrator of the Wage and Hour Administration before issuing an opinion on any matter covered by both the Equal Pay Act and Executive Order 11246, as amended by Executive Order 11375.

§ 60-20.6 Affirmative action.

(a) The employer shall take affirmative action to recruit women to apply for those jobs where they have been previously excluded.

Note. This can be done by various methods. Examples include: (1) including in itineraries of recruiting trips women's colleges where graduates with skills desired by the employer can be found, and female students of coeducational institutions and (2) designing advertisements to indicate that women will be considered equally with men for jobs.

(b) Women have not been typically found in significant numbers in management. In many companies management trainee programs are one of the ladders to management positions. Traditionally, few, if any, women have been admitted into these programs. An important element of affirmative action shall be a commitment to include women candidates in such programs.

(c) Distinctions based on sex may not be made in other training programs. Both sexes should have equal access to all training programs and affirmative action programs should require a demonstration by the employer that such access has been provided.

PART 60–30—HEARING RULES FOR SANCTION PROCEEDINGS

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SUBPART G—MISCELLANEOUS

60–30.34 Cooperation by agencies.
60–30.35 Effect of this part on other rules and regulations.

AUTHORITY: Secs. 201, 205, 208, 209, 301, 302(b), and 303(a) of Executive Order 11240, as amended, 30 F.R. 12319; 32 F.R. 14303; § 60–1.26 of Part 60–1 of this chapter (41 CFR Part 60–1).

SOURCE: 37 FR 20537, Sept. 30, 1972, unless otherwise noted.

SUBPART A—GENERAL INFORMATION

§ 60–30.1 Applicability of rules, waiver, modification.

(a) *Applicability of rules.* These rules of procedure supplement the provisions of § 60–1.26(b) of this chapter. The rules govern the practice and procedure for hearings conducted by the Office of Federal Contract Compliance with respect to the imposition of sanctions under sections 208(b), 209(a) (5) and (6) of Executive Order No. 11246, as amended.

(b) *Waiver, modification.* Upon notice to all parties, the hearing examiner or the Secretary may, with respect to matters pending before him modify or waiver any rule herein upon a determination that no party will be prejudiced and that the ends of justice will be served thereby.

§ 60–30.2 Definitions.

As used in these rules:

(a) "Associate Solicitor" means the Associate Solicitor for Labor Relations and Civil Rights, U.S. Department of Labor, Washington, D.C. 20210, who has been designated to prosecute all actions under this part and § 60–1.26(b) of this chapter in the name of the Director.

(b) "Chief Hearing Examiner" means the Chief Hearing Examiner, U.S. Department of Labor, Washington, D.C. 20210.

(c) "Department" means the Department of Labor.

(d) "Director" means the Director of the Office of Federal Contract Compliance of the Department of Labor.

(e) "Hearing Examiner" means the hearing officer designated by the Chief Hearing Examiner, pursuant to section 208(b) of Executive Order 11246, as amended, and § 60–1.26(b) of this chapter to conduct hearings under section 209 of the order.

(f) "Notice" means, unless the context clearly indicates otherwise, the Notice of Proposed Cancellation, Termination, or Ineligibility.

(g) "The order" means Executive Order 11246 of September 24, 1965 (30 F.R. 12319), as amended (32 F.R. 14303).

(h) "Party" means a respondent: the Director of the Office of Federal Contract Compliance of the Department of Labor: and any person or organization participating in a proceeding pursuant to § 60–30.11(a).

(i) "Respondent" means a person or organization against whom sanctions are proposed because of alleged violations of Executive Order 11246, and the rules, regulations, and orders thereunder.

(j) "Secretary" means Secretary of the Department of Labor.

§ 60–30.3 Computation of time.

In computing any period of time under these rules or in an order issued hereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed in the District of Columbia, in which event it includes the next following business day.

SUBPART B—FORM AND FILING OF DOCUMENTS AND PLEADINGS

§ 60–30.4 Form.

Documents and pleadings filed pursuant to a proceeding herein shall be dated, the original signed in ink, shall show the docket description and title of the proceeding, and shall show the title, if any, and address of the signatory. Copies need not be signed, but the name of the person signing the original shall be reproduced.

§ 60–30.5 Filing; service.

(a) *Manner of service.* Service upon any party shall be made by the party filing the document or pleading by delivering a copy or mailing a copy to the last known address: *Provided, however,* That the notice of hearing shall be sent by registered mail, return receipt requested, pursuant to § 60–1.26(b)(1) of this chapter.

(b) *Upon whom served.* All papers shall be served upon counsel of record and upon parties not represented by counsel, and upon the Associate Solicitor or his designee.

(c) *Proof of service.* A certificate of the person serving the pleading or other document by personal delivery or by mailing, setting forth the manner of said service shall be prima facie proof of service.

(d) *Number of copies.* An original and 3 copies of all documents and pleadings shall be filed.

SUBPART C—PREHEARING PROCEDURES

§ 60–30.6. Notice of proposed cancellation, termination or ineligibility.

Actions shall be commenced under this part and § 60–1.26(b) (2) of this chapter by service of a written notice signed by the Director, or by the Associate Solicitor in the name of the Director, on the contractor or subcontractor against whom the Director seeks the imposition of sanctions. The notice shall indicate whether the Director proposes to request the Secretary to cancel or terminate, or cause to be canceled or terminated, in whole or in part, any one or more contracts or subcontracts, or to declare the prime contractor or subcontractor ineligible for further contracts or subcontracts under section 209 of the order. The notice shall contain a concise jurisdictional statement, a short and plain statement of the matter furnishing a basis for the imposition of sanctions, an enumeration of the sanctions being proposed, and a citation of the provisions of the order regulations pursuant to which the requested action may be taken.

§ 60–30.7 Answer.

(a) *Filing and service.* Within 14 days after receipt of the notice of proposed cancellation, termination, or ineligibility, Respondent shall file an answer and a hearing request with the hearing examiner or, if no hearing examiner has been designated, with the Chief Hearing Examiner.

(b) *Contents; failure to file.* The answer shall admit or deny specifically, and in detail, matters set forth in each allegation of the notice. Unless Respondent is without knowledge, in which case the answer shall so state, and the statement shall be deemed a denial. Matters not specifically denied shall be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered. Failure to file an answer shall constitute an admission of all facts recited in the notice.

(c) *Hearing request.* The request for a hearing shall be included as a separate paragraph of the answer.

§ 60–30.8 Amendments.

The Director may amend the notice once as a matter of course before an answer is filed, and Respondent may amend its answer once as a matter of course not later than 10 days after the filing of the original answer. Other amendments of the notice or of the answer to the notice shall be made only by leave of the hearing examiner. An amended notice shall be answered within 7 days of its service, or within the time for filing an answer to the original notice, whichever period is longer.

§ 60–30.9 Notice of hearing.

In response to Respondent's request for a hearing, a notice of hearing shall be served on the Respondent pursuant to § 60–1.26(b)(1) of this chapter. Such notice shall contain the time, place, and nature of the hearing and the legal authority under which the proceedings are to be held.

§ 60–30.10 Motions; disposition of motions.

(a) *Motions.* Motions shall state the relief sought, the authority relied upon and the facts alleged, and shall be filed with the hearing examiner, or with the Chief Hearing Examiner, if no hearing examiner has been designated. If made before or after the hearing itself, these matters shall be in writing. If made at the hearing, they may be stated orally; but the hearing examiner may require that they be reduced to writing and filed and served on all parties in the same manner as a formal motion. Within 7 days after a written motion is served, or such other time period as may be fixed, any party may file a response to a motion.

(b) *Disposition of motions.* The hearing examiner, or Secretary, may not grant a written motion prior to expiration of the time for filing responses thereto, except upon consent of the parties or following a hearing thereon, but may overrule or deny such motion without awaiting response: *Provided, however,* That prehearing conferences, hearings, and decisions need not be delayed pending disposition of motions. Rulings by the hearing examiner shall not be appealed prior to the transfer of the case to the Secretary, but shall be considered by the Secretary when the case is transferred to him for decision.

§ 60–30.11 Participation by interested persons.

(a) (1) To the extent that proceedings hereunder involve employment of persons covered by a collective bargaining agreement, and compliance may necessitate a revision of such agreement, any labor organization which is a signatory to the agreement shall have the right to participate as a party.

(2) Other persons or organizations shall have the right to participate as parties if the final decision of the Secretary could adversely affect them or the class they represent and such participation may contribute materially to the proper disposition of the proceedings.

(3) Any person or organization wishing to participate as a party under this paragraph shall file and serve upon the hearing examiner, or upon the Chief Hearing Examiner, if no hearing examiner has been designated, and all parties a petition within 7 days after the commencement of the action. Such petition shall concisely state (i) petitioner's interest in the proceedings, (ii) who will appear for petitioner, (iii) the issues on which petitoner wishes to participate, and (iv) whether petitioner intends to present witnesses.

(4) The hearing examiner shall determine whether each petitioner has the requisite interest in the proceedings and shall permit or deny participation accordingly. Where petitions to participate as parties are made by individuals or groups with common interest, the hearing examiner may request all such petitioners to designate a single representative to represent all such petitioners: *Provided*, That the representative of a labor organization qualifying to participate under subparagraph (1) of this paragraph must be permitted to participate in the proceeding. The hearing examiner shall give each petitioner written notice of the decision on his petition; and if the petition is denied, he shall briefly state the grounds for denial and shall then treat the petition as a request for participation as amicus curiae. The hearing examiner shall give written notice to each party of each petition granted.

(b) (1) Any othe interested person or organization wishing to participate as amicus curiae shall file a petition before the commencement of the final hearing with the hearing examined. Such petition shall concisely state (i) the petitioner's interest in the hearing, (ii) who will represent the petitioner, and (iii) the issues on which petitioner intends to present argument. The hearing examiner may grant the petition if he finds that the petitioner has a legitimate interest in the proceedings, and that such participation may contribute materially to the proper disposition of the issues. An amicus curiae is not a party but may participate as provided in this paragraph.

(2) An amicus curiae may present a brief oral statement at the hearing, at the point in the proceedings specified by the hearing examiner. He may submit a written statement of position to the hearing examiner prior to the beginning of a hearing, and shall serve a copy on each party. He may also submit a brief or written statement at such time as the parties submit briefs and exceptions, and shall serve a copy on each party.

§ 60–30.12 Admissions as to facts and documents.

Not later than 14 days prior to the date of the hearing, except for good cause shown, or not later than 14 days prior to such earlier date as the hearing examiner may order, any party may serve upon an opposing party a written request for the admission of the genuineness and authenticity of any relevant documents described in, and exhibited with, the request, or for the admission of the truth of any relevant matters of fact stated in the request. Each of the matters, as to which an admission is requested shall be deemed admitted, unless within a period designated in the request (not less than 7 days, and not more than 10 days, after service thereof) the party to whom the request is directed serves upon the requesting party a sworn statement either (a) denying specically the matter as to which an admission is requested, or (b) setting forth in detail the reasons why he cannot truthfully either admit or deny such matters.

§ 60–30.13 Production of documents and things and entry upon land for inspection and other purposes.

(a) After commencement of the action, any party may serve on any other party a request to produce and/or permit the party, or someone acting on his behalf, to inspect and copy any unprivileged documents, phonorecords, and other compilations which contain or may lead to relevant information and which are in the possession, custody, or control of the party upon whom the request is served. If necessary, translation of data compilations shall be done by the party furnishing the information.

(b) After commencement of the action, any party may serve on any other party a request to permit entry upon designated property which may be relevant to the issues in the proceeding and which is in the possession or control of the party upon whom the request is served for the purpose of inspection, measuring, surveying or photographing, testing, or sampling the property or any designated object or area.

(c) Each request shall set forth with reasonable particularity the items to be inspected and shall specify a reasonable time and place for making the inspection and performing the related acts.

(d) The party upon whom the request is served shall respond within 7 days after the service of the request. The response shall state, with respect to each item, that inspection and related activities will be permitted as requested, unless there are objections, in which case the reasons for each objecton shall be stated. The party submitting the request may move for an order with respect to any objection or to other failure to respond.

§ 60–30.14 Depositions upon oral examination.

(a) *Depositions; notice of examination.* After commencement of the action, any party may take the testimony of any person, including a party, having personal or expert knowledge of the matters in issue, by deposition upon oral examination for the purposes of discovery and/or the perpetuation of testimony. A party desiring to take a deposition shall give reasonable notice in writing to every other party to the proceeding. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. The notice shall also set forth the categories of documents the witness is to bring with him to the depostion, if any. A copy of the notice shall be furnished to the person to be examined unless his name is unknown.

(b) *Production of witnesses; obligation of parties; objections.* It shall be the obligation of each party to produce for examination any person, along with such documents as may be requested, at the time and place, and on the date, set forth in the notice, if that party has control over such person. Each party shall be deemed to have control over its officers, agents, employees, and members. Depositions shall be held within the county in which the witness resides or works. The party or prospective witness may file with the hearing examiner, or with the Chief Hearing Examiner, if no hearing examiner has been assigned, an objection within 3 days after the identity of such witness first becomes known, stating with particularity the reasons why the party cannot or ought not to produce a requested witness. The party serving the notice may move for an order with respect to such objection or failure to produce a witness. All errors or irregularities in compliance with the provisions of this section shall be deemed waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is or, with due diligence, might have been ascertained.

(c) *Before whom taken; scope of examination; failure to answer.* Depositions may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the deposition is held. At the time and place specified in the notice, the officer designated to take the deposition shall permit each party to examine and cross-examine the witness under oath upon any unprivileged matter which is relevant to the subject matter of the proceeding, or which is reasonably calculated to lead to the production of relevant and otherwise admissible evidence. All objectioins to questions, except as to the form thereof, and all objections to evidence are reserved until the hearing. A refusal or failure on the part of any person under the control of a party to answer a question shall operate to create a presumption that the answer, if given, would be unfavorable to the controlling party, unless the question is subsequently ruled improper by the hearing examiner or the hearing examiner rules that there was valid justification for the witness' failure or refusal to answer the question: *Provided*, That the examining party shall note on the record during the deposition the question which the deponent has failed, or refused to answer, and state his intention to invoke the presumption if no answer is forthcoming.

(d) *Subscription; certification; filing.* The testimony shall be reduced to typewriting by the officer taking the deposition or under his direction, and shall be subscribed by the witness in the presence of the officer who shall attach his certificate stating that the witness was duly sworn by him and that the deposition is a true record of the testimony and exhibts given by the witness, and that said officer is not of counsel or attorney to any of the parties nor interested in the proceeding. If the deposition is not signed by the witness because he is ill, dead, cannot be found, or refuses to sign it, such fact shall be noted in the certificate of the officer and the deposition may then be used as fully as though signed. The officer shall immediately deliver any original copy of the transcript, together with his certificate, in person or by mail to the hearing examiner, or to the Chief Hearing Examiner, if no hearing examiner has been assigned. Copies of the transcript and certificate shall be furnished to all persons desiring them, upon payment of reasonable charges therefor, unless distribution is restricted by order of the hearing examiner for good cause shown.

(e) *Rulings on admissibility; use of deposition.* Subject to the provisions of this section, objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying. Any part or all of a deposition, so far as admissible in the discretion of the hearing examiner, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or was designated to testify on behalf of a public or private corporation, partnership, association, or governmental agency which is a party may be used by the adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the hearing examiner finds: (i) That the witness is dead; or (ii) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (iii) that the party offering the deposition has been unable to procure the attendance of the witness by notice; or (iv) upon application and notice, that such exceptional circumstances exist as to make it desirable to allow the deposition to be used.

(4) If only part of a deposition is introduced in evidence by a party, any party may introduce any other parts by way of rebuttal and otherwise.

(f) *Stipulations.* If the parties so stipulate in writing, depositions may be taken before any person at any time or place, upon any notice and in any manner, and when so taken may be used like other depositions.

§ 60-30.15 Prehearing conferences.

(a) Within 14 days after the answer has been filed, the hearing examiner shall establish a date for the prehearing conference to include all parties and petitioners for status as a party whose petition has not yet been ruled on. Written notice of the prehearing conference shall be sent to all participants in the conference. At the prehearing conference the following matters shall be considered:

(1) Simplification and delineation of the issues to be heard;

(2) Stipulations, admissions of fact and of contents and authenticity of documents;

(3) Limitation of number of witnesses particularly the avoidance of duplicate expert witnesses, and exchange of expert witness lists;

(4) Scheduling dates for the exchange of witness lists (except as provided in subparagraph (3) of this paragraph) and exhibits;

(5) Offers of settlement;

(6) Scheduling of such additional prehearing conferences as may be considered necessary; and

(7) Such other matters as may tend to expedite the disposition of the proceedings.

(b) The record shall show the matters disposed of by order and/or the matters disposed of by agreement in the prehearing conference. The subsequent course of the proceeding shall be controlled by such action.

SUBPART D—DESIGNATION AND RESPONSIBILITIES OF HEARING EXAMINER

§ 60-30.16 Designation.

Hearings shall be held before a hearing examiner designated by the Chief Hearing Examiner under the direction of the Secretary. After service of an order designating a hearing examiner to preside, and until such examiner makes his decision, motions and petitions shall be submitted to him. In the case of the death, illness, disqualification, or unavailability of the designated hearing examimner, another hearing examiner may be designated to take his place.

§ 60–30.17 Authority and responsibilities.

The hearing exmanier shall proposed findings and conclusions to the Secretary on the basis of the record before him. In order to do so, he shall have the duty to conduct a fair hearing, to take all necessary action to avoid delay, and to maintain order. He shall have all powers necessary to those ends, including, but not limited to, the power to:

(a) Hold conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding by consent of the parties or upon his own motion;

(b) Require parties to state their position with respect to the various issues in the proceeding;

(c) Require parties to produce for examination those relevant witnesses and documents under their control;

(d) Administer oaths;

(e) Rule on motions, and other procedural items on matters pending before him;

(f) Regulate the course of the hearing and conduct of participants therein;

(g) Examine and cross-examine witnesses, and introduce into the record documentary or other evidence;

(h) Receive, rule on, exclude, or limit evidence, and limited lines of questioning or testimony which are irrelevant, immaterial or unduly repetitious;

(i) Fix time limits for submission of written documents in matters before him and extend any time limits established by this part upon a determination that no party will be prejudiced and that the ends of justice will be served thereby;

(j) Impose appropriate sanctions against any party or person failing to obey an order under these rules which may include:

(1) Refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(2) Excluding all testimony of an unresponsive or evasive witness, or determining that the answer of such witness, if given, would be unfavorable to the party having control over him; and

(3) Expelling any party or person from further participation in the hearing;

(k) Take official notice of any material fact not appearing in evidence in the record, which is among the traditional matters of judicial notice;

(l) Recommend whether the Respondent is in current violation of Executive Order 11246, as amended, and applicable rules, regulations, and orders, as well as the nature of whatever corrective action may be necessary to bring the Respondent into compliance with the equal employment opportunity clause;

(m) Recommend to the Secretary the adoption of a consent order agreed to by the parties in settlement of the issues in a proceeding; and

(n) Take any action authorized by these rules.

SUBPART E—HEARINGS AND RELATED MATTERS

§ 60–30.18 Appearances.

(a) *Representation.* The parties or other persons or organizations participating pursuant to § 60–30.11 have the right to be represented by counsel.

(b) *Failure to appear.* In the event that a party appears at the hearing and no party appears for the opposing side, the party who is present shall have an election to present his evidence in whole or such portion thereof sufficient to make a prima facie case before the hearing examiner. Failure to appear at the hearing shall not be deemed to be a waiver of the right to be served with a copy of the hearing examiner's recommended decision and to file exceptions to it.

§ 60–30.19 Appearance of witnesses.

(a) A party wishing to procure the appearance at the hearing of any person having personal or expert knowledge of the matters in issue shall serve on the prospective witness a notice setting forth the time, date and place at which he is to appear for the purpose of giving testimony. The notice shall also set forth the categories of documents the witness is to bring with him to the hearing, if any.

A copy of the notice shall be filed with the hearing examiner and additional copies shall be served upon the opposing parties.

(b) It shall be the obligation of each party to produce for examination any person, along with such documents as may be requested, at the time and place, and on the date, set forth in the notice, if that party has control over such person. Each party shall be deemed to have control over its officers, agents, employees, and members. Due regard shall given to the convenience of witnesses in scheduling their testimony so that they will be detained no longer than reasonably necessary.

(c) The party or prospective witness may file an objection within 3 days after the identity of such witness first becomes known, stating with particularity the reasons why the party cannot produce a requested witness. The party serving the notice may move for an order with respect to such objection or failure to produce a witness.

§ 60-30.20 Evidence; testimony.

Formal rules of evidence shall not apply, but rules or principles designed to assure production of the most probative evidence available shall be applied, as the hearing examiner directs. Testimony shall be given orally by witnesses at the hearing, but may, in the discretion of the hearing examiner, be prepared in writing and served on all parties within 10 days prior to the hearing. A witness shall be available for cross-examination, and, at the discretion of the hearing examiner, may be cross-examined without regard to the scope of direct examination as to any matter which is relevant and material to the proceeding. The hearing examiner may exclude evidence which is immaterial, irrelevant, or unduly repetitious.

§ 60-30.21 Objections; exceptions.

(a) *Objections.* If a party objects to the admission or rejection of any evidence or to the limitation of the scope of any examination or cross-examination or the failure to limit such scope, he shall state briefly the grounds for such objection. Rulings on all objections shall appear in the record. Only objections made before the hearing examiner may be relied upon subsequently in the proceedings.

(b) *Exceptions.* Formal exception to an adverse ruling is not required. Rulings by the hearing examiner shall not be appealed prior to the transfer of the case to the Secretary, but shall be considered by the Secretary upon filing exceptions to the hearing examiner's recommendations and conclusions.

§ 60-30.22 Offer of proof.

An offer of proof made in connection with an objection taken to any ruling of the hearing examiner excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and, if the excluded evidence consists of evidence in written form or consists of reference to documents, a copy of such evidence shall be marked for identification and shall accompany the record as the offer of proof.

§ 60-30.23 Public documents.

Whenever a party offers a public document, or part thereof, in evidence, and such document, or part thereof, has been shown by the offeror to be reasonably available to the public, such documents need not be produced or marked for identification, but may be offered for official notice as a public document item by specifying the document or relevant part thereof.

§ 60-30.24 Ex parte communications.

The hearing examiner shall not consult any person, or party, on any fact in issue unless upon notice and opportunity for all parties to participate. No employee or agent of the Federal Government engaged in the investigation and prosecution of this case shall participate or advise in the rendering of the recommended or final decision, except as witness or counsel in the proceeding.

§ 60-[illegible]0.25 Oral argument.

Any party shall be entitled upon request to a reasonable period between the close of evidence and termination of the hearing for oral argument. Oral arguments shall be included in the official transcript of the hearing.

§ 60–30.26 Official transcript.

The Department will designate the official reporter for all hearings. The official transcripts of testimony taken, together with any exhibits, briefs, or memoranda of law filed therewith, shall be filed with the Department. Transcripts of testimony may be obtained from the official reporter by the parties and the public at rates not to exceed the applicable rates fixed by the contract between the Department and the reporter unless distribution is limited by order of the hearing examiner for good cause shown. Upon notice to all parties, the hearing examiner may authorize such corrections to the transcript as are necessary to reflect accurately the testimony.

§ 60–30.27 Summary judgment.

(a) *For Director.* At any time after the expiration of 14 days from the commencement of the action or after service of a motion for summary judgment by the Respondent, the Director may move the hearing examiner with or without supporting affidavits for a summary judgment in his favor upon all claims or any part thereof.

(b) *For Respondent.* The Respondent may, at any time after commencement of the action, move the hearing examiner with or without supporting affidavits for a summary judgment in his favor as to all claims or any part thereof.

(c) *Other parties.* Any other party to a formal proceeding under this part may support or oppose motions for summary judgment made by the Director or Respondent, in accordance with this section, but may not move for a summary judgment in his own behalf.

(d) *Motion and proceedings thereon.* The motion shall be served upon all parties and the hearing examiner or, if no hearing examiner has been designated, upon the Chief Hearing Examiner, at least 15 days before the time fixed for the hearing on the motion. The adverse party or parties may serve opposing affidavits prior to the day of hearing. The judgment sought shall be rendered forthwith if the notice and answer, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment rendered for or against the Director or the Respondent shall constitute the hearing examiner's findings and recommendations to the Secretary on the issues involved. Hearings on motions made under this section shall be scheduled by the hearing examiner, or the Chief Hearing Examiner, and may be postponed until the date established in the notice for the final hearing on the merits.

(e) *Case not fully adjudicated on motion.* If on motion under this section judgment is not rendered upon the whole case or for all the relief asked and a final hearing is necessary, the hearing examiner at the hearing of the motion, by examining the notice and answer and the evidence before him and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. He shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which relief is not in controversy, and directing such further proceedings as are just. At the hearing on the merits, the facts so specified shall be deemed established, and the final hearing shall be conducted accordingly.

(f) *Form of affidavits; further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The hearing examiner may permit affidavits to be supplemented or opposed by depositions or further affidavits. When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials in his notice or answer, but his response, by affidavit or as otherwise provided in this section, must set forth specific facts showing there is a genuine issue for final hearing. If he does not so respond, summary judgment, if appropriate, shall be rendered against him.

(g) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for the reasons stated present by affidavit facts essential to justify his opposition, the hearing examiner may refuse the application for summary judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other orders as are just.

(h) *Affidavits made in bad faith.* Should it appear to the satisfaction of the hearing examiner at any time that any of the affidavits presented pursuant to this section are presented in bad faith or solely for the purpose of delay, the hearing examiner may make such orders and impose such sanctions as may be appropriate against the offending party.

SUBPART F—POST HEARING PROCEDURES

§ 60–30.28 Proposed findings of fact and conclusions.

Within 20 days after receipt of the transcript of the testimony, each party and amicus may file a brief with the hearing examiner. Such briefs shall be served simultaneously on all parties and amici, and a certificate of service shall be furnished to the hearing examiner. Requests for additional time in which to file a brief shall be made to the hearing examiner, in writing, and copies shall be served simultaneously on the other parties. Requests for extensions shall be received not later than 3 days before the date such briefs are due. No reply brief may be filed except by special permission of the hearing examiner.

§ 60–30.29 Record for recommended decision.

The transcript of testimony, exhibits, and all papers, documents, and requests filed in the proceedings, including briefs, but excepting the correspondence section of the docket, shall constitute the record for decision.

§ 60–30.30 Recommended decision.

Within 20 days after the filing of briefs, or, if the parties elect not to file such documents, not more than 20 days after the close of the hearing, the hearing examiner shall recommend findings, conclusions, and a decision. These recommendations shall be certified, together with the record for recommended decision, to the Secretary for his decision. The recommended findings, conclusions, and decisions shall be served on all parties and amici to the proceeding.

§ 60–30.31 Exceptions to recommended decisions.

Within 14 days after receipt of the hearing examiner's recommended findings, conclusions, and decision, any party may submit exceptions to said recommendation. These exceptions may be responded to by other parties within 10 days of their receipt by said parties. All exceptions and responses shall be filed with the Secretary. Service of such briefs or exceptions and responses thereto shall be made simultaneously on all parties to the proceeding, and a certificate of service shall be furnished to the Secretary. Requests to the Secretary for additional time in which to file exceptions and responses thereto shall be in writing and copies thereof shall be served simultaneously on other parties. Requests for extensions must be received no later than 3 days before the exceptions are due.

§ 60–30.32 Record.

After expiration of the time for filing briefs and exceptions, the Secretary shall make a final decision on the basis of the record before him. The record shall consist of the record for recommended decision, the rulings and recommended decision of the hearing examiner, and the exceptions and briefs filed subsequent to the hearing examiner's decision.

§ 60–30.33 Final decision.

After expiration of the time for filing, the Secretary shall make a final decision on the basis of the record for decision, and upon consideration of any exceptions and briefs filed subsequent to the hearing. A copy of the decision of the Secretary shall be served on all parties and amici to the proceeding.

SUBPART G—MISCELLANEOUS

§ 60–30.34 Cooperation by agencies.

All agencies are directed to cooperate with the Director and his representatives in the prosecution of any matter under this part. Such cooperation shall include, but not be limited to, the furnishing of information and other assistance in hearing preparation, and the production of witnesses and documents upon request for participation or use in the conduct of hearings.

§ 60–30.35 Effect of this part on other rules and regulations.

All orders, instructions, regulations, and memoranda of the Secretary of Labor and other officials of the Department of Labor and the agencies are hereby superseded to the extent they are inconsistent herewith.

PART 60-40—EXAMINATION AND COPYING OF OFCC DOCUMENTS

SUBPART A—GENERAL

Sec.
60-40.1 Purpose and scope.
60-40.2 Information available on request.
60-40.3 Information exempt from compulsory disclosure and which may be withheld.
60-40.4 Information disclosure of which is prohibited by law.

SUBPART B—PROCEDURE FOR DISCLOSURE

60-40.5 Applicability of procedures.
60-40.6 To whom to direct requests.
60-40.7 Particular disclosure.
60-40.8 Facilities and procedures for disclosure.

AUTHORITY: Executive Order 11246, as amended by Executive Order 11375; 5 U.S.C. 552.

SOURCE: 38 FR 3193, Feb. 2, 1973, unless otherwise noted.

SUBPART A—GENERAL

§ 60-40.1 Purpose and scope.

This part contains the general rules of the OFCC providing for public access to information from records of the OFCC or its various compliance agencies. These regulations implement 5 U.S.C. 552, the Freedom of Information Act and supplement the policy and regulations of the Department of Labor, 29 CFR Part 70. It is the policy of the OFCC to disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment. This part sets forth generally the categories of records accessible to the public, the types of records subject to prohibitions or restrictions on disclosure, and the places at which and the procedures whereby members of the public may obtain access to and inspect and copy information from records in the custody of the OFCC and the compliance agencies.

§ 60-40-2. Information available on request.

(a) Upon the request of any person for identifiable records obtained or generated pursuant to Executive Order 11246 (as amended) such records shall be made available for inspection and copying, notwithstanding the applicability of the exemption from mandatory disclosure set forth in 5 U.S.C. 552 subsection (b), if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the OFCC or the Compliance Agencies except in the case of records disclosure of which is prohibited by law.

(b) Consistent with the above, all contract compliance documents within the custody of the OFCC and the Compliance Agencies shall be disclosed upon request unless specifically prohibited by law or as limited elsewhere herein. The types of documents which if in the custody of the OFCC or Compliance Agencies must be disclosed include, but are not limited to, the following:

(1) Affirmative action plans, whether or not reviewed and finally accepted by the OFCC or the Compliance Agencies except as limited in 41 CFR 60-40.3 (a)(1).

(2) Imposed plans and hometown plans, pending or approved.

(3) Text of final conciliation agreements.

(4) Validation studies of tests or other preemployment selection methods.

(5) Dates and times of scheduled compliance reviews.

§ 60-40.3 Information exempt from compulsory disclosures and which may be withheld.

(a) The following documents or parts thereof are exempt from mandatory disclosure by the OFCC and the compliance agencies, and should be withheld if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of the functions of the OFCC or the Compliance Agencies.

(1) Those portions of affirmative action plans such as goals and timetables which would be confidential commercial or financial information because they indicate, and only to the extent that they indicate, that a contractor plans major

shifts or changes in his personnel requirements and he has not made this information available to the public. A determination by an agency to withhold this type of information should be made only after receiving verification and a satisfactory explanation from the contractor that the information should be withheld.

(2) Those portions of affirmative action plans which constitute information on staffing patterns and pay scales but only to the extent that their release would injure the business or financial position of the contractor, would constitute a release of confidential financial information of an employee or would constitute an unwarranted invasion of the privacy of an employee.

(3) The names of individual complainants.

(4) The assignments to particular contractors of named compliance officers if such disclosure would subject the named compliance officers to undue harassment or would affect the efficient enforcement of the Executive order.

(5) Compliance investigation files including the standard compliance review report and related documents, during the course of the review to which they pertain or while enforcement action against the contractor is in progress or contemplated within a reasonable time. Therefore, these reports and related files shall not be disclosed only to the extent that information contained therein constitutes trade secrets and confidential commercial or financial information, inter-agency or intra-agency memoranda or letters which would not be available by law to a private party in litigation with the agency, personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, data which would be exempt from mandatory disclosure pursuant to the "informants privilege" or such information the disclosure of which is prohibited by statute.

(6) Copies of preemployment selection tests used by contractors.

(b) Other records may be withheld consistent with the Freedom of Information Act on a case-by-case basis, with the prior approval of the Director, OFCC.

§ 60–40.4 Information disclosure of which is prohibited by law.

The Standard Form 100 (EEO–1) which is submitted by contractors to the OFCC, a compliance agency or a Joint Reporting Committee servicing both the OFCC and the EEOC shall be disclosed pending further instructions from the Director, OFCC. The statutory prohibition on disclosure set forth in Section 709 (e) of the Civil Rights Act of 1964 is limited by the terms of that section to information obtained pursuant to the authority of title VII of that Act and its disclosure by employees of the EEOC.

SUBPART B—PROCEDURES FOR DISCLOSURE

§ 60–40.5 Applicability of procedures.

Requests for the inspection and copy of information from records in the custody of the OFCC or the Compliance Agencies which are identifiable and available under the provisions of Subpart A of this part shall be made and acted upon as provided in the following sections of this subpart. Officers and employees of the OFCC and the Compliance Agencies are authorized by the Director, OFCC to continue to furnish to the public, informally and without compliance with these procedures, information and copies from its records which prior to the enactment of the Freedom of Information Act (5 U.S.C. 552) were customarily furnished in the regular performance of their duties.

§ 60–40.6 To whom to direct requests.

A request for contract compliance records or information shall be directed to the Director of Contract Compliance of the agency designated as the appropriate Compliance Agency for the industry to which the records pertain, pursuant to 41 CFR 60–1.3(d). If the person making the request does not know in which Compliance Agency the record is located, he may direct his request to the Director, Office of Federal Contract Compliance, Department of Labor, 14th and Constitution Avenue NW., Washington, DC 20210, for appropriate handling.

§ 60–40.7 Partial disclosure.

If a requested record contains some materials which are protected from disclosure and other materials which are not so protected, identifying details or protected matters shall be deleted wherever analysis indicates that such deletions are feasible. Whenever such deletions are made, the remainder of the records may be disclosed.

§ 60–40.8 Facilities and procedures for disclosure.

(a) Procedural matters such as where the information may be inspected, forms of requests, time for reply to requests, forms of denials, appeals from denials, and fees for special services and copying services, shall be controlled by the general regulations of the custodial agency except to the extent modified herein.

(b) Procedures relating to the availability of records in the custody of the OFCC shall be governed by the Department of Labor regulations, 29 CFR 70.35 to 29 CFR 70.64.

(c) Copies of all requests for disclosure of information made directly to the Compliance Agencies shall be submitted to the OFCC within 5 calendar days of receipt. The compliance agencies shall thereafter allow 5 working days from the time the request is submitted to the OFCC for comment by the OFCC. Delay by the OFCC may be waived at the request of the compliance agency.

(d) The compliance agencies shall furnish the OFCC with copies of all initial actions by the agencies granting or denying a request for information. The OFCC shall be given an opportunity by the Compliance Agencies to consult on all appeals from initial decisions denying requests for information.

PART 60–50—GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION OR NATIONAL ORIGIN

Sec.
60–50.1 Purpose and [illegible].
60–50.2 Equal employ[illegible] policy.
60–50.3 Accommodations to religious observance and practice.
60–50.4 Enforcement.
60–50.5 Nondiscrimination.

AUTHORITY: Sec. 201, E.O. 11246, 30 FR 12319, and E.O. 11375, 32 FR 14303.

SOURCE: 38 FR 1933, Jan. 19, 1973, unless otherwise noted.

§ 60–50.1 Purpose and scope.

(a) The purpose of the provisions in this part is to set forth the interpretations and guidelines of the Office of Federal Contract Compliance regarding the implementation of Executive Order 11246, as amended, for promoting and insuring equal employment opportunities for all persons employed or seeking employment with Government contractors and subcontractors or with contractors and subcontractors performing under federally assisted construction contracts, without regard to religion or national origin.

(b) Members of various religious and ethnic groups, primarily but not exclusively of Eastern, Middle, and Southern European ancestry, such as Jews, Catholics, Italians, Greeks, and Slavic groups, continue to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religion and/or national origin. These guidelines are intended to remedy such unfair treatment.

(c) These guidelines are also intended to clarify the obligations of employers with respect to accommodating to the religious observances and practices of employees and prospective employees.

(d) The employment problems of blacks, Spanish-surnamed Americans, orientals, and American Indians are treated under Part 60–2 of this chapter and under other regulations and procedures implementing the requirements of Executive Order 11246, as amended. Accordingly, the remedial provisions of § 60–50.2(b) shall not be applicable to the employment problems of these groups.

[38 FR 1933, Jan. 19, 1973; 38 FR 3511, Feb. 7, 1973]

§ 60–50.2 Equal employment policy.

(a) *General requirements.* Under the equal opportunity clause contained in section 202 of Executive Order 11246, as amended, employers are prohibited from discriminating against employees or applicants for employment because of religion or national origin, and must take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their religion or national origin. Such action includes, but is not limited to the following: Employment, upgrading, demotion, or transfer: recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

(b) *Outreach and positive recruitment.* Employers shall review their employment practices to determine whether members of the various religious and/or ethnic groups are receiving fair consideration for job opportunities. Special attention shall be directed toward executive and middle-management levels, where employment problems relating to religion and national origin are most likely to occur. Based upon the findings of such reviews, employers shall undertake appropriate outreach and positive recruitment activities, such as those listed below, in order to remedy existing deficiencies. It is not contemplated that employers necessarily will undertake all of the listed activities. The scope of the employer's efforts shall depend upon all the circumstances, including the nature and extent of the employer's deficiencies and the employer's size and resources.

(1) Internal communication of the employer's obligation to provide equal employment opportunity without regard to religion or national origin in such a manner as to foster understanding, acceptance, and support among the employer's executive, management, supervisory, and all other employees and to encourage such persons to take the necessary action to aid the employer in meeting this obligation.

(2) Development of reasonable internal procedures to insure that the employer's obligation to provide equal employment opportunity without regard to religion or national origin is being fully implemented.

(3) Periodically informing all employees of the employer's commitment to equal employment opportunity for all persons, without regard to religion or national origin.

(4) Enlisting the assistance and support of all recruitment sources (including employment agencies, college placement directors, and business associates) for the employer's commitment to provide equal employment opportunity without regard to religion or national origin.

(5) Reviewing employment records to determine the availability of promotable and transferable members of various religious and ethnic groups.

(6) Establishment of meaningful contacts with religious and ethnic organizations and leaders for such purposes as advice, education, technical assistance, and referral of potential employees.

(7) Engaging in significant recruitment activities at educational institutions with substantial enrollments of students from various religious and ethnic groups.

(8) Use of the religious and ethnic media for institutional and employment advertising.

§ 60–50.3 Accommodations to religious observance and practice.

An employer must accommodate to the religious observances and practices of an employee or prospective employee unless the employer demonstrates that it is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. As part of this obligation, an employer must make reasonable accommodations to the religious observances and practices of an employee or prospective employee who regularly observes Friday evening and Saturday, or some other day of the week, as his Sabbath and/or who observes certain religious holidays during the year and who is conscientiously opposed to performing work or engaging in similar activity on such days, when such accommodations can be made without undue hardship on the conduct of the employer's business. In determining the extent of an employer's obligations under this section, at least the following factors shall be considered: (a) Business necessity, (b) financial costs and expenses, and (c) resulting personnel problems.

§ 60–50.4 Enforcement.

The provisions of this part are subject to the general enforcement, compliance review and complaint procedures set forth in Subpart B of Part 60–1 of this chapter.

§ 60–50.5 Nondiscrimination.

The provisions of this part are not intended and shall not be used to discriminate against any qualified employee or applicant for employment because of race, color, religion, sex, or national origin.

PART 60–60—CONTRACTOR EVALUATION PROCEDURES FOR CONTRACTORS FOR SUPPLIES AND SERVICES

SUBPART A—GENERAL

Sections

60–60.1 Purpose and scope.
60–60.2 Background.

SUBPART B—PROCEDURES FOR CONTRACTOR EVALUATION

60-60.3 Agency actions.

SUBPART C—DISCLOSURE AND REVIEW OF CONTRACTOR DATA

60-60.4 Confidentiality and relevancy of information.
60-60.5 Employee interviews.
60-60.6 Exit conference.
60-60.7 Time schedule for completion.

AUTHORITY: 5 U.S.C. 553(a)(3)(B), 29 CFR 2.7; sec. 201, E.O. 11246, 30 FR 12319, and E.O. 11375, 32 FR 14303.

SOURCE: 39 FR 5630, Feb. 14, 1974, unless otherwise noted.

SUBPART A—GENERAL

§ 60-60.1 Purpose and scope.

This part shall be known as "Revised Order No. 14" and is intended to establish standardized contractor evaluation procedures for compliance agencies in their conduct of compliance reviews of contractors for supplies and services subject to the Equal Employment Opportunity Requirements of 41 CFR 60-1.40 and 41 CFR Part 60-2 (Revised Order No. 4) for the development of written affirmative action programs.

§ 60-60.2 Background.

(a) Each prime contractor or subcontractor with 50 or more employees and a contract of $50,000 or more is required to develop a written affirmative action program for each of its establishments (§ 60-1.40 of this chapter). If a contractor fails to submit an affirmative action program and supporting documents, including the workforce analysis within 30 days of a request therefor, the enforcement procedures specified in OFCC Order No. 4 (§ 60-2.2(c) of this chapter) shall be applicable.

(b) Required affirmative action programs must contain a utilization analysis and goals and timetables as required in § 60-2.11 and § 60-2.12 of this chapter.

SUBPART B—PROCEDURES FOR CONTRACTOR EVALUATION

§ 60-60.3 Agency actions.

Basic steps. A contractor evaluation should proceed as follows: (1) A desk audit of the contractor's affirmative action program with special attention directed to the included workforce analysis, using the format set forth in the Standard Compliance Review Report, (2) an on-site review of those matters which still are not fully or satisfactorily addressed in the affirmative action program and workforce analysis, using the format set forth in the Standard Compliance Review Report and (3) where necessary, an off-site analysis of information supplied by the contractor during or pursuant to the on-site review. (The standard compliance review report will be published on or before the effective date of this part.) Contractors may reach agreement with their respective compliance agencies on nationwide AAP formats or on frequency of updating statistics with the approval of the Director of OFCC.

(a) *Desk Audit.* Using OFCC approved methods of priority selection, compliance agencies shall routinely request from among the Federal contractors within their jurisdiction affirmative action programs and supporting documentation, including the workforce analysis and support data for audit. As used throughout this part, the term "Affirmative Action Program (AAP) and supporting documentation" means the Required Contents of Affirmative Action Programs, as set forth in Subpart B of 41 CFR Part 60-2 and Methods of Implementing the Requirements of Subpart B, set forth in Subpart C of 41 CFR Part 60-2. "Workforce analysis" is defined as a listing of each job title as appears in applicable collective bargaining agreements or payroll records (not job groups) ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision. If there are separate work units or lines of progression within a department a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line. Where there are no formal progression lines or usual promotional sequences, job titles should be listed by department, job families, or disciplines, in order of wage rates or salary ranges. For each job title, the total number of incumbents, the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups must be given: Blacks, Spanish-surnamed Americans, American Indians, and Orientals. The wage rate or salary range for each job title must be given. All job titles, including all managerial job titles, must be listed.

(1) *Exceptions to the desk audit requirements.* For pre-award reviews and for complaint investigations with the approval of the agency Contract Compliance Officer (as defined at § 60–1.6(b)), the desk audit need not be carried out or an abbreviated desk audit may be performed and an immediate on-site review performed. Special reports that meet the criteria in (b) (1) below may be requested from contractors, as required, for submission to the agency for complaint investigations and follow-up reviews performed within 1 year of a full compliance review. The Director may approve other special compliance reviews when the circumstances require an immediate on-site review.

(b) *On-site review.* If upon selection of an AAP and included workforce analysis for desk audit, the compliance agency finds that the material submitted does not demonstrate a reasonable effort by the contractor to meet all the requirements of subparts B and C of Order No. 4 (Part 60–2 of this chapter) the on-site review need not be carried out and the enforcement procedures specified in Order 4 shall be applicable. Otherwise following a desk audit of the affirmative action program and supporting documentation the agency will schedule an on-site review of the establishment, provided, that an on-site review need not be carried out when the agency can determine that the contractor's affirmative action program is acceptable. This determination must be based on the current desk audit and an on-site review conducted within the preceding 24 months and also must include an affirmative determination that the circumstances of the previous on-site review have not substantially changed.

(1) Each agency is to request from those contractors scheduled for on-site reviews that information necessary to perform the review be made available on-site. Specifically, this includes (i) information necessary to conduct an in-depth analysis of apparent deficiencies in the contractors utilization of women or minorities, (ii) information required for a complete and thorough understanding of data contained in or offered as support for the affirmative action program and (iii) information concerning matters relevant to a determination of compliance with the requirements of Executive Order 11246 (as amended), but not adequately addressed in the affirmative action program. However, the contractor should be requested to furnish only the specific items of information which the compliance officer determines are:

(a) Necessary for conducting the review and completing the standard compliance review report, and

(b) Not contained in or able to be derived from the material submitted by the contractor.

(2) In order to pursue certain issues uncovered in the compliance review, it may be necessary for the compliance officer to request certain additional information on-site even though such data have not been previously identified. Such additional information must also meet the above criteria.

(c) *Off-site analysis.* Where necessary, the compliance officer may take information made available during the on-site review off-site for further analysis. An off-site analysis should be conducted where issues have arisen concerning deficiencies or an apparent violation which, in the judgment of the compliance officer, should be more thoroughly analyzed off-site before a determination of compliance is made.

SUBPART C—DISCLOSURE AND REVIEW OF CONTRACTOR DATA

§ 60–60.4 Confidentiality and relevancy of information.

(a) *Desk audit data.* If the contractor is concerned with the confidentiality of such information as lists of employees, employee names, reasons for termination and pay data, then alphabetic or numeric coding or the use of an index of pay and pay ranges are acceptable for desk audit purposes.

(b) *On-site data.* The contractor must provide full access to all relevant data on-site as required by § 60–1.43 of this chapter.

(c) *Data required for off-site analysis.* The contractor must provide all data determined by the Compliance officer to be necessary for off-site analysis pursuant to § 60–60.3(c) above. Such data may only be coded if the contractor makes the code available to the compliance agency. If the contractor believes that particular informatoin which is to be taken off-site is not relevant to compliance with the Executive Order, the contractor may request a ruling by the agency Contract Compliance Officer. The contract compliance officer shall issue a ruling within 10 days. The contractor may appeal that ruling to the Director of OFCC within 10 days. The Director of OFCC shall issue a final ruling within 10 days. Pending a final ruling, the information in question must be made available to the compliance officer off-site, but shall be considered a part of the investigatory file and subject to the provisions of paragraph (d) below. The agency shall take all necessary precautions to safeguard the confidentiality of such information until a final determination is made. Such information may not be copied by the agency and access to the information shall be limited to the compliance officer and agency personnel involved in the determination of relevancy. Data determined to be not relevant to the investigation will be returned to the contractor immediately.

(d) *Public access to information.* Information obtained from a contractor under Subpart B will be subject to the public inspection and copying provisions of the Freedom of Information Act, 5 U.S.C. 552. Contractors should identify any information which they believe is not subject to disclosure under 5 U.S.C. 552, and should specify the reasons why such information is not disclosable. The Contract Compliance Officer will consider the contractors claim and make a determination, within 10 days, as to whether the material in question is exempt from disclosure. The contract compliance officer will inform the contractor of such a determination. The contratcor may appeal that ruling to the Director of OFCC within 10 days. The Director of OFCC shall make a final determination within 10 days of the filing of the appeal. However, during the conduct of a compliance review or while enforcement action against the contractor is in progress or contemplated within a reasonable time, all information obtained from a contractor under Subpart B except information disclosable under §§ 60–40.2 and 60–40.3 of this chapter is to be considered part of an investigatory file compiled for law enforcement purposes within the meaning of 5 U.S.C. 552(b)(7), and such information obtained from a contractor under Subpart B shall be treated as exempt from mandatory disclosure under the Freedom of Information Act during the compliance review.

(e) *Examination and copying of documents.* Nothing contained herein is intended to supersede or otherwise limit the provisions contained in part 60–40 of this chapter for public access to information from records of the OFCC or its various compliance agencies.

§ 60–60.5 Employee interviews.

The compliance officer should contact, where appropriate, a reasonable number of employees for interviews as part of the on-site review of the contractors' employment practices. The number, scope and manner of conducting such interviews should be discussed in advance with the contractor.

§ 60–60.6 Exit conference.

(a) Upon completion of the on-site review (and off-site analysis, if one is undertaken) the compliance officer should schedule an exit conference with contractor officials to review the findings of the review. This exit conference should itemize the apparent violations that lend themselves to immediate correction, and solicit the contractor's agreement to take adequate corrective action by specified dates. The contractor's commitments should be contained in a written conciliation agreement signed at the exit conference. However, in cases where the apparent deficiencies require further analysis subsequent to the on-site review, the compliance officer will advise the contractor of the areas of concern, secure the data necessary to his ultimate compliance determination, complete the review later by notifying the contractor in writing of all apparent violations found, and obtain the contractor's commitments in a written conciliation agreement to correct such deficiencies.

(b) The contractor may at any time avail himself of the provisions of § 60–1.24 (c)(4) of this chapter which provides as follows:

When a prime contractor or subcontractor, without a hearing, shall have complied with the recommendations or orders of an agency or the Director and believes such recommendations or orders to be erroneous, he shall, upon filing a request therefor within 10 days of such compliance, be afforded an opportunity for a hearing and review of the alleged erroneous action by the agency or the Director.

§ 60–60.7 Time schedule for completion.

(a) With the exception of extensions of time granted by the Director of OFCC for good cause shown, within 60 days from the date the affirmative action program including the workforce analysis is received by the agency, the compliance agency must either have found the contractor in compliance and notified the contractor of that fact, or must have issued a 30-day show cause notice as required under the rules and regulations pursuant to the Executive Order.

(b) During this period the compliance agency shall:

(1) Complete the desk audit.

(2) Schedule the on-site review.

(3) Complete the on-site review.

(4) Complete the off-site analysis, if conducted.

(5) Give notice of compliance or issue show cause notice.

(6) Complete and forward the coding sheet to OFCC.

(c) A contractor's affirmative action plan may be accepted only after the coding sheet has been forwarded to OFCC. The coding sheet is the notification required by § 60–2.2.(a)(2) of this chapter. Failure of the compliance agency to give the contractor a notice of compliance or issue a show cause notice within the time period set forth in paragraph (a) shall not be deemed a finding of compliance or acceptance of the contractor's affirmative action program by the compliance agency.

§ 60–60.8 Supersedure.

The requirements of this Part 60–60 supersede the prior version of Revised Order No. 14 published at 38 FR 13376, May 21, 1973.

(5 U.S.C. 553(a)(3)(b) 29 CFR 2.7 section 201, Executive Order 11246, 30 FR 12319, and Executive Order 11375, 32 FR 14303.)

§ 60–60.9 Attachments.

The following formats are set out in full as they give detailed information as to procedures and requirements of value to contractors:

STANDARD COMPLIANCE REVIEW REPORT

CONTRACT COMPLIANCE REVIEW PROCEDURE AND REPORT FORMAT

Purpose: The purpose of these guidelines is to provide compliance officers with a systematic standardized approach to the conducting of a compliance review and the preparation of a comprehensive report under Revised Order No. 14. It is not meant to be an all inclusive or an inflexible document to be used in sequence in the actual conducting of a compliance review, but it is an effort to point out the essential elements that should at least be addressed in all such efforts. An analysis of the affirmative action program and support data is required of each contractor facility targeted for review. The purpose of your analysis is to determine if the contractor is in compliance with the requirements of Executive Order 11246, as amended, and the implementing regulations. If your analysis identifies deficiencies, the reasons or possible reasons (including past or present personnel policies or practices) why certain deficiencies exist should be identified and evaluated as well as the appropriateness of the actions the contractor has taken or plans he intends to take. This will enable you to make a determination of whether or not the contractor is in compliance with the Executive Order.

In preparing the actual written report for official submission (which is subject to review by the Office of Federal Contract Compliance), the information must be presented in the prescribed format irrespective of the agency originating the review. The prescribed format is the various items listed below in the order in which they are listed. Instructions for the analysis for each heading are found in the Desk Audit Section, or in the On-Site Review Section of these guidelines.

Part A. Desk Audit Section

I. Identifying Information
II. Workforce Analysis
III. Recruitment, Hiring, Selection and Placement
IV. Promotion and Transfer
V. Terminations
VI. Analysis of Jobs with Substantial Concentrations of Minorities or Women

Part B. On-Site Review

I. **Identifying Information**
II. **Community Survey**
III. **Initial Contact with Contractor**
IV. **EEO Policies and Procedures**
V. **Recruitment, Hiring, Selection and Placement**
VI. **Promotion and Transfer**
VII. **Terminations**
VIII. **Supervisory Positions**
IX. **Pay Practices**
X. **Analysis of Jobs with Substantial Concentrations of Minorities or Women**
XI. **Training and Educational Opportunities**
XII. **Goals and Timetables**
XIII. **Religious and National Origin Discrimination**

In addition, no review is competed until the Coding Sheet is forwarded to OFCC. The Coding Sheet provides the necessary instructions for its completion.

Part A. Desk Audit Section

I. Identifying Information.

A. Indicate: the name and address of the contractor; the date the letter was sent requesting the affirmative action program and supporting documentation including the workforce analysis, the date the AAP was received; the type of review (i.e., pre-award, post-award, follow-up or other).

B. In beginning the desk audit, determine and so indicate whether or not there is a utilization analysis for minorities and women that considers the points itemized in 41 CFR 60–2.11. Discuss fully any deficiencies with the analysis. Has the contractor established goals and timetables for minorities and women to the extent required by 41 CFR 60–2.12? If the contractor has not established a goal, does his AAP analyze the factors in 41 CFR 60–2.11? Does the contractor's AAP include all the ingredients listed in 41 CFR 60–2.13? This discussion should be a brief introductory statement to the further analysis which will constitute the desk audit.

II. Workforce Analysis.

A. *Composition.* (1) An adequate compliance review must always be founded on a clear understanding of where minorities and women are *not* employed in the contractor's workforce. An overall view of the composition of the workforce should be obtained by reviewing the most recent copy of SF–100 (EEO–1) as well as copies of the official submission for the past year or more. This analysis should indicate such potential problem areas as whether or not minorities and women are employed in higher level job categories, under-utilization of women in nonclerical jobs, and concentrations of minorities and/or women in service worker or unskilled categories. The comparison made with past EEO–1 reports will give some insight into the kind of progress being made by the company in their overall employment pattern. Also review the rank and pertinent data on the establishment in Table C of the OFCC Target Selection and Evaluation System for the past year or more.

(2) Prepare your analysis of this summary information, recognizing that these comparisons are most fundamental in nature and only form the foundation from which to explore minority group and female utilization. Further exploration in the utilization of minorities and women must now be made.

(3) The composition of the workforce by minority group and sex must be understood well beyond EEO–1 job categories and must consider where such employees are working and not working in individual departments or other units. This is necessary in order to determine whether of not the company is underutilizing minorities or women in certain jobs, and whether or not minority groups or females are employed in specific jobs, and as a result might be identified as members of an "affected class".

B. *Examination of Work Force Analysis.* (1) Review the "workforce analysis" required from the contractor. For the purpose of this report alphabetic or numeric coding or the use of an index of pay and pay ranges is acceptable and should be used when contractors are concerned about confidentiality of salary information.

(2) List the job titles by department in which the minority or female proportions either do not generally reflect the minority or female composition of the establishment's labor force or the labor force of the area within which it is

reasonable to expect persons to commute. These titles are to be considered "focus job titles". Also list as "focus job titles" areas with substantial concentration of minorities or women and also job titles where minorities or women may be continuing to suffer the effects of past discrimination. These problem areas will now be the principle focus of the review. Present your analysis for each such "focus job title" listed, including at least all of the following areas:

(a) Is the job group to which this job title belongs addressed as an area of deficiency or source of promotable persons in the affirmative action program? Where certain job titles within a given job group show an inordinate and consistent absence of minorities or women in relation to their availability, the contractor may be required to establish and set worth specific goals and timetables for these job titles separately from the goals for the job group of which they are a part.

(b) Are any problems in the utilization of minority men or minority women or members of a particular minority group (Blacks, Spanish-surnamed Americans, Orientals or American Indians) addressed where necessary through the establishment of separate goals and timetables? See 41 CFR 60–2.12(k).

(c) In the job group to which this job title belongs, are goals and timetables significant and attainable such that underutilization will be eliminated in a reasonable period of time and that turnover and growth are considered in the establishment of numerical goals, including the use of percentages as backup goal estimates? See 41 CFR 60–2.12.

(d) Are other appropriate actions included in the affirmative action program to remedy current concentrations of minorities or women in certain jobs?

(3) *Evaluation of Contractors AAP and Focus Job Titles.* (a) If in your analysis, you conclude that the contractor's affirmative action program has satisfactorily addressed each of these areas, then add your analysis of the contractor's past achievements for the relevant focus job title and the current status of attainment in his affirmative action program. Has the contractor met his past goals and is he proceeding at a current rate of progress that implies he will meet current goals? I not, you must determine if the contractor has made a good faith effort to achieve these goals. Cite the specific efforts that you conclude demonstrate good faith. Include your analysis as called for in item XII of the on-site section of these guidelines as part of this desk audit.

(b) If in your analysis, you conclude that the contractor's affirmative action program has not satisfactorily addressed any of these areas, then you must identify the additional information needed. Include the following in your analysis of the contractor's AAP.

(1) Such material as organizational charts.

(2) Promotional sequences and line of progression charts (if established).

(c) In subsequent sections of the desk audit, specific analysis is required. If the information necessary for an adequate analysis is not available in the contractor's affirmative action program or if the focus job titles are not adequately included, a letter to the contractor should be sent prior to the on-site visit informing him of the information that must be available on site. Items for possible inclusion in the letter are: applications and information on applicants (see III B); rejections, (see III E); promotions and transfers (see IV); terminations (see V); and job groups (see VI). These items are not intended to be used to impose additional standard reporting requirements on contractors. The regulations require an analysis of each of these areas and the contractor may prepare an analysis that meets the regulations and the contractor's own needs through the affirmative action program and support data. An adequate analysis by the contractor will enable you to prepare an analysis similar to that called for in each section of this report or to determine that the area is not causing an equal opportunity problem. If the contractor's analysis is inadequate under the regulations, or if the focus job titles cited by you in your review of the workforce analysis are not included, or if information is needed for the three categories cited in 41 CFR 60–60.3(b)(1) then the contractor should be informed of the additional information that must be made available on site. In addition, you must determine that such requests meet the requirements of 41 CFR 60–60.3(b)(1) (a) and (b).

III. Recruitment, Hiring, Selection and Placement.

A. OFCC regulations require contractors to conduct an analysis of applicant flow as part of their hiring practices. (41 CFR 60–1.40(b)(2), 60–2.12(1), 60–2.23(a)(2), (3), (4), and 60–2.24 (d) and (e)). Review the sections of the affirmative action program that contain this analysis.

B. Prepare as a part of this report, your analysis of the contractor's data on recruitment, hiring, selection and placement. Determine if the data supplied by the contractor is adequate under the regulations and analyze these data. Your analysis should reflect applicant activity for the last year. If the number of applicants in the last year was less than 100, your analysis should include all such applicants. If the number of applicants in the last year was more than 100, your analysis should include an appropriate sample of 10 percent of such applicants or 100, whichever is greater. Summarize total applicants by total, male, female, and male and female minority classifications. While in many cases applicants are not classified by particular job, it should be possible to provide some separation of the applicant flow count into at least broad occupation groups. Report the number of offers of employment for each category and by total, male, female, and male and female minority classifications. The acceptance should be related to the job groups outlined by you in your review of the workforce analysis.

C. If the data supplied by the contractor are inadequate under the regulations or if the data relevant to the focus job titles cited by you in your review of the workforce analysis are not indicated, further information will be necessary. In the letter prior to the on-site visit, advise the contractor to maintain such data in the future and that the following collection of data will be made during the on-site review to determine any problems that may exist in applicant flow and hiring rates. Because information is more readily accessible on site and to insure that the recruitment, hiring, selection and placement procedures are adequately analyzed, more information will be necessary.

During the on-site review, obtain applications of applicants for blue-collar employment and applicants for white-collar employment. You may use a random sample or an immediate past chronological period. You should be sure to include the job titles cited by you in your review of the workforce analysis. Now construct the report described in the paragraph above showing applicants, offers and acceptances by total, male, female, and male and female minority classifications by as much organization job grouping detail as possible.

D. Based on the data collected under paragraph B or C above, indicate whether or not the proportion of offers or hires to minorities or women is less than the porportion of applicants who are minorities or women for the particular job groups. If so, the basis for this rejection rate must be investigated and discussed. Discuss the selection procedures used for these jobs. Explore whether or not the distribution of those minorities or women actually employed reflects a current or past lower rate of hire.

E. For any job group identified in paragraph D above as having a lower rate of offers or hires for minorities or women than indicated by the applicant flow, ask the contractor in the letter prior to the on-site visit (or during the on-site review if the information in paragraph B is collected on site), to have available for the on-site review, an analysis showing the reasons for the rejection of applicants for total and by appropriate race and sex groups for these job groups. Reasons include but are not necessarily limited to:

(1) Qualified for some jobs, but no vacancies at time of application.
(2) Failed to fill out application completely.
(3) Failed paper-and-pencil or performance tests.
(4) Failed educational requirements.
(5) Unsatisfactory work history.
(6) Unfavorable credit report.
(7) Unfavorable interview.
(8) Unfavorable reference check.
(9) Failed physical requirements.
(10) Transportation inadequate.
(11) Criminal convictions.
(12) Applicant rejected contractor's offer of employment.

IV. Promotion and Transfer.

Review the contractor's analysis of promotions and transfers in his affirmative action program. If such analysis is not available, or if the contractor's analysis is inadequate under the regulations, the investigator should ask the contractor in the letter prior to the on-site review to prepare for the on-site review a list of promotions. If the number of promotions in the last year was less than 100, your analysis should include all such promotions. If the number of promotions in the last year was more than 100 your analysis should include an appropriate sample of 10 percent of such promotions or 100, whichever is greater. A promotion is defined as any personnel action resulting in movement to a position of greater skill, effort or responsibility. Wage increases alone do not determine a promotion. The review should relate name or other identification to minority/majority group status, sex, previous job, department and pay, and new job and department and pay.

V. Termination.

Review the contractor's analysis of terminations in his affirmative action program. If such analysis is not available or if the contractor's analysis presented in the affirmative action program is inadequate under the regulations or if the focus job titles cited by you in your review of the workforce analysis are not included, advise the contractor in the letter prior to the on-site review, to prepare for the on-site review a list of terminations, by name or other identification, showing hire and termination date, job assignment, minority/majority group membership and sex. To determine if there is an unfair disparity of company policies, terminations should be reviewed. If the number of terminations in the last year was less than 100, your analysis should include all such terminations. If the number of terminations in the last year was more than 100 your analysis should include an appropriate sample of 10 percent of such terminations or 100, whichever is greater.

VI. Analysis of Jobs with Substantial Concentrations of Minorities or Women.

A. Now look again at each of the focus job titles with substantial concentrations of minorities or women as cited by you in your review of the workforce analysis. Based upon your analysis of the workforce composition and your analysis in previous sections, prepare an analysis which includes an identification of those specific jobs wherein the minority or female incumbents could have been denied placement, promotion or transfer due to discrimination.

B. In order to identify an affected class, it will be necessary to review detailed listings of employees in the jobs identified in A above. Inform the contractor in the letter prior to the on-site review that these listings will be required for the on-site review. For all the job groups cited, the contractor should be asked to prepare a list by department, line of progression or unit within which promotion normally occurs of all employees ranked by job in order of progression and indicating for each: name, job title, rate of pay, sex, minority group or nonminority identification, original hire date, and other appropriate seniority dates considered in promotion, transfer or layoffs. If department, job, company or plant seniority dates are utilized by the contractor such dates must be included. Usually, even if seniority is not a guiding factor in promotions, in all but managerial positions, total length of service will be correlated to job entitlement.

Part B. The On-Site Review

I. Identifying Information.

Give the dates of the on-site review indicating the date the review was initiated and completed. List the names and titles of contractor personnel contacted in the review.

II. Community Survey.

A. Community contacts should be made as appropriate and practical prior to the direct meeting with the contractor. Some later confirmations may be required. The number of these contacts depends on the nature of the information available prior to visiting the locale. If there is a regional OFCC office, they may be able to advise you on the effectiveness of some community resources as possible referral sources for minority and women job seekers. A contact with the local office of the State Employment Service is vital to ascertain the substance of the contractor's relationship with that agency. If there is a minority specialist in the office, he or she can be most helpful in orienting you towards other community resources.

B. The following is relevant information which must be reported in this section as determined through community contacts or otherwise:

(1) Report of population and workforce data as specified in Order No. 4.

(2) Indicate other key industries and companies with whom the contractor will be competing for minority and women workers.

(3) List the significant employment oriented organizations which could be referral sources for minorities and women.

(4) Identify the community leaders generally recognized as representing minorities and women.

(5) Comment on the community image of the contractor as an EEO employer and otherwise including the reputation of the contractor's facility as a desirable place to work.

III. Initial Contact with Contractor.

A. *Initial Contact.* (1) If this is the initial compliance review experience for the contractor, a brief discussion of the history of the compliance program is appropriate. Otherwise, the contractor need only be brought up-to-date regarding any new policies or changes in the rules and regulations occurring since the previous review. If not adequately determined in the previous review or, if significant changes have occurred, discuss the contractor's overall corporate organization in terms of corporate headquarters, subsidiaries, number of facilities and nature of the inter-facility relationships as it might affect this review.

(2) Discuss the nature and extent of the contractor's Government contract work. How does this relate to the contractor's business? Discuss the major nonexempt subcontractors and determine if the contractor has satisfied his EEO responsibilities in their regard. Have they been notified of their EEO obligations relative to filing the Standard Form 100 and preparing an affirmative action program? Review a sample contract and purchase order form for inclusion of an EEO clause. Does the contractor require a certification of nonsegregated facilities from each nonexempt subcontractor? Does the contractor assure appropriate physical facilities to both sexes?

(3) Any additional information needed for the conduct of this review should be requested during the initial contact to assure its availability while still on-site. A tour of the facility might be appropriate at this time or at least it can be tentatively scheduled for a later point in the review. To avoid unwarranted or unintended interferences with employer-employee relations, the number, content and scope of employee interviews should be discussed with the contractor at this time.

B. *Report of General Information.* Based on the information obtained from the contractor, or researched by you, report on the contractor's corporate organization as it might affect this review. If this material is adequately covered in a previous review, attach a copy of the relevant portion of that review. Attach copies of a sample contract or purchase agreement and a sample certification of non-segregated facilities as exhibits to this report. Describe the compliance history of the contractor leading up to the previous compliance review, indicating the compliance agencies involved and any changes in the compliance posture. What actions has the contractor taken relative to commitments made subsequent to the last compliance review?

IV. EEO Policies and Procedures.

A. *External.* Describe how the contractor indicates he has attempted to establish an image of an EEO employer in his community and in his recruitment area. How does the contractor utilize and support organizations which would assist his efforts and implement his affirmative action program?

B. *Internal.* (1) Are EEO posters prominently displayed? Indicate the type of EEO policy statements that have been issued. By whom and addressed to whom? Are these statements posted? Are they included in employee handbooks or policy manuals? Is the policy statement up-dated periodically? Has management expressed any intention in writing or otherwise to take disciplinary action for failure to adhere to EEO policies and procedures? Does the contractor publicize an EEO achievement? Have out-dated posters mentioning restrictions on employment of females been removed?

(2) Describe the role of the EEO coordinator. What role does the coordinator play in dissemination of policy? How much time does he or she spend in EEO work?

(3) Describe if supervisors are involved in goal setting. How have the lower level supervisors received and disseminated company EEO policy? Are supervisors held accountable for failure to meet EEO goals? Is EEO part of the orientation for new employees and are there periodic meetings with employees and/or supervisors on the subject?

V. Recruitment, Hiring, Selection and Placement.

A. *General Procedures.* (1) Review the material in the desk audit section of these guidelines to see that you have completed the required analysis to identify the job titles where fewer offers or acceptances are made to minorities and women and have indicated information needed for on-site analysis.

(2) Provides an analysis based on the following issues with full explanation when necessary, from data gathered at the on-site review. Are different inter-

viewers assigned to interview applicants because of their job interest, race or sex? Is job counseling offered? If not hired, is the applicant given a specific reason? Is it generally the real reason and is it so noted on the application form? If not hired, what happens to the application form? What are the possibilities of the application being retrieved at a latter date? Based on the EEO specialist's analysis of records as well as the contractor's statements, has this happened very often? If the employment office does not make final decisions for hire, who does and on what basis? If additional interviews are conducted, is there feedback to the employment office and the EEO Coordinator? Does anyone monitor for disparate rejection ratios of minorities and women? Can and does anyone challenge decisions made by the selecting officials? Are those who make selections conscious of the contractor's goals and timetables? Describe what role if any the Coordinator has in the selection process.

(3) Does the contractor maintain applicant flow data which gives all the necessary information such as name, race, sex, job applied for, source of referral, date of application and disposition? Obtain copies of application forms. Do the forms request information which could be used in a discriminatory manner? Specify the questionable information and who might have access to it. If such information is allegedly asked for affirmative action purposes, could it be maintained on a separate record? Are any questions asked of applicants of one sex but not of applicants of the other sex (e.g., anticipated temporary disability, child care problems, and marital status)? From discussions with interviewers and supervisors as well as from comments appearing on the application forms, what appear to be some of the more subjective criteria considered? (i.e., socio-economic background, illegitimacy, appearance, dress, hair style, geographical, or non-job related school preferences.) Describe the filing system and check to see how long applications are retained. Is there an affirmative action file or other retrieval system to enable minorities and women to be reconsidered if no job can be offered at the time of their original application? Are there written job descriptions or job specifications? If not, what procedures are used instead? Are job requisitions submitted to the employment office in writing and how detailed are they? Are these forms or others used for external recruitment? Sample a representative number of job requisitions on a given date and determine if minorities and women were applying at the same time. The contractor's applicant flow data and application retrieval system should permit this kind of comparison with minimum effort. Obtain samples of any other relevant forms utilized by the personnel operation such as interview reports.

Rules and Regulations

(4) Describe in detail, the job application process from the point where the applicant first makes contact with the contractor. Observe the physical layout of the contractor's employment office for any segregation by race of sex of applicants and whether it would be apparent to a job seeker that the contractor has an integrated workforce. What are the responsibilities of any receptionist on duty? Does the receptionist screen applicants or application forms in any way? Is everyone requested to complete an application form at all times?

(5) Does the contractor have a policy on nepotism? If so, is the policy written or applied to effect job opportunities adversely for women more than men? Does there appear to be any selection or placement pattern based on race or sex? Does the contractor claim any bona fide occupational qualifications to justify sex discrimination?

B. *Determination and Analysis of Adverse Effect.* (1) Adverse effect is a differential rate of selection which works to the disadvantage of a covered group. In order to determine whether adverse effect results from the use of "objective" selection requirements, review the data provided by the contractor on the reasons for rejection for the job titles cited by you in the desk audit analysis. Present the number and proportion of nonminority applicants or employees and the number and proportion of minority applicants or employees rejected for each of the cited reasons. Present the same statistics for women and men. Then determine the selection rate for each of these groups by subtracting the rejection rate from 100 percent. If the selection rate for minorities (or women) is less than 80 percent of the selection rate for the remaining applicants for any of the cited reasons, then there is an adverse effect and the selection method must be validated as required by the OFCC Testing and Selection Order. To make this computation, divide the selection rate for the covered group by the selection rate for the remaining applicants and compare the resulting figure with 80 percent. For example, if 30 percent of nonminorities are rejected (100 percent—30 percent=70 percent selected) on the basis of educational requirements and 53 percent of minorities are rejected (100 percent—53 percent=47 percent selected) on this basis, then there is an adverse effect (i.e., 47 percent divided by 70 percent equals 56 percent, which is less than 80 percent). If no individual reason is causing an adverse effect but the minorities (or women) selected for employment is less than 80 percent of the remaining applicants selected, then the entire selection process must be reviewed and validated as required by the OFCC Testing and Selection Order. Continue in this section with those job titles where you have determined that there is an adverse effect resulting from one or more "objective" selection) requirements. Continue with part (3) below for other job titles cited by you in the desk audit analysis, where there are not "objective" selection requirements causing an adverse effect.

(2) Refer to the Testing and Selection Order (41 CFR 60–3). To meet the requirements of that Order, all contractors must submit certain information. (41 CFR 60–3.4(a), 60–3.6, 60–3.15, 41 CFR 60–2.23(a)(3), 60–2.23(b)(7), (8), (13), 60–2.24(b), (d)).

(a) To be meaningful, information submitted concerning use of tests should include:

1. Applicable job title or job group.

2. Identifying information on procedures used for selection or promotion of individuals, including the following for paper and pencil or performance tests: name of test, form, and publisher or author.

3. Criteria for acceptance or cut-off score, if applicable.

4. For total candidates tested in the past year, the number of men and women not acceptable. The same information for men and women should be provided for Negroes, Spanish-surnamed Americans, American Indians and Orientals when the group constitutes 2 percent or more of the labor force in the labor market or recruiting area and for nonminority men and women. If no definite criteria of acceptance are used (such as cut-off scores, the average (mean) test score for each group and the scores of the three lowest scoring candidates accepted should be presented.

(b) If the selection procedure for which there is an adverse effect is a paper and pencil or performance measure (see 41 CFR 60–3.2), inquire if this has been validated. If the test has not been validated then the contractor must take appropriate action (e.g., take necessary steps to validate the procedure—during which time cut-off scores may have to be changed or eliminated, or eliminate the adverse effect). The compliance office must determine whether the action taken by the contractor is in accord with 41–CFR 60–3 and testing and selection guidance memoranda issued by OFCC. If the selection procedure has been validated, the contractor must provide evidence to show that the procedure has been validated in accordance with the Order and the compliance officer must review this evience. For guidelines on reporting validity, refer to 41 CFR 60–3.6 of the Revised Testing and Selection Order as amended in January 1974. You should inform contractors of noncompliance with the Order when validity or evidence supporting validity is absent or substantially deficient. However, since the issues involved in test validity are often quite technical and complex, the compliance officer should not try to identify or resolve these issues during the review. In cases where there are technical or complex issues or any case where the compliance officer cannot make a clear determination of compliance or noncompliance, the contractor's evidence of test validity is to be submitted for higher level review along with the compliance officer's analysis of the adverse effect.

(3) *Underutilization, Higher Rejection Rates and Other Selection Procedures.* For any job groups cited by you in the desk audit where there is underutilization or a higher rejection rate for minorities or women, are selection techniques other than tests used for employment decisions? Such techniques include but are not restricted to unscored or casual interviews, unscored application forms and unscored personal history and background requirements not used uniformly as a basis for qualifying or disqualifying applicants (see 41 CFR 60–3.13). If so, the contractor must either provide the same validation evidence as called for in B above or must adjust employment procedures so as to eliminate the higher rejection rate and underutilization.

(4) *Adequacy of Applicant Flow.* Are the contractor's applicant flow data adequate for the focus job titles cited by you as having underutilization in your review of the workforce analysis? If not, the following further investigation into recruitment methods and resources is necessary during the on-site review.

(a) What procedures are used for external recruitment? Summarize the contractor's explanation of the specific recruitment methods and resources utilized for each focus job title involved. Are minority and women-oriented press or broadcast media utilized? Do recruitment ads, either in words or location in the publication, suggest preference for one sex? Explain the impact of word-of-mouth or other employee referral systems. Explain if recruitment sources are contacted in writing at the time of actual job openings and how much information is provided to them as to the qualifications necessary.

(b) Is the contractor actually aware of the results of the company's recruitment efforts? Has the contractor specifically requested to have minority and women candidates among these referrals? Has the contractor discontinued using any of these sources which have failed to make such referrals? Has the contractor instituted any transportation or housing programs to aid in minority recruitment? What is the contractor's explanation for any failure to attract a significant number of women and minority applicants? Are employment opportunities denied to women with young children but not to men with young children? Does the contractor deny employment opportunities to women or men based on a State "protective" law?

(c) Describe the college recruitment program only if college recruitment is involved for the focus job titles cited in your review of the workforce analysis. Are schools visited with predominantly minority or women enrollment? Is the contractor familiar with some of the lesser known schools? How is this program related to the company's national recruiting program? Describe the blue-collar recruitment program, if applicable.

(d) Identify the appropriate entry level positions and the promotional ladders as indicated by the contractor and by the EEO Specialist's confirmation through sample record analysis. Are these lines in any way oriented by race or sex? Differentiate between those promotions that are automatic and those that are competitive. What is the significance of interest, ability and seniority in promotion and transfer considerations? Are there any periodic written performance ratings which influence promotion or transfer? Explain whether or not minorities or women are concentrated in certain jobs outside any line of progression or which deadend before the employee can reach the pay grade to which their experience, training or seniority might entitle them. Is there a well stuctured transfer program? Discuss any lack of representation of minorities and women in this program. Review the file on transfer requests, if any. Have many minorities or women been overlooked or rejected disproportionately? What is the frequency of inter- or intra-departmental transfer for better working conditions or to gain promotional opportunities? Is counseling offered to employees considering this move? How common is transfer from blue-collar to white-collar positions or from "traditionally female" to "traditionally male" jobs or vice versa? Who monitors promotion and transfer activity and through what means? How is job security affected by transfer or promotion and does this disproportionately affect minorities or women?

VI. Promotion and Transfer.

A. Based on the information outlined in the desk audit section on promotion and transfers, a determination should now be made if there is a disparity between promotion rate of minorities and women as related to the rate for nonminorities and/or males.

B. Any selection criteria for promotion that is causing a higher rejection rate of minorities or women must be reviewed using the procedure in VB (1) and (2), above.

VII. Terminations.

As a result of your analysis of data supplied during the desk audit or on-site, if there is a disproportionate number of terminations because of assignment of minority group members or women to specific kinds of jobs, the causal factor should be explored and discussed on-site. Present the results of that explanation here or state that no such disproportionate effect exists. Are employees of one sex in a certain job title terminated upon reaching a certain age without the same rule applying to the other sex? Are procedures affecting termination validated if there is a disproportionate effect? Refer practices or procedures that may indicate age discrimination to the Wage-Hour Administrator of the U.S. Department of Labor.

VIII. Supervisory Positions.

Review the workforce analysis and focus jobs cited by you in the desk audit with specific reference to supervisory positions. Comment on the representation of minorities and women among supervisors and where promotions during the previous year suggest any improvement. If appropriate, review selected personnel records to conduct the following analysis. Explain how supervisors are selected. Who monitors these actions? Explain how supervisory ability is measured. Are minorities and women supervising integrated groups? Are women supervisors generally at a lower plateau in the organization? Where there is low utilization of minorities or women in supervisory positions, can this be traced to specific past actions in recruitment or placement? Are there selection criteria for supervisory positions that are causing an adverse effect? If so, follow the procedures in VB(1) and VB(2)(b)(1) above. Where minorities and women have been newly installed as supervisors, has there been any negative reaction from the workforce and how has management dealt with it? Is there a supervisory development program? Does this start prior to entry into supervision or is it part of an on-the-job program? Does it include training on EEO matters and problems?

IX. Pay Practices.

Review and compare wages and salaries of a sampling of minorities and women within selected job titles. The following list of questions are necessary in making this investigation. Be sure and give a full explanation with each answer.

A. Are there positions with similar duties but with different rates of pay?

(1) Does the incumbent's sex or race have anything to do with these differences in rates of pay?

(2) What is the contractor's explanation for these discrepancies?

B. Are there general salary ranges for jobs or specific rates at which everyone begins?

C. Do minority and women workers appear to to be paid lower beginning rates?

(1) What is the contractor's explanation?

(2) Who makes these determinations?

D. Are the rates negotiable?

E. Are minorities or women assigned to jobs where incentive earnings are more difficult?

F. Does review of any employee's records confirm or dispute the relationship of education, training, and experience to the wages being earned?

X. Analysis of Jobs with Substantial Concentrations of Minorities or Women.

A. Review the information prepared by the contractor and make a determination as to which, if any, departments or lines of progression within departments appear to have been utilized in the past for discriminatory placement of minorities or women.

B. Now compare the wage or job class range of each such unit with that of departments or lines of progression where whites (or males, if comparing female) are concentrated. Also compare working conditions, degree of skill acquisition, and rapidity of advancement in each unit. Then make a determination as to whether each of the units in which minorities or females are concentrated is less desirable. Take into consideration in this analysis whether progression to the top of one line may lead to advancement to management while the other may not. Additional detail data will probably be required for this analysis.

C. If discriminatory placement has occurred you must attempt to determine if and when the company has ceased discriminatory placement. Begin with a review of your analysis of new hire data, determining whether placement into departments and lines of progression has been oriented according to race or sex. If so, then all present minority and female incumbents of the units identified should be considered members of an affected class. If race or sex no longer appear to be factors in placement of new hires, further inquiry of the contractor must be made to determine when these factors cease to be considerations in placement. Try to establish a definite date; all incumbents of the units identified hired prior to that date will be identifiable as members of the affected class.

D. Formulate a definition of the affected class as identified in this review, and identify each member of it. This may me done, for example, by reference to their locations in the seniority list. A typical definition would read as follows:

The affected class shall be considered to be all black employees presently assigned to Progression Lines 1, 2, 3, and 4 who were hired prior to December 31, 1970.

E. Now you must conduct an analysis to determine which business practices are resulting in the denial of equal empolyment opportunity to these discriminatorily placed in the past. Examine provisions of the collective bargaining agreement, or if no union, the company policy manual, and summarize in the compliance review those provisions having to do with transfer, promotion and layoff, as well as those dealing with the effect of seniority upon such personnel changes. The following must determined:

(1) May any qualified employees transfer from one employment unit to another?

(2) What kind of seniority—plant, department, seniority unit, job—is the basis for transfer competition?

(3) If lines of progression or promotional sequences are utilized within departments, is seniority the principal determinant of promotion from one job level to the next highest job level. In other words, is progression through the line principally a function of seniority?

(4) What kind of seniority—plant, department, seniority unit, line of progression, or job—is the basis for competition for promotion within lines of progression or seniority units?

(5) What kind of seniority competition is there for reduction in force and layoff?

(6) Assuming that the affected class may transfer, if qualified, to other employment units, the heart of the matter is what losses, in terms of seniority, job retention rights,and wages, they will sustain if they seek to avail themselves of transfer opportunity?

F. Now make a determination as to whether members of the affected class are presently qualified, or can become qualified in the same manner as white or male employees in the past, for jobs in the employment units from which they have been excluded. The most productive technique here is probably comparing present qualifications of the affected class with qualifications of whites (or males) at the time the whites (or males) were hired. Make a determination of the qualifications of the least qualified white (or male) currently in the more desirable employment unit.

G. If you have identified an affected class, remedies must be developed for the contractor to be in compliance. Refer to OFCC guidance memos on affected class in developing each step of the remedy. However, in arriving at the nature and extent of the remedy, some insight is needed into the extent that any remedy would be welcomed and utilized by such individuals even with job security assured. It is therefore advisable that selected members of the affected class be interviewed. Your written discussion of the remedy should include the following aspects. Referring to the lines of progression or promotional sequences, which jobs must dead-ended minorities and women move into in order to progress? Would the affected class employee require additional training to progress? Are the jobs in the promotional sequences functionally related? What changes in the bargaining agreements would be necessary in order to stimulate transfer of affected class members or perhaps make transfer unnecessary? Has the contractor already initiated some action in this regard? When? Could long-time affected class members possibly move up more than one job title immediately or with little extra training in order to obtain their rightful place in relationship to their company seniority? Note: since this is still a preliminary stage to final agreements, you should avoid unnecessary interference in employer-employee relationships by giving the contractor the opportunity to discuss remedies with affected class members. If the contractor fails to do this adequately, you should interview selected members of the affected class. Through interviews you should determine whether minorities or women feel the union, if any, is servicing them properly.

(1) *Bargaining Units*. (a) Identify the various unions in the contractor's establishment. Determine if there are any memoranda of understanding of addendums not included in the labor agreement. Obtain copies of all collective bargaining agreements. Do the labor agreements contain an EEO clause? Review these agreements (and attach them along with progression charts to this report) considering, as appropriate, the following:

(b) Are EEO grievances subject to the applicable grievance machinery, if any. If so, with what frequency have such EEO grievances been filed and what have been the results. Does the labor agreement spell out the rights of employees in terms of tenure, layoff, recall, transfer, promotions and the various fringe benefits? Is there a formal posting and bidding procedure for transfer or promotions? What are the criteria for determining the successful bidder? Are minorities and women encouraged to bid into jobs where they have been previously underutilized? How important is seniority? Can an employee hold more than one seniority date? If so, explain what each means and how it was acquired. Do the layoff and recall provisions have a disparate effect on minorities and women? How and why? Have there been any mergers of seniority units or lines of progression, and how has this affected minorities and women? Are there any "understood" or traditional practices which differ from those described in the contract itself? Are disciplinary actions spelled out clearly? (Explain this under Section 3 below.)

(2) *Non-Bargaining Unit Positions.* Determine if there are company policies or precedures in writing which deal with the situations as discussed in the previous paragraph for those positions not covered by any bargaining unit? Does longevity play any role in job security?

(3) *Benefits and Disciplinary Actions.* Review the contractor's personnel manual or its equivalent. Are there any disciplinary policies which would tend to discriminate against minorities or women? What is the policy on maternity leave and is it in accord with OFCC regulations? Does the policy result in rejection or suspension from employment or require involuntary leave solely on account of the condition of pregnancy? Are there any distinctions based upon sex in the granting of fringe benefits, including medical, hospital, accident, life insurance, pension and retirement benefits, profit sharing and bonus plans, credit union benefits, or leave which violate current OFCC regulations? Are the same benefits made available for the wives and families of male employees also made available for the husbands and families of female employees? Does the contractor specify any differences on the basis of sex in either mandatory or optional retirement age?

XI. Training and Educational Opportunities.

A. *Internal.* (1) Review the contractor's data on training that has occurred over the past year. Indicate the participation by total, male, female and male and female minority classification and show the training participating rate for each group. If the number of applicants in the last year was less than 100, your analysis should include all such applicants. If the number of applicants in the last year was more than 100, your analysis should include a sample of 10 percent of such applicants or 100 whichever is greater. Include employees hired directly into such programs. Is participation strictly voluntary or are there selection procedures? Such procedures must be validated if there is an adverse effect.

(2) Inquire about what types of training new employees receive. Is there evidence of any disparate failure or dropout rate? If such disparities exist, what efforts has the contractor made to correct the situation? How is failure determined? Is it in accord with 41 CFR Part 60-3? Is formal training being required now for jobs not previously involved? If so, have you included this in the section on affected class? If there is a registered apprenticeship program, has the contractor developed an affirmative action program under 29 CFR Part 30 or a State plan for EEO in Apprenticeship? Has the contractor's Apprenticeship AAP been approved by the contractor's apprenticeship registration agency?

B. *External Programs.* Describe any programs offering tuition assistance and the extent of minority and women participation? What is the contractor's explanation for any disproportionate representation of women or minorities? Describe any school work or other cooperative type programs, the minority and female enrollment at these institutions, and the minority and female participation in such programs. Are there any summer school work programs or other Government or privately-funded training on a part time basis? Are there any selection or qualifying procedures that would tend to preclude the involvement of a representative number of minorities and women (e.g., expense, length of training, travel involved, no clear evidence of career advancement, etc.)? After completion of the program, is job replacement assured or assistance available?

XII. Goals and Timetables.

A. *Achievement of past and present goals and timetables.* Is the contractor meeting the current goals and timetables? Did he meet previous goals and timetables? If not, determine from the contractor his assessment of why the goals were not achieved. Pursue what you deem to be necessary changes for future success in meeting goals. If the contractor is not meeting the current goals and timetables or if the contractor did not meet the previous goals and timetables, a determintaion of good faith must be made and the determination will be based upon his efforts to broaden his recruitment and promotion base. See B(2) below.

B. *Establishment of present and future goals and timetables.* (1) Specific goals and timetables are to be established separately for minorities and women considering the factors cited in Order 4 and based on the contractor's analysis. In establishing timetables the contractor must consider the anticipated expansion, contraction and turnover of and in the workforce. This would include a review of anticipated vacancies in the major job groupings for the next year and any other pertinent period related to the affirmative action program.

(a) A goal must be established for each job group in which underutilization exists and must be designed to completely correct the underutilization. The goal must be stated as a percentage of the total employees in the job group and must be equal to the percentage of minorities or women available for work in the job group in accordance with the criteria set forth in 41 CFR 60–2.11.

A single goal for minorities is acceptable, unless through the company's evaluation it is determined that one minority is underutilized in a substantially disparate manner, in which case separate goals and timetables for such minority groups may be required individually, and it may further be required, where appropriate, that separate goals be established within the minority groups by sex. (See Order 4, § 60–2.12(k).)

(b) For each job group in which underutilization exists, a specific timetable must be established for reaching the ultimate goal in the minimum feasible time period.

(c) For each job group in which underutilization exists, the contractor must establish annual rates of hiring and/or promoting minorities and women until the ultimate goal is reached. These rates should be the maximum rates that can be achieved through putting forth every good faith effort, including the use of available recruitment and training facilities, and must not be lower than the percentage rate set in the ultimate goal. Numerical goals based on projected openings are required but cannot be used in place of percentage goals. Goals should be stated both as actual numbers and as percentages for backup goals. That is, a contractor may establish a goal of 10 women based on an expected 20 vacancies for hires or promotions. But his expected vacancies may vary. So he should also give a percentage goal (e.g., 50 percent of hires) which would apply if opportunities exceed his current estimates.

(d) Each program must contain specific and detailed action oriented programs, including recruitment and training programs, which comply with Revised Order 4. These programs must, among other required ingredients, commit the contractor to undertake every good faith effort to contact and make use of relevant recruitment and training resources available in the community and to use its own resources for recruiting and training minorities and women to fill positions in job groups where underutilization exists. Data regarding promotable employees, community training facilities and company training facilities must be prepared by the company itself, and related to the locality.

(2) How many of these jobs will be filled through upgrading? In considering the current work force, turnover, and deficiencies identified, are the contractor's goals reasonable and will they achieve prompt and full utilization of minorities and women? Is there evidence that the contractor is considering minorities and women not in the work force? Make specific suggestions for affirmative action based on problem areas and on areas previously lacking in positive affirmative action, as pointed out by the review. The affirmative action program must appear as an exhibit to this report. Determination of good faith effort should be made which shall include but not be limited to the following:

(a) Notification to the community organizations that the contractor has employment opportunities available and maintenance of records regarding the organizations' response.

(b) Maintenance of a file of the names and addresses of each minority or female worker referred to the contractor and what action was taken with respect to each such referred worker.

(c) Participation in training programs in the area. Full consideration of the training which the contractor can reasonably undertake.

(d) Dissemination of the contractor's EEO policy, by including it in any policy manual; by publicizing it in company or union newspapers, annual report, etc. by conducting meetings to explain and discuss the policy; by posting of the policy; and by specific review of the policy with minority and female employees.

(e) Dissemination of the EEO policy externally by informing and discussing it with all recruitment sources; by advertising in news media, specifically including minority news media; and by notifying and discussing it with all contractors and subcontractors.

(f) Specific and constant personal (both written and oral) recruitment efforts directed at all minority and female organizations, schools with minority and female students, minority and female recruitment organizations, and training organizations, within the contractor's recruitment area.

(g) Specific efforts to encourage present minority and female employees to make referrals in the recruitment effort.

(h) Validation of all worker specifications, selection requirements, tests, etc., as required by the Testing and Selection Order 41 CFR § 60-3.

(i) Making every effort to provide after-school, summer and vacation employment to minority youths.

(j) Where reasonable, the development of on-the-job training opportunities and participation and assistance in any association or group training programs relevant to the contractor's needs.

(k) Continuing inventory and evaluation of all minority and female personnel for promotion opportunities and encouragement of minority and female employees to seek such opportunities.

(l) Assuring that seniority practices, job classifications, etc., do not have a discriminatory effect.

(m) Assuring that all facilities and activities are nonsegregated.

(n) Continual monitoring of all personnel activities to insure that its EEO policy is being carried out.

(o) All other sections of Subpart C of Order 4 (41 CFR 60-2-20, 21, 22, 23, 24, and 25) and the OFCC Sex Discrimination Guidelilnes at 41 CFR Part 60-20.

XII. Religious and National Origin Discrimination.

Refer to the regulations (41 CFR 60-50). Has the contractor reviewed his practices to determine whether members of religious and/or ethnic groups are receiving fair consideration for job opportunities? Describe the outreach and positive recruitment activities undertaken by the contractor to remedy problems identified. (See 41 CFR 60-50.2(b)). Describe any accommodation made by the contractor to the religious observances and practices of an employee or prospective employee. When such situations exist, if the contractor has not made such accommodation, describe the contractor's rationale including, at least: (a) business necessity, (b) financial costs and expenses and (c) resulting personnel policies.

((5 U.S.C. 553(a)(3)(B)) 29 CFR 2.7 section 201, Executive Order 11246, 30 FR 12319, and Executive Order 11375, 32 FR 14303.)

Signed at Washington, D.C., this 8th day of July, 1974.

PETER J. BRENNAN,
Secretary of Labor.
BERNARD E. DELURY,
Assistant Secretary for Employment Standards.
PHILLIP J. DAVIS,
Director, Office of Federal Contract Compliance.

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Antibias Regulation of Universities

FACULTY PROBLEMS AND THEIR SOLUTIONS

by Richard A. Lester

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A Report Prepared for
The Carnegie Commission on Higher Education

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Foreword

The Carnegie Commission on Higher Education has consistently expressed support for efforts to increase the relative participation of women and members of minority groups in college and university faculties. It has recognized, however, that such efforts will be accomplished with considerable difficulty and probably more slowly than we might wish.

In our report entitled *Opportunities for Women in Higher Education,* and in a technical note to our final report *Priorities for Action,* we reviewed some actions that must be taken if the difficulties are to be overcome. Among them are increasing the numbers of women and members of minorities who pursue graduate studies and become part of the "pool" of qualified academic talent available for faculty appointment; finding jobs for new faculty members during a period in which little or no enrollment growth is anticipated and existing faculties are well staffed by relatively young men and women; and matching new faculty members who seek jobs with the often highly specialized openings that may occur.

Some of these same problems have been of concern to Richard A. Lester, who has conducted an extended independent study of the issues involved and has had practical experience with employment practices and compensation differentials in both industry and academe. He has served as chairman of the Southern Textile Commission under the National War Labor Board (1945), as vice-chairman of the President's Commission on the Status of Women (1961–1963), Dean of the Faculty of Princeton University (1968–1973), and chairman of Princeton's Equal Employment Opportunity Committee (1968–1972).

In this book, Lester reports on his studies and discusses many of the specific problems associated with increasing the membership of women and members of minority groups on the faculties of major colleges and universities. He stresses the fact that current faculty members favor such an increase, but warns that many of the action programs prescribed to achieve it fail to take into consideration either the inadequate supply of qualified people among those groups currently underrepresented on our faculties or the characteristics of academic employment that distinguish it from employment in industry. At stake is not only an equitable system of academic employment, but also loss of financial support as governments apply economic sanctions to achieve numerical hiring goals that often have little relevance to the character and mission of universities. Lester has given us a sensible and well-documented study that should be vitally important as our colleges, universities, and state and federal governments consider or reconsider the policies that guide them in this difficult and sensitive area. He speaks with the authority of a person with extensive and most successful experience in the field of industrial relations and academic administration and with the credentials of a long-time supporter of equal opportunity. His wisdom and his advice merit the most careful consideration.

Clark Kerr
Chairman
Carnegie Commission
on Higher Education

May 1974

Preface

Since 1968, universities and colleges having federal research contracts have been under antibias regulation by the federal government. The regulation, enforced by the Department of Health, Education, and Welfare, has been unsatisfactory in certain respects to various parties—university faculty and administrators, interested women and men in academic communities, and persons in concerned organizations and in government.

Difficulties were to be expected in the first five years of a program that involves such a sensitive and complex subject as discrimination in faculty employment in universities and colleges. The question to ask is: How much have we learned from five years of experience, and is the program generating difficulties and ill-effects unnecessary for the achievement of its legitimate purposes? This book attempts to answer that question and, in doing so, proposes some different solutions to the problems involved.

In presenting criticisms of government programs, and proposing alternative ways to achieve and enforce nondiscrimination for university faculties, I do so out of a strong conviction that prejudice in employment, on account of race, sex, religion, or other nonperformance factors, is destructive of democratic values and violates the principle of appointment and promotion on merit, which is so vital for achievement of the educational objectives of our institutions of higher learning. It should also be said that some of the criticisms and proposals in the book were presented to HEW officials by me in January 1972, in September 1972, and in October and December 1973.

Some of the ideas offered here have much wider application than just to the faculties of universities. I leave it to those versed in other areas of activity to develop such broader applications.

The writing of this book was my own idea, and the product is mine. I have purposely avoided seeking financial support for the project. The Carnegie Commission on Higher Education has no responsibility for any opinion and bias in these pages.

Many persons have helped to sharpen the reasoning and improve the ideas and analysis in this book. They have done so through discussion of views and experience and by reading parts of the first draft of the manuscript and giving me the benefit of their criticisms and suggestions. I particularly wish to express my appreciation to the following for their contribution, but hasten to add that none of them is responsible for the particular views or proposals presented in the book: Robert L. Aronson, Orley Ashenfelter, William G. Bowen, J. Douglas Brown, John H. Bunzel, Robert R. France, Marjorie Galenson, Eli Ginzberg, Frederick H. Harbison, Clark Kerr, William F. Miller, Charles A. Myers, Robert B. McKersie, Albert Rees, Adele Simmons, Sheldon Steinbach, Phyllis Wallace, Edwin H. Young, and Verne A. Stadtman, whose skillful editing has greatly improved the book's readability.

The staff of the Industrial Relations Section of Princeton University—Helen E. Fairbanks, Dorothy Silvester, Karen Stout, and Irene Rowe—have been of valuable assistance in a variety of ways, including preparation of the manuscript for the press.

Richard A. Lester
Princeton, New Jersey

Antibias Regulation of Universities

1. *Introduction*

Equal opportunity for each person to rise to the top—as a student and as a faculty member—on the basis of individual merit, is essential for the healthy functioning of institutions of advanced learning. Painful experience in this country and abroad has demonstrated the corrosive effects on the creation and cultivation of truth when outside groups—government, business, religious, or other special interests—exert too much pressure or gain significant control over the operation of universities. The professional integrity of the search for, and distribution of, truth must be maintained if the intellectual leadership in a country is to be free from the bonds of prejudice.

THE NATURE OF OUR INQUIRY

The problem of eliminating bias in the appointment, advancement, and compensation of faculty of major universities—without hampering their professional purposes or their potential for benefiting mankind—is presented in this book. That is a complex problem with many ramifications. Analysis of the problem's various facets involves critical examination of government programs that enforce "affirmative action" against job discrimination as applied to the faculties of the most advanced universities. We shall examine the implications that "compliance" with federal and state antibias programs may have on the future of our distinguished institutions of higher education over, say, the next 30 years, which is about the average length of faculty tenure appointments by promotion.

Our analysis will draw on experience, especially since 1968, in particular institutions. Our analysis should not, however, be considered a report of individual case studies. During 1973 and early 1974, discussions of problems and experiences were held with administrators and faculty members at some 20 universities across the country, with compliance officials in Washington and in several regional offices of the Department of Health, Education, and Welfare (HEW), and with staff personnel in associations of colleges and universities. No direct quotations are, however, presented from such conversations. Frankness was encouraged by assurance that the specifics of those discussions would be used primarily for understanding problems and developing possible solutions for them. Therefore, only published material is used in reference to individual institutions or persons.

University faculty and administrators generally are sympathetic with the elimination of prejudice from faculty employment, whether based on race, sex, religion, ethnic origin, or any other grounds. Indeed, many of them could be considered oversympathetic. For instance, a broad national survey shows that about 32 percent of the male and 42 percent of the female faculty of universities questioned in the 1972–73 academic year favored preferential hiring for women in faculty positions at their institutions. Preferential hiring for members of minority groups was favored by 35 percent of the male faculty and 36 percent of the female faculty.[1] Faculty members want to avoid being labeled as "prejudiced" against blacks, women, or persons with particular religious views, or being charged with violating particular antidiscrimination legislation or federal executive orders banning bias in employment.

Although university faculty are quite individualistic and mixed in their positions on particular issues, numerous surveys have shown that a high proportion of university professors are liberal or left of center in their social and political views (see Ladd & Lipset, 1973, pp. 16, 18–19, 22–26, 28). However, they tend to be relatively conservative or cautious concerning change in internal university operations. Also, in each age group, the distinguished, highly achieving professors in the prestigious institutions generally are disproportionately more liberal—"display the greatest inclination to support politics of social criticism from perspectives of egalitarian and popular values"—than are professors in the middle-tier and lower-tier institutions (ibid., pp. 19, 22–27).

On the issue of race and sex bias, and affirmative action to achieve government-specified, numerical hiring goals for women and blacks in universities and elsewhere in the economy, university professors often find themselves somewhat torn by conflicting philosophic viewpoints. Some, especially in the social sciences and the humanities (ibid., p. 28), may favor action beyond equal opportunity extending into equality of results. But they and their colleagues may also be quite concerned about assaults on the principle of selection and reward according to individual merit, in the economy in general and in university faculties in particular.[2]

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[1] The percentages are significantly smaller for two-year colleges. In those institutions, male faculty figures were 20 percent favoring preferential hiring for women and 28 percent for members of minorities. See Bayer (1973, p. 30). In a 1968–69 survey with approximately the same coverage, 23 percent of the men and 20 percent of the women on university faculties favored "relaxing" the normal academic requirements in appointing "members of minority groups" to positions on their faculty. See Bayer (1970, p. 17).

Generally speaking, university faculty and top university administrators can be expected to support appointment, advancement, and compensation of individual faculty members on the basis of merit, judged by past performance and by future promise as indicated by previous experience. On educational as well as legal and moral grounds, they can be expected to want to conform to the principle of equal opportunity for faculty employment for all qualified persons. It may, however, be difficult to convince all concerned, including some students, advocacy groups, and compliance officers, that the best-qualified candidate for a particular position was appointed or promoted to tenure from among the candidates who emerge in open competition. Differences of opinion may arise on the qualities that a particular university most needs in its faculty, in general and especially for a particular opening. Differences may also involve which candidate's abilities and potential as a teacher-scholar best fit an ideal conception of the position.

LEGAL BASIS FOR GOVERNMENT CONTROL

Executive Order No. 11246, approved by President Lyndon B. Johnson in September 1965, provides that as a condition of obtaining federal contracts, all contractors, including universities with research contracts, sign an agreement not to "discriminate against any employee or applicant for employment because of race, color, religion, or national origin." Sex was added to that list by Executive Order No. 11375, effective October 1968. The Department of Labor was given responsibility by President Johnson for issuing rules, regulations, and orders to carry out the nondiscrimination purposes of the Executive order and to determine compliance by contractors. Provision was made for the department to delegate its compliance enforcement powers to other federal administrative agencies for coverage of contractors in particular industries or sectors. Under such delegation, the Office for Civil Rights in the Department of

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[2] Ibid. (p. 31). For good illustrations of such conflicting viewpoints, see Galbraith, Kuh, and Thurow (1971) and Bunzel (1973).

Health, Education, and Welfare administers the compliance reviews and applies the rules and regulations to colleges and universities, regardless of which federal agency awards the contract.[3] HEW's 10 regional offices have the responsibility, in the first instance, for determining whether a university is in compliance and for recommending possible enforcement action to the Department of Labor. In case of a finding of noncompliance with Executive Order No. 11246 as amended or with the rules, regulations, or orders issued by the Department of Labor, a university may have its federal research or other contracts canceled, terminated, or suspended in whole or in part, and the university may be declared ineligible for further federal contracts.

From December 1969 to January 1974, a total of 20 universities are recorded as having had a temporary block imposed on new contracts or renewals for failure either to supply the required data or to meet other compliance requirements, including the submission of an acceptable affirmative action plan.[4] The delayed contracts of those 20 institutions amounted to about $28.5 million. At least four other universities have been reported as experiencing some brief delay.

Complaints of discrimination may be of three kinds. *Pattern* complaints allege that a general pattern of discrimination exists at a college or university. A *class* complaint alleges that discrimination prevails against a particular class (or classes) of employees in an institution. An *individual* complaint involves a charge that the complainant has personally been subjected to discrimination in employment or in applying for employment; it can include a claim of discrimination against members of the complainant's class and, thus, include a class complaint.

Through its regional offices, the Office for Civil Rights has responsibility for investigating pattern and class complaints against universities, and had such responsibility for the individual complaints of professional employees of universities until March 1972. Educational institutions were excluded from Title VII of the Civil Rights Act of 1964 until that exclusion was removed by enactment of the Equal Employment Opportunity Act in March 1972. Thereafter all individual complaints were to be handled by the Equal Employment Opportunity (EEO) Commission and not by HEW, which did, however, continue to handle some filed before March 1972.

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[3] Except for colleges and universities, federal contract compliance is handled as part of the contracting process, with compliance reviews conducted by compliance officers on the staffs of the agencies that actually make the contracts with the contractors. Only in the case of institutions of higher education is all compliance supervision concentrated in a single agency (the Department of Health, Education, and Welfare), whatever the agencies with which universities conclude their research and other contracts.

[4] They were: Harvard, University of Michigan, Columbia, Cornell, Duke, Vanderbilt, Northwestern, Notre Dame, University of Illinois, Loyola University (New Orleans), Yeshiva, University of California at Berkeley and at San Diego, New Mexico State University, University of Arkansas, University of Texas, Rice University, Mt. Sinai School of Medicine, Virginia Polytechnic Institute, and University of Washington.

Most of the complaints brought against colleges and universities have been on grounds of sex discrimination. In the spring of 1970, Harvard University was the first private institution and the University of Michigan the first public institution to be investigated by HEW as a result of complaints lodged against them. By mid-1973, pattern complaints on grounds of sex discrimination were reported to have been made against some 500 of the 2,500 institutions of higher education. Included in the 500 were practically all the major universities. Many of those complaints were brought by such women's advocacy organizations as the National Organization for Women and the Women's Equity Action League. A figure for the number of class complaints was not available at the time. By mid-1973, about 350 women had filed individual complaints against their institutions. Such actions have tended to put university administrators under considerable internal as well as external pressure.

In addition to enforcement of antibias requirements under federal contracts, HEW has enforcement powers under the Higher Education Amendments of 1972, which prohibit discrimination on the basis of sex in all federally assisted programs or activities.

The Higher Education Amendments of 1972 also extended to executive, administrative, and professional employees in colleges and universities the provisions of the Equal Pay Act of 1963. The Wage-Hour Division of the Department of Labor is the compliance agency for enforcing equal pay for women and men on jobs requiring equal skill, effort, and responsibility.

The Equal Employment Opportunity Act of 1972 amended Title VII (which deals with employment) of the Civil Rights Act of 1964 to include thereunder all educational institutions, whether they have federal assistance or not, and gave new enforcement powers to the Equal Employment Opportunity Commission. The commission (or the Attorney General in the case of public institutions) may bring a civil action in the federal courts against an institution, charging an unlawful employment practice, which may include a pattern of discrimination as well as an individual complaint.

Furthermore, about four-fifths of the states have fair employment practices laws, which usually ban discrimination in employment on grounds of race, sex, religion, or age. The laws in many states apply to the faculties of institutions of higher education and are generally administered by a state agency specifically created for that purpose. As provided in the Civil Rights Act of 1964, the federal commission defers action on charges until a state agency granted deferred status has acted on the same complaint.

Thus a university can be subject to as many as four separate compliance investigations over a period of time and can have separate charges of discrimination brought against it by three federal agencies and a state agency. The agencies have different data requirements and may apply somewhat different definitions, criteria, and standards for determining the existence and extent of discrimination. Indeed, as indicated in Chapter 7, enforcement may vary significantly among the 10 regional offices of HEW. Although coordination among the different federal and state enforcement agencies has improved somewhat, universities have been troubled by inconsistency and confusion in the enforcement of antidiscrimination laws and regulations. Also, universities that submitted affirmative action plans have often waited a year, two years, and even longer without definite and official word from HEW on whether their plans were acceptable as submitted. From November 1971 until July 23, 1973, some 33 affirmative action plans submitted by colleges and universities were given interim or final approval, 51 plans were rejected as not approvable under the Executive order and HEW's rules and regulations, and 175 were pending.[5] Those figures accounted for only about two-sevenths of the universities and colleges estimated to be under HEW regulation.

In addition to actions by government agencies, educational institutions can be sued directly in the federal and state courts by persons alleging that they have suffered discrimination. Universities have been confronted with an increasing number of such court suits under Title VII of the Civil Rights Act and state legislation. At the same time, a considerable number of charges of "reverse discrimination" (favoring women and members of minorities) have been filed with HEW against academic institutions, and some have been taken directly to the courts.

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[5] Data obtained from letter sent by Gwendolyn Gregory of the Office for Civil Rights of HEW to Sheldon E. Steinbach of the American Council on Education, dated Sept. 17, 1973.

CHARACTERISTICS OF MAJOR UNIVERSITIES

Universities are known for the quality of their faculties as educators and as creators of new knowledge through research, and for the relative effectiveness of their programs of undergraduate instruction and graduate training in the arts and sciences. It is mainly on their contributions in the humanities, social sciences, and physical sciences that the national and world reputation of American universities rests.

In addition to the education of students and the creation of new knowledge, universities serve as independent centers for the advanced study of human affairs and the critical evaluation of society. To perform those functions properly, academic freedom—freedom to search out and report the truth—is essential.

Compared with universities in other countries, American institutions of higher education have enjoyed an unusually large measure of autonomy and independence from government control.[6] That has been true not only of our private universities but also of the great state universities. Indeed, the state universities that have achieved the most distinction have generally enjoyed the greatest degree of autonomy.

In this book, special attention is given to the possible effects of government antidiscrimination regulation upon the faculties and the instruction-research programs of what are termed *major universities*. They are the three to four dozen most outstanding universities in the country in terms of advanced education and research in the arts and sciences.[7] Among the major universities in this country are such distinguished centers of learning as the University of California at Berkeley, Massachusetts Institute of Technology, and the universities of Chicago, Columbia, Harvard,

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[6] For a comparative analysis of American universities and those in other countries, see Ben-David (1972).

[7] As used in this book, the term means those universities that rank in the top level according to such criteria as (1) assessments of the quality of programs of graduate education published by the American Council on Education and number of Ph.D. degrees granted per year and (2) measures of research contribution such as volume of scholarly publications, dollar volume of research, and honors received by faculty (e.g., Nobel Prize winners, members of the National Academy of Sciences, and awards by professional associations in academic disciplines).

Michigan at Ann Arbor, Princeton, Stanford, Wisconsin at Madison, and Yale.

Such institutions have not only been leaders in advanced instruction and scholarship but also tend to be selected by HEW as leaders in the development of detailed affirmative action plans that conform to federal regulations. In other words, they have been used to establish patterns, to provide early examples of approvable affirmative action plans.

Furthermore, the problems and issues of government regulation via affirmative action plans with numerical hiring goals tend to arise most acutely in cases involving the major universities. Many years of on-the-job training are required before one becomes a mature teacher-scholar who enjoys the combined advantages of academic tenure and academic freedom at such institutions.

A high degree of faculty self-governance generally characterizes major universities. The faculty determine the curriculum and largely control academic personnel decisions on such matters as recruitment, appointment, reappointment, promotion, and individual faculty salaries.

Our major universities generate a large proportion of the new knowledge and basic-research contributions in this country. Probably in no other country is national scientific endeavor so concentrated in universities as it is in the United States (see Kerr, 1972). A good part of our well-being rests on the effectiveness of their faculties.

While they share the goal of improving knowledge and training minds, the major universities differ in their traditions, in their administrative structures and practices, in the areas of their strength within different disciplines, and in their student-faculty relationships. And they are in strong competition with one another for financial and other community support, for the best undergraduate students, for the best graduate students in particular disciplines, and for the best faculty in different subject areas.

In American universities, the academic department is an important unit in the organization and governance of a university faculty, especially for purposes of the teaching and research programs and personnel decisions. Departments are generally organized according to academic disciplines. Within a department, tenured professors in their teaching and research tend to operate much like individual entrepreneurs; but they do, of course, have a strong self-interest in the successful operation and long-term future of that department. The aim is a kind of collegial form of self-government, motivated by a common desire for excellence. Excellence can be defined in terms of the institution's reputation for undergraduate instruction, for graduate training, and for research output, both inside the university and among teacher-scholars in the discipline around the country and in the world at large.

In a very real sense, the faculty are the university. The reputation and success of a university depends largely on the teaching and research ability, the dedication, and the collegial cooperation of the professoriate. Therefore, the trustees and the administration generally allow a considerable measure of autonomy to the faculty in teaching and research activities, and successful university administration involves working in cooperation with faculty in the definition and achievement of the educational objectives of the institution.

Although our analysis will focus on major institutions, much of it applies to other universities and distinguished colleges as well. A number of the less-prominent universities have at least one distinguished academic department and to that extent are part of the interuniversity competition for top-quality faculty. Also, major universities not infrequently compete for individual faculty with departments in such distinguished colleges as Amherst, Oberlin, Swarthmore, and Williams. In considering the problems of applying affirmative action guidelines, one needs to recognize that a fairly mixed situation exists in terms of the academic reputations of individual faculty in the 2,500 institutions of higher education in this country, of which some 900 come under federal contract compliance.

PLAN OF THE BOOK

This study of antibias regulation of major universities begins in Chapter 2 with an examination of faculty appointments at such institutions. An understanding of the universities' demand for faculty is basic for the analysis in the chapters that follow. A reader knowledgeable of university aims in hiring, promotion, and compensation of faculty may wish to skim or omit this chapter.

Chapter 3 considers the various aspects of discrimination, especially in university faculties, and explains the need to take supply factors into account in dealing with allegations of discrimination in employment. The federal government, in its method of analysis and its enforcement programs, has tended to neglect these factors. The supply analysis in this chapter provides a basis for much of the discussion in the next two chapters.

Chapters 4 and 5 critically examine the federal program of compliance for contractors, based on Executive orders and administrative decisions. This HEW program of compliance uses estimated proportional representation by sex and race to establish the extent of discrimination, and requires that the contractor adopt numerical hiring goals by sex and race in order to achieve that proportional representation. Chapter 4 is concerned especially with the development of the enforcement program of HEW and the prescribed scheme for estimating the statistical base for hiring goals to enforce proportional representation. Chapter 5 contains a critical analysis of numerical hiring goals calculated in the required manner and considers other goals for affirmative action plans.

The enforcement programs of other federal agencies and of state agencies, based on legislation, are considered in Chapter 6. They involve the investigation and prosecution of complaints filed with an agency or the courts by individuals alleging that they have been discriminated against on grounds of sex, race, or religion. Use of adversary proceedings to determine the comparative professional qualifications of individual faculty for appointment and promotion is examined, and a voluntary system for outside mediation and arbitration of individual complaints of discrimination in faculty employment is proposed.

Chapter 7 discusses the staff of the Higher Education Division of HEW and the requirements it enforces with respect to the affirmative action plans of universities and colleges. On the basis of experience, a single HEW regulatory unit for the major universities is recommended.

The faculty system of collegial decision making by a community of scholars and its long-term educational benefits are discussed in Chapter 8. The faculty system is contrasted with industry's hierarchical system of authority from the top down. The chapter explains the unsuitability of the industrial model for faculty decision making under government antibias regulation.

Chapter 9 presents an alternative program of antibias regulation for faculty of institutions of higher education. The program provides for systematic collection of faculty data from covered institutions and central analysis of the material for purposes of comparing the progress of the institutions and estimating the effects of the government's antibias programs as well as for enforcement purposes. The six substantive components of the program are based on the material and conclusions presented in preceding chapters.

The final chapter summarizes the principal faults in federal antibias regulation of universities, indicating that the seven main defects of federal regulatory programs can have as adverse consequences for most of the country's universities and colleges subject to regulation as they have for major universities. The chapter discusses the need for leadership by faculty and administrators to achieve appropriate and constructive antibias programs on the part of both the universities and the government.

2. The Operation of Faculty Appointment Systems

Antibias programs and government regulation for antibias purposes need to take proper account of the systems for faculty appointment and promotion in leading universities. Those systems have evolved over a long span of time and are peculiar to higher education in countries of the Western world. They involve special procedures for faculty evaluation and selection of candidates, and they play a crucial role in determining faculty quality and the achievement by universities of their educational goals.

Unfortunately, university administrators and faculty are finding that things they assume are well known about the functioning of their systems for faculty appointment and advancement are often not understood and appreciated, and are passed off lightly by federal officials and others who press distinguished universities to make commitments to increase sharply the number of women and blacks and members of other minorities in their faculties. Consciously or unconsciously, efforts are being made, in the name of antidiscrimination, to transform those faculty systems—to make them conform more closely to industrial patterns of personnel management.

Such developments present a challenge to the faculties and top administrations of major universities, to whom the country looks for leadership in higher education. The public needs to be informed of the significance of those faculty systems for the successful accomplishment of the educational programs of universities, and the universities need to reexamine their systems of faculty appointment and advancement to make sure that they are as free of bias—race, sex, and other forms—as is humanly possible. That message runs throughout this book and is given special emphasis in the last chapter.

This chapter discusses the planning, the appointment procedures, the demand competition, and the drive for faculty excellence that characterize major universities. It explains the costliness of tenure appointments that prove unsatisfactory—"mistakes"—and the need to take account of faculty development in formulating and enforcing government programs for preventing bias in faculty recruitment, appointment, and advancement.

PLANNING FOR EXCELLENCE

Major universities generally strive, especially in the selection of tenured faculty, to achieve teaching and scholarship of the highest order. The tenured faculty play the central role in determining the intellectual quality of the institution and in shaping its long-term character and reputation.

To develop and retain a distinguished and effective faculty in the face of severe competition among the three or four dozen major universities requires a great deal of thoughtful planning, skillful recruitment, and careful development of an environment that fosters productive academic careers. Great academic departments and outstanding faculties do not come about by the mechanistic application of procedures or by a willingness to settle for the very good instead of the very best. They are usually the result of intelligent efforts and leadership on the part of many faculty and members of the administration.

In planning for the most effective use of the resources available for faculty staffing of a department or all departments in the arts and sciences in a university, the faculty and the administration need to think in terms of the educational objectives of the institution. In what kind of a program of teaching and research should the university excel? How much stress should there be on undergraduate teaching, on graduate teaching, on sponsored research projects? How wide a coverage of disciplines should a particular university try to achieve? In what subfields of the different disciplines should it seek to have great strength? What methods of instruction, and in what proportions, seem best suited for its educational program? What research best fits its faculty and physical facilities?

Especially in major universities, research and teaching reinforce each other. The search for new knowledge helps teaching to continue to be fresh and stimulating throughout a professor's tenure, and the critical interchange between advanced student and creative scholar sharpens and improves the research product. Students are thus able to gain insights into the exacting and imaginative work involved in creating new knowledge by scholarly and scientific methods and disciplined diligence.

Planning for a department, a group of departments, and the whole faculty involves not only drawing proper balances among undergraduate teaching, graduate teaching, and particular kinds of research, but also thinking about the needs for the next academic year within a long-range framework. Assistant professors are usually hired for a three- to five-year term; promotions to tenure, which normally extends to retirement, usually involve an employment commitment averaging between 30 and 35 years.

In addition to the foregoing, planning for excellence of a departmental faculty has to take account of such other factors as the following:

The specific amounts of teaching time by subfield required to staff needed courses, semester by semester, taking account of scheduled leaves of absence

Awareness of the dynamics of the discipline in order to anticipate student requirements and to take advantage of developing prospects for particular research enterprises

Arrangement for sufficient versatility in the teaching staff to furnish the flexibility needed to meet short-term changes and long-range trends in the discipline

Provision of sufficient diversity among the faculty to meet student and research needs—such as differences in approach and methods of analysis, differences in background and views in subjects where values and policy issues are important factors in instruction, and differences in sex, race, and cultural experience to provide breadth of understanding and role models, which may be especially important for undergraduate instruction

Retention of sufficient nontenure positions and turnover among junior faculty to supply the stimulus and invigorating influence of able, fresh recruits to the discipline, who are trained under other masters of their subject, and to provide opportunity for the department to select for promotion to tenure on the basis of a period of experience as a junior faculty member at the institution

Continuation and enhancement of an institution's reputation in certain subfields and disciplines gained as a result of the research contributions and training in the profession provided by previous faculty—in other words, the retention of traditional strengths and historical advantages of the department and the university

Faculty diversity is a complex subject that involves a variety of aspects and considerations. Faculty members differ with regard to: (1) their abilities for particular types of teaching, (2) their approaches and methods of scholarship, (3) their sheer intellectual ability and dedication to scholarship, (4) their gifts for intellectual leadership and administration, (5) their philosophies of life and education, (6) their cultural background and range of experience, (7) their political-social viewpoints and activism for reform, (8) their race, sex, and national origin, and (9) many other aspects. Individual faculty members have different combinations of these characteristics and generally are quite individualistic.

Particular kinds of diversity serve particular educational and intellectually creative purposes. Natives of an area can enrich area studies. Diversity of intellectual approach and philosophy may be more creative and educationally significant in the humanities and social sciences than in the physical sciences and engineering. Diversity of race, religion, and sex may be more important for student-faculty relationships and student role-models at the undergraduate level than at the graduate level, and it may be of greater significance in some settings and times than in other circumstances and periods.

In considering the question of appropriate diversity for a faculty, one should think in terms of balance among objectives and the area of focus for such balance. Proper diversity can improve breadth of understanding and provide challenge to conventional wisdom and unthinking conformity. But challenge just for challenge's sake can promote dilettantism and be nonconstructive. There is a question on the need for, and kind of, diversity in particular academic departments and on whether diversity should be considered and judged in terms of its distribution by department, by divisions of the arts and sciences departments, or over the arts and sciences faculty as a whole. A single pattern of diversity applied to each and every discipline in a uniform fashion would be a kind of uniformity—a contradiction of diversity. It would tend to injure the very values that diversity should promote.[1]

Faculty diversity, to be constructive, must involve tolerance and respect for appropriate differences among colleagues. Effective functioning of academic departments requires a readiness on the part of independent operators enjoying academic freedom to cooperate in the achievement of common departmental and university objectives, to pursue the truth in a collegial atmosphere of friendly rivalry. Above all, one should bear in mind the importance, especially for major universities, of the intellectual quality of the faculty and its combined ability to achieve the educational objectives of the institution.

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[1] Advocacy groups are prone to overlook the many dimensions and the differentiation inherent in the concept of academic diversity in their single-minded pursuit of one goal. The Office for Civil Rights in the Department of Health, Education, and Welfare in compliance enforcement at institutions of higher learning has also been subject to the same criticism. This matter is discussed further in Chapter 5.

ATTRACTING OUTSTANDING TEACHER-SCHOLARS

Major universities in this country compete for leading scientists, social scientists, and humanities scholars throughout the universe of advanced learning. In considering the recruitment and development of outstanding faculty, one needs to distinguish between mature teacher-scholars who are considered for a tenure position and "fresh" Ph.D.'s who are considered for term appointments. The latter are regarded as probationary employees gaining further training and experience in order to qualify for a tenure appointment at some institution.

Leading scholars usually have to be attracted away from tenure professorships that are satisfactory to them. These scholars generally have experienced numerous attempts to woo them to other universities. Their decisions to stay or to move are likely to hinge on the comparative advantages of positions at the competing universities—on which place they think would best facilitate their research contributions and would afford them the best opportunity to teach and develop outstanding young scholars.

Some of the leading teacher-scholars are so generally able and contribute so much to the work of their colleagues and the university enterprise that any major university would consider it a great achievement to attract one of them to its faculty. Other prominent scholars and scientists may not be effective in certain types of teaching and may be oriented almost exclusively toward their own research and research staff. Their scholarly reputations may make them academic ornaments, but some universities may decide that scholars of such limited usefulness are too costly in terms of meeting institutional needs and the disturbing repercussions that their appointment at a very high salary and with very special advantages would have on the tenured faculty in the department and in the university in general. Departments at universities that do not have "research professorships," and have a single faculty teaching in both the undergraduate and graduate programs, would not seek to attract such a "limited" contributor to their university's educational goals unless (1) the department was anxious for added prominence in research or (2) it was well staffed with faculty who had the attributes that the "star" lacked, and his or her subfield was one in which the university wished to be eminent in scholarly terms.

The most distinguished teacher-scholars are normally not in the market looking for jobs as is the case with students who are just completing their Ph.D. training or is the case with many junior faculty who, in their early probation years, are searching for career identity and often move between institutions as a part of that process. And a major university with a senior position does not normally need to canvass the market to discover or observe the supply being offered. The tenured members of a department as a group are likely to know who the top teacher-scholars are in the subfield where there is an opening. If one is thinking in such terms as reputation in the discipline and drawing power for the most able graduate students, the best-qualified teacher-scholars for a tenure opening should be well recognized by scholars in the discipline. That is especially true in the physical sciences, where a strong relationship appears to exist between the significance or quality of a scientist's contributions (as measured by citations of his or her published work) and both awards received and appointment in high-ranking departments.[2]

To avoid a charge of sex or racial bias, universities nowadays generally follow a procedure that involves some public announcement of both tenure and nontenure openings. Whether or not past experience has proved such announcement of value in recruitment for senior faculty positions, because of HEW pressure in affirmative action plans and in compliance reviews, money and time are spent for that purpose.[3]

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[2] See Cole and Cole (1967). Also, analysis shows that the system of using scientists as "referees" with respect to selection or rejection of papers submitted for publication to a leading scientific journal can serve to avoid any special bias of selection in terms of the authors' ages, scientific reputations, academic positions, etc. See Merton and Zuckerman (1973).

[3] Universities in Great Britain and the Scandinavian countries have for decades advertised open professorships as a standard practice. However, the ratio of female faculty to male faculty in Britain and the three Scandinavian countries seems, on the whole, to be lower than in this country. See Galenson (1973, pp. 27, 29).

When a decision has been made on the best-suited teacher-scholar for a tenure position, every effort is made to attract him or her to the university. If it cannot attract its first choice, a major university may leave a tenure post open, filling the vacancy temporarily with visitors or junior faculty until the university can obtain the very best mature scholar. It may give a standing offer to the professor considered the best person for an open professorship, or may wait two or three years and make a second offer to the top-ranked scholar who declined to move on the first offer. In a surprising number of cases, the second offer is accepted. Standing offers may also be made to a leading teacher-scholar without regard to an institution's need in a particular subfield. That might be done because of that professor's breadth of scholarly interests and the contributions that a powerful mind can make to the intellectual life of a university community.

A university trying to attract a distinguished professor will seek to make its offer as close to his or her desires as possible, without violating its teaching norms and appropriate salary relationships. Discussions concerning various aspects of the university and the offer—benefit comparisons, collegial relationships, housing, the relative advantages of living in the community, etc.—will be held with the professor and his or her family. A mature professor is likely to weigh all aspects because a move may be costly in terms of interruption of work and of adjustments to new conditions and because any move could be the last one. And, of course, the professor's present university will undoubtedly make a counteroffer.

The process of recruitment and appointment is typically much more market-like in hiring persons who have recently earned a Ph.D. degree or are close to it (normally the Ph.D. is a prerequisite for entering on the promotional ladder at a university). The new Ph.D. supply available each year is about one-seventh the size of the nation's faculty members who hold Ph.D. degrees. Of course, many Ph.D.'s in engineering and science go into nonacademic employment. Universities usually hire junior faculty (assistant professors and instructors) in much larger numbers than senior faculty (associate and full professors). For instance, junior hires recently have been running at a rate 5 to 10 times the figure for senior hires at some major universities.

Enforcement of equal employment opportunity for women and minority persons is vital when they are ready for their first regular teaching position. That is true because: (1) there is a possibility that some new Ph.D.'s of great promise will not be known by leading scholars in a subfield;[4] (2) with considerable uncertainty of the ultimate performance of individuals and the limited commitment of a nontenure appointment, universities may be justified in making some high-talent but high-risk appointments where the probability that the appointee will achieve great distinction may be as low as one out of four; (3) experience in the early years is very important in determining the career level that one aspires to reach; and (4) it is most desirable that those who have the capability to reach the top in the academic profession have the proper environment and opportunities (including free time for research) to permit the full development of their talents and contributions.

It is at the stage of first full-time appointment to a position on the ladder of promotion that any "pattern of discrimination" in faculty employment can best be established by objective analysis. Major universities seek to appoint persons to assistant professorships from among the most promising as teachers and scholars in the current crop of Ph.D.'s[5]

Even during the current period of oversupply of Ph.D.'s relative to demand, especially for positions at the major universities, there is strong competition among leading departments for Ph.D.'s they believe have the greatest promise. Ph.D.'s assumed to be the most promising candidates are likely to receive offers from several major universities at about the same time of the year – December, January, and February.

Factors that can influence the decision of a strong candidate include the following: the salary and rank offered; the prospects for a tenure opening later on in the candidate's specialty; teaching loads; free time for research, including paid leave for that purpose; research support and facilities; other benefits, including pensions; the quality and congeniality of the faculty in the department; the quality of the students; the university's financial condition; and the kind of leadership the university's administration provides.

Excellence attracts excellence. To draw new faculty of the highest quality to junior positions, a university should have a first-class academic reputation. Able and ambitious new Ph.D.'s may wish to spend their early years in the profession at a leading university for the "career development" benefits that professional experience there can provide. And, even though it offers little prospect for a tenure opening in a certain subfield, a leading university may be a very favorable place from which to obtain an attractive post elsewhere.

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[4] Ph.D. candidates of high quality often earn reputations as graduate students while working on their theses by such means as the submission and publication of articles at that stage and the presentation of papers or participation in discussions at annual meetings of the professional association in the discipline.

[5] The sex ratio for the top group of new Ph.D.'s in a discipline might differ from the sex ratio for all new Ph.D.'s in that discipline. However, one can probably assume that the average quality of all female new Ph.D.'s and all male new Ph.D.'s in any one year is approximately equal.

THE FACULTY'S ROLE IN ACHIEVING EXCELLENCE

As already explained, the faculty in leading universities usually enjoys a large measure of self-governance. Indeed, there seems to be a fairly close correlation between an institution's standing in the scholarly world and the control that the faculty enjoys over its own affairs. At the highest levels of academe, the faculty, through the department structure and a facultywide appointments committee, practically exercises the power to select new faculty, to judge which faculty members should not be reappointed and which should be promoted to tenure, and, in many institutions, to decide faculty salaries and salary increases for individual faculty. Essentially, the tenured faculty are the employers of faculty in leading institutions, and any charges of discrimination in faculty employment are, for the most part, really made against faculty members in the performance of their faculty responsibilities.

Leaders among the faculties of major universities place great store on significant contributions to knowledge through the disciplined methods of scholarship and science. For outstanding contributions, teacher-scholars are singled out for rewards of various kinds—rapid promotion, professional awards and honors, ample research support, and other forms of academic distinction and privilege. At the top reaches of academia, there is a considerable amount of "discrimination by distinction."

In a leading university, the tenured faculty of a department should have the primary responsibility for recommending new appointments, reappointments, and promotions and also for judging the salaries that assistant and associate professors merit. Most of the tenured members of a high-ranking department should know by reputation the leading teacher-scholars in the discipline, should be in a good position to judge the qualifications most needed in a candidate for an open position in the department,[6] and generally should have a strong professional interest in hiring an outstanding performer and an effective colleague. Tenured faculty tend to have a fairly long perspective on the department and have an extensive experience with the development of graduate students, junior faculty, and senior faculty on which to base their judgment of a candidate's promise as a teacher-scholar in that setting.

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[6] For joint appointments in two departments or where interdepartmental programs are involved in appointments, a proposed appointment would be critically examined by the two or more departments or organizational units.

From the viewpoint of long-run benefit to the institution, perhaps the most important function that the tenured professors of a department perform is to select and attract the best persons for tenure appointments. Usually a great deal of time, effort, and care are devoted to that process.

Rather typically, the department selects from its members a search committee to study the scholarly work, the teaching qualities, and the potential contributions to the department and the university of mature teacher-scholars in the subfield who appear to be among the best suited for the post. The search committee obtains all the significant information it can on the leading candidates and makes a report to the tenured members of the department, possibly ranking the leading candidates and recommending one as the best. The department goes over the material, with other members reading the writings and possibly collecting additional confidential material from personal sources. When the department's tenured faculty are satisfied that the canvass of the subfield, the available material on candidates, and the analysis of their strengths and weaknesses are complete and according to requirements, they vote on a recommendation that an offer be made to the candidate considered best qualified for the post.[7]

The department's recommendation is then sent to the administration, where it is checked for conformance to procedures and completeness of documentation. The procedure in many major institutions provides for solicitation by (say) the dean of the faculty of letters from distinguished outside scholars in the field and subfield, asking, on a strictly confidential basis, for an evaluation of the recommended candidate as a teacher-scholar and for a comparison of his or her qualifications with other professors of recognized excellence in that subfield in this country and abroad. When the confidential outside letters and any other additional material are available, the procedure may require that the department's recommendation be presented to a higher-level committee, perhaps a standing faculty committee on appointments (technically advisory to the president and elected by the faculty) for its review.[8]

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[7] The department's tenured faculty could decide at this point that no possible candidate is sufficiently distinguished and promising as a teacher-scholar in the future for appointment to a professorship and instead have the opening converted to a nontenure or a visiting appointment for the time being.

Review by an overall faculty or faculty-administration committee on appointments has certain advantages. Such a committee is able to judge a department's appointment recommendation on a broader, less parochial basis; it is in a position to compare the quality of recommendations coming from the different departments; and it has additional material on which to base a judgment. That additional material includes the outside confidential letters of evaluation, which, generally speaking, are remarkably frank and informative and often contain quite thoughtful analysis of the subfield and comparative assessments of individuals as teacher-scholars.

The committee on appointments makes its recommendations, both for and against, to the president—who usually accepts them, presenting the favorable ones to the trustees for final approval. Experience indicates that faculty-appointments committees are apt to reject more department recommendations for promotion to tenure of faculty from within than recommendations for appointments to tenure from outside. Partly, that is because a number of contemplated appointments from outside may be headed off by the deans and the president's raising questions with the department chairman before a formal recommendation is made by the tenured members of the department.

Faculty assessment of an assistant professor for promotion to tenure based on a five- to seven-year period of experience, which ends in a decision either to promote or to terminate, is a very severe form of testing. During that period, assistant professors at major institutions are under great pressure to achieve an outstanding record in scholarship, in teaching, and in other contributions to the university that compares favorably with the record of scholars in their field at other universities. Such a record generally requires intense dedication to the task of achieving a national and international reputation in one's field for scholarly accomplishment and promise of further accomplishment. In some cases, promotion cannot be achieved because no appropriate tenure opening exists in the assistant professor's subfield at that university.

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[8] The procedure outlined is very similar to that in effect at Princeton, Stanford, and a number of other universities. Under the Harvard system, the department reports and recommendation for a tenure appointment are submitted to an "ad hoc committee," composed of several inside faculty from different departments and several outside scholars. The committee meets with the president and the dean of the faculty. At Princeton the deans and the president meet with the committee in a series of meetings that review departmental recommendations concerning reappointments, promotions, new outside appointments in the tenure ranks, and salary increases in the three professional ranks.

At most major universities, probably less than half of those who are appointed assistant professors are promoted to continuing tenure. At Princeton University, for example, in the early 1960s about one out of three who were appointed assistant professors eventually achieved tenure; by the late 1960s and early 1970s, that ratio had declined to about one out of four, despite an apparent increase in the average quality of assistant professors.[9] In the arts and sciences at Harvard University, the ratio is considerably lower; assistant professorships there are, for the most part, considered as temporary appointments for one five-year term.

With such severe competition for tenure appointments and so much of the university's future riding on them, it is important to make certain that the universities have proper procedures to assure open and equal opportunity in recruitment and that they base assessment of qualifications on as much valid information and expert judgment as possible. In the enforcement of nondiscrimination in university faculty hiring and advancement, the Office for Civil Rights of the U.S. Department of Health, Education, and Welfare should place more stress and store on proper procedures properly applied and less on questionable statistical estimates.

The faculty procedures are less well-suited for handling appointments outside the regular ranks, such as a lecturer appointment. That is so because candidates for those positions generally are selected on grounds other than scholarly achievement or promise. Such special nonscholarly appointments include persons hired as native-speaking teachers of such foreign languages as Arabic, Chinese, Japanese, Russian, and Turkish. They also include skilled artists in the visual arts: dancers, painters, film makers, and sculptors. Distinguished scholars may find it somewhat difficult to assess the university performance and academic promise of faculty performing such services. Persons in such special categories of faculty are often hired for undergraduate instruction and for short periods of time. The purpose and terms of their appointment need to be clearly defined and mutually understood if they are not to feel discriminated against in cases where their appointments continue over a considerable period of time and then are terminated or do not lead to promotion.

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[9] For a discussion of the factors and procedures in promotion to tenure at Princeton, see *An Information Statement for the Guidance of New Faculty at Princeton University* (1972).

THE COSTLINESS OF MISTAKES

At leading institutions, an outside appointment to a professorship carries tenure upon appointment, and an outside appointment to an associate professorship either does, or practically does, carry tenure.[10] Appointments that turn out to be mistakes can be quite costly unless the disappointing faculty member can be induced to leave. Since he or she has been a disappointment as a teacher-scholar in a major university, rival universities may not have an interest in hiring that faculty member away.

A teacher-scholar may, over time, develop serious shortcomings. For example, he or she may have a block on publication of his or her theoretical work or research results. If the faculty member has a lively, innovative mind and makes contributions through the effects his or her ideas have on the published work of students and colleagues, that may not be a serious drawback. However, a department in a major university can afford only a limited number of oral-tradition, publication-shy scholars.

Other types of mistakes are more serious. The faculty member on tenure appointment may lack the mental capacity or the drive to do the hard work of advanced teaching and research necessary to become a major figure in his or her field. The scholarly efforts of such a faculty member may consist largely of tidying up the edges of a system of thought of a distinguished professor. Over time both the teaching and research contributions of the faculty member become less and less interesting or important. Similarly, in dynamic disciplines, the faculty member's professional training may be rendered obsolete by the development of new research methods and analytical techniques or of new branches of the discipline, thus reducing the effectiveness of his or her teaching and research activities.[11] Or, the attention and energies of the faculty member may be drained off into outside consulting or other off-campus activities that contribute little to the growth and intellectual enrichment of a teacher-scholar so that his or her academic contributions suffer. For some of these adverse developments in individual cases, a department's faculty or a department's chairman or the university administration, singly or in combination, may share some of the responsibility for the decline. They may have failed to encourage and advise the faculty member and to help him or her to adjust to changes. One reason for stressing research and paid leaves of absence for scholarship is the stimulus to renewal and growth that they provide.

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[10] Often an initial appointment of associate professor from outside is made as a three-year appointment which, if renewed, carries tenure. Normally, much the same procedure is followed for appointment to associate professor as for appointment to tenure, and the initial appointment is followed by a further appointment carrying tenure in practically all cases. Only a great disappointment with the person's performance would cause a refusal to reappoint an associate professor from outside.

[11] In biochemistry it is said that the field is developing so fast and the competition for scientific contributions is so keen that, over a five-year period, practically all knowledge becomes obsolete, and professors have to spend an extraordinary amount of time on their research and on preparation for teaching advanced courses.

Finally, the faculty member's failure to live up to expectations may be due to nervous breakdowns, alcoholism, severe family problems, or other personal handicaps. The strenuous competition at high levels in academic life and the severe judgment of faculty by able students (reflected in their selection and evaluation of courses and choice of dissertation supervisors) may cause a sensitive faculty member to feel great strain.

As a faculty member's comparative effectiveness as a teacher and scholar declines, his or her usefulness to the department and university becomes more and more limited. He or she is not used so much for graduate teaching, is not invited to give papers or seminars on research achievements, and is less able to raise adequate funding for research. Colleagues in the department, including junior faculty, have less respect for his or her judgment; nevertheless, the professor, though declining in professional status, continues as a tenured member of the department to vote on new appointments, reappointments, and promotions. The relatively ineffective professor may be blocking the subfield either for appointment of a much more able teacher-scholar from outside or for promotion of an outstanding assistant professor in the department to tenure in that subfield.

Over time, the unsatisfactory professor's situation becomes increasingly embarrassing and difficult. Under a merit system of pay based on performance, the professor may receive either no salary increase or a very small one each year, as a result of evaluation of his contributions by the chairman of the department, the faculty appointments or review committee, and the deans. His or her discontent may have unfortunate effects on the department's faculty meetings. Complaints may be made to the administration. Eventually, the professor may charge that he or she is being discriminated against unfairly in various ways—in salary, promotion, the granting of paid leaves for scholarship, the allocation of department and university research funds, the warnings colleagues give to students about the professor's courses, etc. If the professor can do so, he or she may decide to file a complaint with a federal or state civil rights compliance agency, alleging discrimination on grounds of sex, race, or religion.

With a well-developed appointments' procedure and professional handling of cases by the departmental faculty and the administration under that procedure, the uncorrectible "mistakes" at any one time can be confined to no more than 2 percent of the tenured faculty. Weaknesses in procedure or stress on nonprofessional standards is likely to lead to a much higher percentage.[12]

It is, of course, especially troublesome if the "mistakes" tend to be concentrated in one department or a few departments. Where that is the case, it may be difficult to improve faculty quality because such departments would not be attractive to outstanding teacher-scholars or students. Also, in enforcing antidiscrimination laws and regulations, compliance officials may argue that female and minority-group assistant professors are fully qualified for an opening if their training, teaching, and scholarship are equal to the qualifications of some tenured professors in that department.[13] Given a universitywide ratio of, say, only one out of four assistant professors able to continue on through to promotion to tenure, pressures are likely to be very strong indeed to have women and blacks among those promoted in order to meet numerical goals and to have more racial and sexual "diversity" in the faculty. Such pressures, if effective, are likely to increase the percentage of "mistakes," especially in relatively weak departments. Unfortunately, "mistakes" in many instances do not become very evident for 5, 10, or even 15 years, but the tenure period amounts to 30 to 35 years.

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[12] This is not the place to argue the pros and cons of academic tenure. The author believes that for major universities the tenure system has been, on balance, beneficial in terms of the quality and the performance of the faculty. In promotion cases, tenure provides junior faculty with a definite goal and forces the department's tenured faculty to make a final, well-documented decision on an assistant professor by a specific date, following an adequate period of experience. Tenure encourages professors to take a long-range view of the university's needs and their own careers, including research plans. It makes them more willing to take on tasks (such as department chairmanships and committee assignments) for the good of the university apart from their teaching and research. The security that tenure provides facilitates a collegial atmosphere and, under academic freedom of inquiry, candid criticism of university affairs and colleagues' work; the small number of "mistakes" in granting tenure and the possible disincentive of security to high productivity in an unfavorable environment normally are not sufficient to offset such advantages. For an article pointing to the advantages of tenure in distinguished universities, see Brewster (1972). See also *Discussion Memorandum on Academic Tenure at Harvard University* (1971); the system of Ad Hoc Committees on Permanent Appointments is explained pp. 36–40. For a recent comprehensive analysis of faculty tenure see Commission on Academic Tenure (1973).

[13] Revised Order No. 4 (Title 41 of the Code of Federal Regulations, Chapter 60-2.24 f5) states: "Neither minority nor female employees should be required to possess higher qualifications than those of the lowest qualified incumbent." See also Weitzman (1973, p. 484).

SOME IMPLICATIONS FOR ANTIBIAS REGULATION

The facts set forth in this chapter need to be taken into account in federal and state programs of enforcement of nondiscrimination for the faculties of major universities.

The hiring of tenured faculty in leading institutions is a much more individualistic and carefully considered matter than is generally appreciated. It may make little sense, indeed it may be positively misleading in the case of major institutions, to think in terms of an ill-defined pool of supposedly qualified and available candidates from which judgments are made about the existence or nonexistence of discrimination and on the basis of which universities are to establish numerical goals for their hiring of women and blacks. And, as previously mentioned, it should be realized that charges of discrimination in faculty employment are likely to be directed at the faculty and to imply criticism of faculty procedures, which may, in some instances, need improvement.

There are significant differences among major universities and among academic departments within major universities. Leading institutions vary in size, traditions, governing structures and practices, and educational methods and goals. Vital to America's institutions of higher learning are their independence and the competition among them that is partly based on their differences. A government enforcement program should not, in the name of antidiscrimination, seek to impose a single pattern or set of procedures in a mechanistic, routine manner upon the internal operations and practices of all universities.

One of the great strengths of American universities is the drive their faculties have for improved quality and the opportunity that opens up for persons of diverse background to teach and write their way to the top in the world of science and scholarship. Makers and enforcers of antidiscrimination regulations should be careful not to impose requirements that blunt that professional drive and discourage salary differentials according to merit of performance as teacher-scholars.

Civil rights rule-makers and compliance enforcers need to recognize that graduate study leading to a Ph.D. degree is not the qualifying experience for a tenure position at a major university. The testing period is usually the first five to seven years after completing the requirements for a Ph.D. It is during those years that one demonstrates whether he or she has the intellectual capacity, the ingenuity and originality, the discipline and career dedication to make the outstanding contributions necessary to be a leading teacher-scholar in one's age group in a disciplinary subfield. The age range during which those qualities are demonstrated is usually between 25 and 35.[14]

When major institutions continue to promote to tenure only one out of three or one out of four highly selected assistant professors and the ratio turns out to be that unfavorable for female assistant professors, will the government enforcers recognize that that result is to be expected? Or will they press their aim "to increase materially the utilization of minorities and women at all levels where deficiencies exist"? And will some of the women not promoted (and thus terminated) and their supporters insist that the university is not properly carrying out its "affirmative action obligation"? And will those views lead not to the use of regular faculty self-government procedures for a hearing and ruling by a committee of faculty peers on cases of alleged unfair treatment in relation to appointment, reappointment, promotion, or academic rights but to the filing of a formal complaint with a government compliance agency or a court?

Those are the kinds of questions that press for attention as one studies recent experience and thinks about the future of our major universities in a period of increasing federal and state government intrusion into their governance.

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[14] As is explained in the next chapter, that age range is likely to be a difficult one for women who seek to combine both a professional career aimed at the top and marriage and children.

3. Discrimination and Qualified Supply

Discrimination in employment pervades all advanced societies. An enterprise generally tries to select employees who will work well together under its kind of supervision and who have the potential for promotion to more responsible positions. Employer preference for "our type of employee" may be based on past experience, employee opinion, management's personal prejudices, unsupported assumptions, and any number of other influences. Firms, through in-plant training and in other ways, invest in developing an efficient work force; selection of the "right people" for particular jobs is a key element in that process.[1]

It is theoretically conceivable that employers' preferences could be distributed—locally, industrially, and occupationally—to reflect a true cross section of the total supply. In that case, all workers with the same qualifications could have equal employment opportunity. The supply itself would, of course, reflect any lack of equal opportunity that individuals might have experienced with respect to the particular kind and amount of preemployment training and experience required to acquire the necessary qualifications.

Actually, individual employer discrimination in hiring and employment presents a serious problem, especially for a democratic society, because it tends to be concentrated against certain classes and groups and to be more prevalent in some occupations than in others.

Theoretically, employer competition for workers should eliminate discrimination in employment and pay. Competitive forces should operate to have persons in a locality who have identical qualifications receive the same pay and have equal opportunity for employment in a job stressing those qualifications. Actually, market forces have not served to eliminate fully discrimination in pay or hiring; indeed, they seem, in many cases, not to have been very effective in significantly reducing the economic consequences of discrimination on the individuals directly affected, even over long periods of time.

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[1] For a statement of views of managements concerning their preferences in hiring workers for manufacturing operations, see Lester (1954, pp. 53–68).

Because the market has been relatively ineffective in solving many aspects of discrimination in employment against women and blacks and members of other minorities, government corrective action has been taken in the form of legislation, Executive orders, and regulations.

The term *discrimination* has been loosely used, often to ascribe blame and charge guilt without really knowing just what is meant. Strictly speaking, sex discrimination in employment would occur if men with exactly the same qualifications[2] as women were given preference in hiring, advancement, or pay; racial discrimination would occur if, in the same circumstances, a white person were given such preference over a black person. In each case, the reverse would also be true; if a woman or a black were given preference, there would be sex or racial discrimination. Where ability and other attributes are not identical, selection of a man with a better combination of qualifications for the job over a woman, or a white over a black, would not constitute sex or racial discrimination. Discrimination could occur at an earlier stage, however, in the form of unequal opportunity to obtain the necessary education and other qualifications for a particular position.

Education can play an important role in the elimination of prejudice and the development of personal talents, so that individuals enjoy more freedom to choose and enter appropriate careers and can advance in them according to their ability, ambition, hard work, and available job openings. Mainly, education helps to eliminate barriers to opportunity for individuals—whatever their skin color or sex—so that they can become part of the qualified supply for a profession or other high-level position requiring advanced university training.

As leaders in the world of higher learning in the humanities and the social and physical sciences, distinguished universities play a major role in encouraging and developing highly talented supply, while, as a part of the demand, they employ some of that supply. Because they are so important on the supply and demand sides, the faculty of major universities are likely to be sensitive to university obligations in both aspects. As teachers, they are very much aware of both the beneficial consequences that the elimination of bias has for education and the social cost when talent is underdeveloped because it is blocked by discrimination.

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[2] It would be most extraordinary for two candidates for a particular faculty position to have a combination of qualities for university teaching and for research contributions that is identical, or even "essentially equal." That is one reason that discrimination on grounds of sex, race, etc., may be difficult to prove in some cases.

In this chapter, supply for faculty positions in major institutions will be examined first for women and then for blacks. Many aspects of the discrimination problem, especially in universities, are different for women and blacks. That fact has too often been disregarded in antidiscrimination programs and legislation and by enforcement officials.

Basically, the qualifications for nontenure positions or for tenure positions in major universities should be the same regardless of race, sex, religion, or ethnic background. As suggested above, the qualifications for nontenured faculty can be described as follows: (1) intellectual ability and scholarly promise, demonstrated as a graduate student, that would rate one in the top group of the new Ph.D.'s in the discipline in the country;[3] (2) special competence in the subfield or combination of subfields, because openings in a discipline usually carry subfield qualifications even at the nontenure level; and (3) special abilities in teaching, research, and administrative matters that suit the institution's educational goals and student population and complement the teaching and research capabilities of the existing departmental staff.

For tenured faculty, as previously explained, qualified supply needs to be defined in even more individual and special terms, and the basis for judging qualifications is one's performance in teaching, scholarship, and colleagueship during the first five to seven years as an assistant professor.[4] Generally speaking, a national or international reputation as an outstanding teacher-scholar is a necessary qualification. Beyond that, each institution seeks the person best suited for its particular needs over the projected period of a faculty member's tenureship.

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[3] One might say top decile to indicate the kind of intellectual ability for academic work that major universities would expect to have for faculty appointment. However, as high as a quarter to half of the Ph.D.'s being turned out at a particular major university might be among those in the top decile for the whole country, in view of the selectivity it may be able to exercise in admissions and the high quality of its graduate program in that discipline.

[4] In disciplines and subfields such as advanced mathematics, theoretical physics, and economic theory, one may gain an international reputation for distinguished contributions that qualify the individual for a tenure position at a major institution in less than five years.

DISCRIMINATION AGAINST WOMEN

Much of what is loosely called sex discrimination in employment is, at least partly, the consequence of choices made by women that are not attributable to a particular university. Those choices—of courses in secondary school and college, of occupation, and of marriage and children—may, of course, have been greatly influenced by notions concerning the proper role for women that are held by parents, friends, teachers, placement officers, and employers.

An example will indicate the problem of assessing responsibility or blame for the lack of female faculty in particular disciplines in universities. Women hold less than a half of 1 percent of the Ph.D. degrees in engineering and constitute a smaller percentage than that of the faculty members in engineering in universities. (By way of contrast, women in Russia represent perhaps 15 percent of those holding the degree that is equivalent to a Ph.D. in engineering and have been about 11 percent of the engineering teaching faculty in universities.)[5]

If an engineering department or school in a major university has never had a female faculty member, does that university have a "deficiency" and can it be charged with "excluding women"? If it should attract a female faculty member to its engineering school from another major institution by an offer at the same rank, has the university overcome its guilt? Can the university from which the female professor was attracted now be charged with sex discrimination for not having a female member in its engineering faculty, whereas formerly it did have one? Such questions assume undue significance under a system of government regulation that stresses numerical hiring goals.

If the supply of women who are well qualified for faculty positions in engineering is not increased but is only shifted from one university to another, what has been accomplished with respect to sex discrimination in universities beyond, perhaps, bidding up women's salaries, even above those for comparable men? It seems evident that the most effective affirmative action that major universities could take is not to bid the few qualified female engineers away from each other in a kind of game of musical chairs but to adopt effective measures to help increase the qualified supply.[6]

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[5] See Dodge (1966, pp. 137, 208, 279).

Unfortunately, important aspects of supply are neglected in the U.S. Department of Health, Education, and Welfare's *Higher Education Guidelines*[7] (Office for Civil Rights, 1972), issued for determining discrimination and for formulating affirmative action plans. In the HEW Guidelines, a university is given no credit whatsoever for affirmative action through successful efforts in expanding qualified supply; instead a university gets its required numerical goal for employing female faculty increased in proportion to the increase in supply that it achieves.[8]

THE SUPPLY AND DEMAND SIDES

Major universities can discriminate against women for faculty appointment and advancement on the supply side—in graduate education or in postgraduate training as a faculty colleague—or on the demand side—as employers of women who have the graduate training and acquire on-the-job training on their faculties. The supply and demand sides are, of course, in some respects closely interconnected.[9] It is, however, desirable to consider first and separately some of the ways that universities may discriminate against women in training and developing supply qualified for the different levels of teaching and research in higher education.

Universities may discriminate against women in admissions as undergraduate and graduate students. Especially at the graduate level, faculty play a primary part in making decisions on admission and fellowship or research support. Any limitations on female students that are not placed on male students deny the former equal opportunity to qualify for professional careers, including careers as university faculty members. The same can be said with respect to scholarship and fellowship support.

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[6] Relative increases in women's salaries would, of course, tend to stimulate efforts to increase the qualified supply while at the same time encouraging economy in the use of women at the relatively higher salaries.

[7] Hereafter referred to as HEW Guidelines.

[8] The pertinent provision is as follows: "To the extent that an institution makes a practice of employing its own graduates [presumably in any department], the number and percentage of graduate degrees which it has itself awarded to women and minorities in the past ten years or so should be reflected in the goals it sets for its future faculty appointments" (Office for Civil Rights, 1972, p. J4). Most major universities would employ one or more Ph.D. candidates or recipients on the faculty at least for a short period of time.

[9] The supply and demand sides are interconnected, for example, because increased demand tends to stimulate the development of more qualified supply, and because, during his or her probationary, pretenure period on the faculty, the individual is acquiring generally valuable training in the profession to qualify for a tenure appointment, while at the same time engaging in regular full-time employment.

More subtle is whether a department's faculty, in allocating fellowship or research support, discriminates against women if it takes any account of the fact that female students generally have a longer period of graduate study and complete their Ph.D. requirements at a later age than men. Data for the 1950s and 1960s show that consistently for each discipline there is a difference between the median ages of men and women at Ph.D. attainment; the average of all disciplines shows women to be two to three years older. Family responsibilities as wives and mothers are a significant factor causing the period of graduate study to be more prolonged for women, so that the average lapse of time between the baccalaureate and the doctoral degree was approximately 12 years in the case of 1,547 women who earned Ph.D. degrees in 1957 and 1958 (see Astin, 1969, pp. 19–20, 140–142, and the references therein).

Also, female graduate students are more likely to interrupt or discontinue their graduate study. A study of 3,542 recipients of Woodrow Wilson National Fellowships for preparation for an academic career (all of them at about the same level of intellectual ability and over a quarter of them women), who entered graduate school in 1958, 1959, and 1960, showed that only 18 percent of the women and 42 percent of the men had received Ph.D. degrees by mid-1966.[10] On the other hand, during the same period, 60 percent of the women and 36 percent of the men acquired master's degrees which, the author points out, may have been an adequate degree for the teaching career that many of the women then planned.

Do the facts that, on the average, women take longer to obtain a Ph.D. degree and that highly talented women have a higher dropout rate from graduate study than men have a prejudicial effect on their employment as faculty members in major universities? Presumably they can, unless there is insistence that selection must be made strictly on the basis of each individual's record and promise, apart from any group probabilities or average experience. And, as previously noted, it may be worth taking some risk on such scores where there is a distinct possibility that the candidate could become a distinguished member of the profession.

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[10] The percentages are standardized for distribution by academic discipline since the average time to the Ph.D. is relatively short for the sciences and long for the humanities (Mooney, 1968).

Marked fluctuations have occurred over the past half century in the number of doctor of philosophy degrees granted to women compared with men. Table 1 shows by five-year periods the percentage of the total Ph.D. degrees awarded by United States universities from 1920 through 1972 that were earned by women. The percentage for 1945 to 1949 is relatively high, not because the number of doctorates granted to women rose so much but because the number granted to men was so low from 1943 through 1947 as a result of the interruption of men's graduate study during World War II.

As Table I indicates, a drive for advanced study and high professional achievement characterized the generation of women who came of age in the 1920s and 1930s (President's Commission on the Status of Women, 1963, pp. 67–70). That drive slacked off after World War II to be replaced to a significant extent by women's interest in the home and care for young children during the years that are so crucial for preparing and establishing oneself in a professional academic career aimed at high achievement, namely, the years from 25 to 35.

The 1950s and early 1960s were years of "the baby boom." Between 1940 and 1965, the proportion of married women in the female population rose significantly, and the percentage of married

TABLE 1
Percentage of all Ph.D.'s granted between 1920 and 1972 that were received by women

*Period**	*Percent*
1920–1924	15.2
1925–1929	15.2
1930–1934	14.7
1935–1939	14.8
1940–1944	13.9
1945–1949	15.1
1950–1954	9.4
1955–1959	10.5
1960–1964	10.8
1965–1969	12.1
1970–1972	14.9
All 52 years	12.5

* From 1920 to 1957 on a calendar-year basis; thereafter on a fiscal-year basis.

SOURCE: National Research Council, Office of Scientific Personnel, doctorate records file.

women in the age group 25 to 35 who had children under six years of age also increased markedly (see Bowen & Finegan, pp. 202–203 and Appendix Table 7-B, p. 586). Those developments helped to cause the labor force participation rates of these women to decline appreciably and to limit their career ambitions. A result was that in the 1950s and early 1960s a much smaller percentage of women both prepared themselves with Ph.D. training and drove hard to reach the top in their profession.

By the late 1960s and early 1970s, the demographic trends had changed. The proportion of women who were married had declined slightly, the percentage of married women with children under six years of age had dropped sharply, and the labor force participation of women aged 25 to 35 had risen. A new career-oriented drive was in full swing. There was more sharing of household duties among young couples, and stress was being put on the importance of married women having time to pursue academic careers. Generational changes in women's ambitions and the possibilities of fulfilling them through professional careers need to be taken into account, along with factors on the demand side, in any assessment of responsibility for "underrepresentation" of women among tenured faculty, especially in major universities.

Studies and statistics indicate that, in the past, the most serious obstacle to female faculty members progressing in their careers is marriage and children. That is the case even though about half of the female faculty in universities are not married,[11] and surveys indicate that female Ph.D.'s who are married are twice as likely to be childless as women in the same age group in the general population and that they are likely to have a smaller family if they do have children.[12]

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[11] In a 1972–73 survey, 48 percent of the women in universities and the same percentage in all institutions of higher education had "no spouse" at the time (Bayer, 1973, p. 31).

In a survey of women who received Ph.D. degrees in the calendar years 1957 and 1958, it was found that seven or eight years later (December 1965 or early 1966), 55 percent were married or had been married, compared with a figure of 94 percent for women of comparable age in the general population (Astin, 1969, p. 27).

[12] The survey reported in Astin (1969, pp. 29–30) showed that 28 percent of the married women who had doctorates were childless at that time (that is, generally in their early forties) and that those with children had an average of 2.0 compared with 2.6 children for the women in their early forties in the general population. A survey of college and university faculty in 1968–69 showed that 40 percent of the women in university faculties had not married and that 67 percent had no children (Bayer, 1970, p. 12).

In a questionnaire survey sent out at the end of 1965, the women who received Ph.D. degrees in the calendar years 1957 and 1958 were asked about the problems they "encounter in developing [their] careers fully."[13] Eighty percent of them were then employed in academic institutions. The respondents were asked to indicate whether each item considered to be a career obstacle was a "major problem" or a "minor problem." In reply, 18 percent said that "finding adequate help at home" was a major problem, and 22 percent more said that it was a minor problem. Half of the respondents used some sort of outside help for household work and child care. Nevertheless the female doctorates, as a group, spent an average of 10 hours a week on child care plus 18 hours a week on household tasks such as cooking, cleaning, and marketing, which meant a very large claim on the time and energy of half of the female Ph.D.'s who were married (Astin, 1969, pp. 97, 101-102, 147, and 178-179).

"Employer discrimination" was considered a major problem by 12 percent of the women who held doctorates and a minor problem for an additional 24 percent. "Husband's job mobility" and "husband's negative attitudes toward my working" were considered a major problem by 6 and 2 percent, and a minor problem by 8 and 4 percent, respectively, of all respondents. Since only half of the respondents had husbands, those figures would need to be doubled for married women. Almost half of the female Ph.D.'s (45 percent) had been with the same employer during the seven or eight years since receiving their degrees, and half of the married women reported their husbands also had Ph.D. degrees (ibid., pp. 28, 102-103, and 179). If the husband moves to a new position that necessitates a change of employment for the wife, her employment opportunity and progress in her career can be adversely affected.

With respect to discrimination in employment, the female Ph.D.'s were asked: "If you have [presumably at any time] experienced any employment discrimination practices indicate which kind," with the choices listed in order of frequency of respondent designation, as follows: "differential salaries for men and women with the same training and experience" (40 percent of respondents); "differential sex policies regarding tenure, seniority, and promotions" (33 percent); "unwillingness and reservation on the part of employer to designate administrative responsibility and authority to professional women employees" (33 percent); "employer prejudices against hiring a woman" (25 percent), and "other" (12 percent).[14]

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[13] Astin (1969). A total of 1,547 complete questionnaires were returned for an 83 percent response.

With male faculty outnumbering female faculty in universities 6 to 1, many women cannot help but feel that their interests and problems are not given proper consideration by their departmental colleagues, by university appointments committees, and by the administration. With such a sex ratio, faculty personnel policies could be expected to be oriented toward the normal career patterns of males and to neglect, to some extent at least, the interests of women pursuing careers in academe. Until sex discrimination in employment was banned by federal Executive orders and legislation, and women's groups pressured for policies oriented toward women's needs, universities generally paid little attention to possible sex bias in their hiring and employment policies. For example, antinepotism policies, either stated or assumed, served to reduce married women's employment opportunities by making it difficult for a female Ph.D. to obtain appropriate employment in the same university faculty as her husband, or to obtain part-time employment in regular faculty ranks, with all the leave-of-absence, benefit, and tenure rights and privileges that males on part-time status would have. Female faculty especially need those provisions for periods when pregnancy and child-rearing may make part-time employment necessary and desirable. Undoubtedly, scholars who aim at freedom from bias in their scholarly and scientific work should be reminded of the need to have fairness and equality of opportunity in the content and administration of university personnel policies.

It is interesting that statistics indicate that single women on university faculties seem notably less disadvantaged than married women. Undoubtedly that is due in large part to the handicaps that married women have in running a home and in adjusting to their husband's job mobility, both of which have already been discussed.[15]

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[14] Ibid. (p. 179). Since male faculty members may also consider themselves discriminated against in salary, promotion, and distribution of administrative responsibility and authority, it would be interesting to have the response of a similar cohort of male Ph.D.'s to the same questions.

[15] As indicated in the text, the December 1965 survey of women receiving Ph.D.'s in 1957 and 1958 showed that about one-fourth of the married women considered their husband's job mobility a hindrance to their own career development, and for a sixth of them their husband's attitude toward their working was

Some studies indicate that marital status is perhaps the most significant factor in explaining differences in salary and in promotion rates between women and men. An analysis of the faculty status of women and men in the cohort who received Ph.D. degrees in 1940 and remained in academic employment shows that 20 years later (in 1960) some 85 percent of the males and 70 percent of the unmarried women had attained the rank full professor, whereas only 46 percent of the married women had done so. It was concluded that about three-fifths of the promotion differential between women and men academics in that sample could be explained by comparing single women with men.[16]

A questionnaire survey in 1967 of women who received their Ph.D.'s in the arts and sciences and education between 1958 and 1963, and who were employed full-time in faculty positions, had similar results. Among the unmarried women in 1966–67, the ratio of instructors and assistant professors combined (the first rungs on the promotional ladder) to associate and full professors combined was as follows: for single women, 1.1 full and associate professors for each instructor–assistant professor; for men, 1.3 full and associate professors per instructor–assistant professor; and for married women, 0.4 of a full and associate professor per instructor-assistant professor (Simon, Clark, & Galway, 1967, p. 226).[17] The figures for percentages on tenure were much the same: 44 percent for single women, 46 percent for men, 26 percent for married women with children, and 22 percent for married women without children (ibid., p. 229). The view has been expressed that radical reform in sex roles and in responsibilities for household functions and child-rearing will be necessary to provide married women an equal opportunity with men to advance in their professional careers. As already noted, a significant increase in the sharing of such duties has occurred among some young couples in academic life in recent years.

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regarded as a hindrance. The married women were presumably spending an average of around 20 hours a week on the care of children (the 10-hour figure was an average for all women) plus the 18-hour-a-week average for all women spent on household duties.

[16] See Johnson and Stafford (forthcoming). This part of the paper is based on data from National Academy of Sciences (1968, pp. 21, 71, and 85). See also Malkiel and Malkiel (1973).

[17] Completed questionnaires were received from about 60 percent of the women and men (a sample one-third the size of the women's list), leaving an academic-employed sample of 670 single women, 148 married women, 234 married women with children, and 354 men.

Since World War II there has been a secular rise in the emphasis on research in faculty careers, especially in major universities. At the same time in many disciplines the rate of creation of new knowledge has been accelerating. Those developments require more preparation to keep abreast of changes and the allocation of more faculty time to research activity. It becomes increasingly difficult for a woman with heavy household responsibilities to make an outstanding record as a scholar or even to keep abreast of developments in her field.

Data on teaching faculty in universities show that women generally devote much less time to research activities and do less graduate teaching than men. To some extent the figures are biased against female faculty because of the high proportion of female Ph.D.'s in education and home economics, where research is likely to receive less stress. Even allowing for that fact, the male-female differences are significant.

A survey for 1972–73 reveals the following facts concerning teaching faculty in universities: the highest degree held is the Ph.D. or Ed.D. for 19 percent of the women and 48 percent of the men; while the M.A. is the highest degree for 60 percent of the women and 25 percent of the men;[18] 42 percent of the women and 19 percent of the men spend no time in research and scholarly writing (or did not answer the question); at the other extreme, 9 percent of the women and 24 percent of the men spend 17 hours a week or more in such research activities. Ten percent of the women and 39 percent of the men had published 11 or more journal articles, and 11 percent of the women and 24 percent of the men had published three or more books, manuals, or monographs. Concerning published writings in the most recent two years, 14 percent of the women and 40 percent of the men had three or more publications during that period. Thirteen percent of the women and 25 percent of the men considered that their single most outstanding accomplishment was in research and writing. With respect to graduate students, 49 percent of the female faculty and 31 percent of the men currently were not teaching any graduate students.[19]

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[18] Bayer (1973, p. 26). Of the remainder, 5 percent of the women and 9 percent of the men have professional law or medical degrees.

[19] Ibid. (pp. 24, 28–29, and 32). The category of "none" for teaching of graduate students includes respondents not marking that part of the question but pro-

No clear conclusions can be drawn from the available data on the relative importance of the various obstacles to the development of a larger supply of women who could in the future, through research and advanced teaching, qualify for tenure positions in major universities, if equal employment opportunity were assured women aiming at top-rank faculty careers. It is even difficult to define exactly what nondiscrimination and equal employment opportunity mean, given the complexity of the factors and considerations involved. Nevertheless it is evident that talented women, by the choices they make and the priority they give to career ambitions, can have a significant effect on the supply of women able to qualify for tenure faculty appointments at major universities.

EXPERIENCE IN WESTERN EUROPE AND RUSSIA

Marked differences exist in the distribution of men and the distribution of women by faculty rank in universities in both this country and abroad. For male faculty, the largest number are at the professor level; for female faculty, the largest number are at the assistant professor level. The distribution for female faculty is shaped like a pyramid; the male faculty distribution is shaped like an inverted pyramid. The contrast is brought out in Table 2 showing the overall figures for university faculties in the United States in the academic year 1972–73. Two-thirds of the male faculty are

TABLE 2 ***Percentage distribution of university faculty by rank and sex for the United States, 1972–73***

Rank	*Men*	*Women*
Professor	41	12
Associate professor	26	20
Assistant professor	22	35
Instructor	6	23
*Other rank, including lecturer**	5	9
TOTAL	100	100

*"Other rank" includes one-half of 1 percent who lack a rank designation.

NOTE: For women, the figures do not total 100 due to rounding.

SOURCE: Bayer (1973, p. 23).

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viding answers to other parts and to other questions, thus providing grounds for believing that the percentages in the text are approximately correct. The survey of college and university faculty conducted in 1968–69 by Bayer showed that 48 percent of the female faculty in universities and 24 percent of the men were teaching entirely in undergraduate programs.

TABLE 3 ***Women and men in university faculties as percentage of total in the rank, 1972–73***

Rank	*Women*	*Men*
Professor	5.2	94.8
Associate professor	12.3	87.7
Assistant professor	22.2	77.8
Instructor and lecturer	37.6	62.4
TOTAL	15.3	84.7

SOURCE: Bayer (1973, pp. 8, 11, 23). The 1.6 percent of faculty without rank or having some other rank are omitted from the table.

in the two tenure ranks (professor and associate professor), whereas only one-third of the female faculty have that status.[20]

Table 3 shows the marked difference in the proportion of women and men in the various ranks. The women's percentages are progressively smaller as one moves up in rank. The male percentages—the obverse of the female—have the inverted pyramid shape, expanding in percentage terms with each higher rank.

It is widely asserted that any significant deviation of the women's distribution in the three professorial ranks from the men's distribution in those ranks is evidence of a pattern of sex discrimination. The assumption is that equal employment opportunity would lead to the same percentage for women in each professional rank. That assumption fails to take account of the distribution of the qualified supply of women for university appointment at particular ranks. Because, on the average, female faculty devote less time and energy to professional development (especially research) than men and more time to home responsibilities, a smaller percentage of women really qualify for the upper ranks.

Two kinds of factual information support that conclusion. One is that the distribution of single women by faculty rank seems, as we have observed, to resemble the distribution for men more than it does the distribution for married women. The other is that the difference between male and female distributions for university faculty appears to be a generally prevalent phenomenon.

It is remarkable how universal the pyramid shape of women's distribution in the academic profession is. In her useful review of experience of women at work in European countries, Marjorie Galenson finds that, in university teaching in every country for which data are available, the percentages become smaller as one moves up the promotional ladder, with relatively few women at the full professor level (Galenson, 1973, pp. 27, 107–108). She observes that it is "an apparently universal phenomenon" with the professions for the proportion of women to decline "as the promotional ladder is ascended." As part of the explanation she points out that "unlike single women, who are likely, other things equal, to be more successful over their working lives, the probability is that married women will continue to subordinate their careers to their major commitment to their families for a long time to come" (ibid., p. 112).

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[20] The age distribution of male and female faculty is quite similar except that 11 percent of the women and only 5 percent of the men are in the category of "30 or less."

The experience of the Soviet Union is most instructive in this regard, and shows how basic the pyramid distribution for faculty women is.[21] For decades Russian women have enjoyed equal employment opportunity under a strong government and Communist party affirmative action plan. The Soviet Union appears to lead the world in making use of the creative talents of women in fields that elsewhere are dominated by men. For example, women constitute three-quarters of the medical profession, one-half of the scientific workers in research institutions, and one-third of the engineers in the country (Dodge, 1966, pp. 193–95, 211, 237).

In education and advanced training for professional careers, there has been practically no differentiation by sex. A uniform curriculum through the tenth grade ensures that girls will receive as much training in science and mathematics as boys. For many decades there has been free and equal access to university and professional training and free choice of the field of study and of occupation. Soon after the Soviets came into power, basic legislation was passed providing sexual equality of employment opportunity.

Compared with other countries, the Soviets have been remarkably successful in interesting women in fields of science, technology, and medicine. In recent decades, the national government has made major efforts, through the mass media, to interest girls and young women in professional careers and to gain social approval for women in professional work as intelligent and patriotic citizens. Such efforts have been generally successful. By 1947, women constituted 35 percent of the teaching staffs of institutions of higher education. They were 47 percent of the teachers of biology and medicine, 45 percent of the chemists, 23 percent of the geologists, and 21 percent of the physicists and mathematicians (ibid., p. 244). Between 1946 and 1964 women received about 30 percent of the Ph.D.'s (equivalent) that were granted (ibid., pp. 136–137).[22]

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[21] Professor Norton T. Dodge has made a thorough study of academic training of women in the Soviet Union for professional occupations and of women's achievements particularly in science and technology in universities and research institutes. His analysis covers the period from the Revolution (1917) to 1966, when his book on the subject was published. This discussion of women in teaching and research in Soviet universities is based on Dodge's book.

Despite the Soviet Union's success in encouraging women to pursue professional careers, the pyramid phenomenon prevails. As Table 4 shows, women constitute a decreasing percentage of those in the ranks as one moves up from assistant professor to professor. The greatest differential between the sexes is at highest levels of scholarly and scientific achievement (ibid., pp. 236–245).[23]

Professor Dodge explains that Soviet women, who have the training and capacity for first-rank creative work in the arts and

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[22] The Ph.D. equivalent is called the "candidate degree." It may be earned through completion of formal training, with examinations and defense of a dissertation, or on a merit basis as recognition for outstanding scholarly or scientific work without examinations or a thesis defense. Formal work toward the candidate degree may be done at regular universities and technical institutes or at scientific research institutes or laboratories. Women constituted about 30 percent of those holding candidate degrees in 1965 (Dodge, 1966, pp. 134, 199).

[23] It should be pointed out that the Russian figures are not strictly comparable with those for the United States. In Russia, persons once certified in an advanced academic rank (professor, associate professor) continue to retain that rank in the statistics wherever he or she is employed – in universities, research establishments, industry, or government. About two-thirds of the professors of both sexes are employed in universities, and it can be assumed that practically all of them have Ph.D. equivalency since three-fourths have the even more advanced "doctor degree." Almost three-fourths of the associate professors are employed in institutions of higher education, and over 90 percent of them have the equivalent of the Ph.D. (the candidate degree). The bulk of the junior research workers are in scientific research establishments and the majority of assistant professors are in institutions of higher education; of this combined group less than one-quarter have the candidate degree.

TABLE 4
Female scientific workers with academic titles in the Soviet Union; percentage distribution by rank and percentage of total in the rank, 1964

	Distribution	*Percent of rank*
Academicians, corresponding members, and professors	2.3	8.3
Associate professors	20.5	19.1
Senior research workers	18.4	29.0
Junior research workers and assistant professors	58.7	52.3
Total (or percent of total)	100.0	32.2

SOURCE: Dodge (1966, p. 197).

sciences, generally have a lower level of achievement than men because child-care and household duties do not permit the sustained intellectual concentration that such achievement requires (ibid., p. 233)[24] He found from an extensive analysis of articles in scientific and technical journals, "further unmistakable evidence that the scholarly productivity of women is lower than that of men"; the analysis showed that "the average woman contributed about half as many articles as would be expected from their numbers" in the academic discipline.[25] Although the career obstacles of marriage and motherhood are not likely to be reduced drastically in the future, Dodge believes that probably the "professional productivity" of women is likely to increase over the years as their potential for creative work is more fully realized, which, in turn, would lead to a higher proportion of women in the upper ranks of the universities and technical institutes (ibid., p. 236).[26]

That there now is a good basis for such a conclusion is indicated by Table 5. Although progress has not been rapid from 1950 to 1970, there is an unmistakable upward trend in the percentages for full and associate professors relative to those for research workers and assistant professors, as well as an overall increase in the percentage of female faculty.[27] To that extent the extreme triangle has been modified in the Soviet Union.

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[24] Dodge concludes (1966, p. 4) "that the relatively small proportion of women in jobs with the greatest responsibility is far more a reflection of their lower productivity than the result of discrimination."

In the mid-1960s, it was estimated that approximately 12 percent of the children of nursery age and 20 percent of the children of kindergarten age were accommodated in permanent child-care facilities, mostly in urban centers. Women's liberation from housework had partly taken place through sharing of that work. Data for certain cities in the early 1960s indicated that men were spending two-thirds as much time as their working wives on household duties and child care. Nevertheless, working mothers generally continued to bear a disproportionate burden compared with men (ibid., pp. 94, 98).

[25] See Dodge (ibid., pp. 236, 245, and 304–305), where the method used by the author in making the analysis of publications by sex is explained.

[26] Dodge points out that the personal contacts among male scientists going back to the 1920s and 1930s, when female scientists were less plentiful, may be a factor in the continued male dominance of the highest echelons of the scientific academies (ibid., pp. 220–222).

[27] It should be pointed out that the percentages in Table 5 are undoubtedly somewhat affected by a high woman-man ratio and a high proportion of single women that existed during this period as a result of so many men being killed in World War I, the Revolution, and especially World War II. The ratio of men to women in the Russian population fell from 99 men to 100 women in 1897 to 92 in 1939 and 74 in 1946, and had risen to 83 by 1959 (ibid., p. 238).

TABLE 5
Women as a percentage in each rank according to academic titles, Soviet Union, 1950, 1960, 1965, and 1970

Titles	*1950*	*1960*	*1965*	*1970*
Academicians, corresponding members, and professors	5.4	7.3	8.8	9.9
Associate professors	14.8	17.1	19.5	21.0
Senior research workers	30.4	28.4	28.9	25.1
Junior research workers and assistant professors	48.0	51.0	51.1	49.8
TOTAL	26.9	28.2	38.3	38.8

SOURCE: Dodge (1966, Table 115, pp. 196–197, updated by Dr. Dodge with data from *Narodnoe khoziaistvo SSSR v 1969 godu* and *ibid. v 1970 godu*, pp. 709–710 and 656–657). There are still lower categories not included among the figures in this table, which are the equivalent of instructors and teaching assistants.

This long experience in the Soviet Union indicates how unrealistic the statement (page J4 in the HEW Guidelines) concerning the timetable for achieving the HEW goal of proportional representation for female faculty is: "In many cases this [overcoming all underrepresentation] can be accomplished within 5 years; in others more time or less time will be required." That statement is made at a time when 65 percent of the regular university faculty have tenure and the total university faculty is not growing and is not expected to expand much in the next 5 years.

THE SITUATION FOR BLACK FACULTY

The supply situation for black men and women for university teaching differs significantly from that for white women. Women in general represent around 13 percent of all holders of Ph.D. degrees; blacks of both sexes constitute about 1 percent of those with Ph.D. degrees.[28]

A survey in 1969 revealed that of the 1,096 blacks with Ph.D.'s who responded,[29] approximately four-fifths were men and one-fifth women. About three-quarters of them had received their undergraduate training in black colleges. Some 85 percent of the Ph.D. holders were in college and university teaching, and of those on faculties, four-fifths were holding positions in Negro colleges (ibid., pp. 4, 7–8).

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[28] A survey in 1968–69 indicated that less than 1 percent of all earned doctoral degrees in this country are held by blacks. In the five years from 1964 through 1968, black Americans received 0.8 percent of the Ph.D.'s awarded by graduate schools of arts and sciences in this country. See Bryant (1969, pp. 3 and 7).

[29] The survey had the names of 2,280 black Ph.D.'s from whom 1,096 questionnaire replies were received, or about a 50 percent return.

The survey found that, as generally has been the case for women, it required a longer period for blacks to complete their Ph.D. training—their median period for completion was 13 years. The average age at which they obtained the Ph.D. degree was around 37 years. The black Ph.D.'s were distributed as follows: 29 percent in education, 26 percent in the social sciences, 25 percent in the biological and physical sciences, 12 percent in the humanities, and the remaining 8 percent in other fields such as agriculture, business, engineering, home economics, and religion.[30]

As such data indicate, black Ph.D.'s in academic careers have, generally speaking, been disadvantaged (1) by shortcomings in their educational preparation before entering graduate school and (2) by lack of sufficient opportunity to make important research contributions because such a large proportion of them are in college teaching, especially at Negro colleges where the stress has had to be primarily on teaching.

Universities can undoubtedly make their greatest affirmative action contribution on the supply side by exerting strong efforts to encourage able black students to enter on an academic career, to assist them in getting excellent professional training in graduate school and in completing their Ph.D. requirements as soon as feasible, and to help in getting them started on an important program of research in the early years after they obtain their Ph.D. degrees. In recent years, major universities have been engaged in such efforts.

From 1968 on, many universities have made strong efforts to develop and acquire black faculty. With the launching of Afro-American studies programs or departments in the late 1960s, staffed largely by blacks, and under pressure from HEW compliance officials and black students, a kind of special market tended to develop for black faculty. Many universities offered appointments to black faculty at salaries well above those for whites with equivalent or better qualifications. In some cases the salary offers were $3,000 to $4,000 a year higher for blacks at the assistant professor level and $5,000 to $8,000 higher at the associate and full professor levels.[31]

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[30] See Bryant (1969, pp. 5–6). The average age upon receipt of the Ph.D. was calculated from Table II, p. 6.

[31] Among the most extreme instances of reverse discrimination were the offer of associate professorships to blacks just completing their Ph.D.'s and the case of a black assistant professor of philosophy on full-time appointment at a yearly salary of $13,000 at Yale in 1971–72, who was discovered to have also a full-time tenure appointment at the New York State University at Stony Brook at double the salary—$26,000 (*New York Times*, 1972).

As early as 1968 a significant increase had occurred in the number of job inquiries and job offers received by black faculty. A study, based on a sample of 699 black faculty in some 184 non-Southern, predominantly white colleges and on a comparable sample of 440 white faculty (40 percent of the blacks and 70 percent of the whites had Ph.D. degrees), showed that for the academic year 1968–69 the blacks averaged 3.1 job offers, whereas the whites averaged 1.5 offers. The author states that "Blacks with the doctorate from high quality schools who have published report jobs by invitation almost four times as often as whites with the same excellent credentials" and that as early as 1968–69 there was "reverse discrimination in which blacks already in the academic profession are sought out by predominantly white colleges and universities" (Rafky, 1971).

A questionnaire study in 1970, answered by 1,385 blacks with Ph.D. degrees, indicated that the median increase in salary necessary to attract them away from their present positions (mostly in predominantly black institutions) was around $7,500 a year in biological sciences, $6,250 in the social sciences, and $5,500 in the physical sciences and humanities (Mommsen, forthcoming). Such salary elevations would represent a median increase from existing salaries amounting to around 45 percent for those in biological sciences and roughly 35 percent in the other three divisions. Since the black Ph.D.'s had reported increasing numbers of job inquiries and offers during the previous academic year, there was some factual basis for their supply-price figures. Also, their responses indicated that generally they would be more influenced by career opportunities at institutions from which they might receive offers than they would by the racial composition of the faculties.

As the percentages in Table 6 indicate, the expansion in black faculty during that four-year period was heavily concentrated in universities, where their proportion of total faculty almost doubled, and in two-year colleges, where their proportion tripled. The four-year colleges, including the Negro colleges, showed only a small

TABLE 6 ***Black faculty as a percentage of total college and university faculty in the United States, 1968–69 and 1972–73***

Type of institution	*1968–69*	*1972–73*
Universities	0.5	0.9
Four-year colleges	5.0	5.4
Two-year colleges	0.7	2.1
All institutions	2.2	2.9

SOURCES: Bayer (1970, p. 12) and Bayer (1973, p. 31).

increase. The most rapid expansions were for men in universities (0.4 to 0.9 percent; women, only 1.0 to 1.2 percent) and for women and men in two-year colleges (women, 1.4 to 4.2 percent; men, 0.5 to 1.3 percent).[32]

The corresponding figures for women are significantly different, as Table 7 indicates. Women declined as a percentage of the faculty in four-year colleges and in two-year colleges from 1968–69 to 1972–73. Only universities showed a relative increase in female faculty in that four-year period, which raised the women's percentage of total faculty from 19 to 20 percent.

STATISTICAL ANALYSES OF SEX BIAS IN SALARIES

Universities are charged also with discrimination against women in terms of salary. This section critically examines three statistical studies of sex differentials in faculty salaries, drawing also on material already presented in this chapter. Two of the studies, one by Elizabeth Scott (Carnegie Commission, 1973*b*, pp. 115–123 and Appendix E, pp. 199–235) and the other by Helen S. Astin and Alan E. Bayer (1973, pp. 333–356) use the Carnegie Commission Survey of Faculty and Student Opinion (1969 data)[33] as the statistical basis for their analyses and conclusions. The study by George E. Johnson and Frank P. Stafford (forthcoming)[34] primarily uses National Science Foundation data for

TABLE 7 ***Female faculty as a percentage of total college and university faculty in the United States, 1968–69 and 1972–73***

Type of institution	*1968–69*	*1972–73*
Universities	14.8	16.5
Four-year colleges	22.7	21.8
Two-year colleges	25.6	21.9
All institutions	19.1	20.0

SOURCES: Bayer (1970, p. 7) and Bayer (1973, p. 11).

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[32] It is interesting to note, by way of contrast, that the percentages for Asian faculty between 1968–69 and 1972–73 remained fairly constant (except for a significant increase in two-year colleges), so that for all institutions the percentages were 1.3 percent in 1968–69 and 1.5 percent in 1972–73.

[33] Faculty material in that survey is contained in Alan E. Bayer (1970), to which reference is made in Tables 6 and 7 and in footnotes in this chapter. Scott used a selected sample of 17,654 and Astin and Bayer a sample of 6,892, out of a nationally representative sample of 460,028 faculty members in 253 institutions.

[34] Johnson and Stafford's paper is part of a project on academic and professional compensation sponsored by the American Association of University Professors. See "Surviving the Seventies" (1973).

Ph.D.'s in academic employment in six disciplines. Its analysis applies life-cycle training theory, which, starting with a little sex difference at the time of completion of the Ph.D., analyzes sex differences in salary thereafter in terms of on-the-job training or development of professional earning capacity (human capital) during the individual's ensuing life cycle over a 30-year period.

Statistical studies of discrimination in employment are handicapped by the fact that discrimination is not directly measurable. Thus its association with a particular factor or factors cannot be directly calculated. Instead, a residual approach is often used. Allowance is made for the calculated effect of each of a number of relevant factors, and any remaining difference (residual quantity) after such allowance is assumed to represent discrimination.

The residual approach for determining discrimination in employment is likely to be plagued by two difficulties. The first is that one or more significant factors (variables) may be left out of the analysis, which will, of course, affect the size of the residual. The second difficulty involves determination of the amount by which each individual's stock of "human capital" (earning power) is enhanced through his or her on-the-job experience (teaching, research, and learning from colleagues). Spread of a certain quantity of experience over a longer period of time for women than for men, due to part-time service or gaps in employment, may result in a smaller net increase in women's earning power through on-the-job experience. Partly that may be because of the time factor in obsolescence of knowledge and skills in fast-moving fields. Obviously, unless adequate allowance is made for such factors, at least part of any residual should not be attributed to discrimination.

The Scott study is a macro-type analysis in that it uses statistics representing all colleges and universities, including professional schools, in quite broad categories. The analysis is broken down for arts and sciences only by division (biological and physical sciences, social sciences, humanities, and fine arts) and by the six Carnegie Commission classifications of colleges and universities (Research Universities I, Research Universities II and other Doctoral-Granting Universities I and II, Comprehensive Universities and Colleges, etc.)[35] There is no breakdown by faculty rank, by academic department, or by individual institution.

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[35] Research Universities I are the 50 leading universities in terms of federal financial support of academic science in two of three years, which awarded at least 50 Ph.D's in 1969–70. Research Universities II and other Doctoral-

Essentially the Scott study employs a complex statistical analysis (multiple-regression analysis) for arriving at predicted salaries for men and women on the basis of the data. The analysis involves taking into account the influence of 30 variables—personal characteristics, education, experience, and institution—that are associated with differences in faculty members' salaries. Among the 30 predictor variables are age, highest academic degree, year degree was obtained, prestige of granting institution, years employed in higher education, years employed in present institution, scheduled hours of teaching per week, number of published articles, and number of published books.

A predicted average salary was calculated after statistically controlling for all 30 predictor variables in a multiple-regression equation. A separate analysis is made for men and for women, since some of the coefficients for particular variables are significantly different for men and women. For example, advanced degrees are calculated to be much more significant salarywise for men than for women; the coefficients show that, for men, salaries vary directly with the quality of the employing institution within each category of institution, and not for women; but the effect of the number of publications on salary was determined to be about the same for both sexes (Carnegie Commission, 1973*b*, pp. 206–207).[36]

On the basis of the female regression equation, the predicted average salary for male faculty members for all institutions is found to be below the average of their actual salaries by $2,264 a year; for Research Universities I that predicted-actual differential is $2,729. On the basis of the male regression equation, the predicted average for female faculty in all institutions is

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Granting Universities I and II are three categories that awarded at least 50, 40, and 10 Ph.D's, respectively, in 1969–70, and in the case of Research Universities II are on the list of the 100 leading institutions in terms of federal financial support. The three categories total 121 institutions. Comprehensive Universities and Colleges I and II are 453 institutions that offer liberal arts programs, have one or more professional or occupational programs, and may offer master's degrees. For more detail on these categories see Carnegie Commission (1973*a*).

[36] It is interesting to observe that the Astin and Bayer study (1973, pp. 350–351), using the same 1969 data and similar statistical methods, seems to contradict these conclusions with respect to the significance of the three variables as stated in the text.

$1,407 above the actual salary; for Research Universities I, the predicted average for women is $2,009 above the actual average. The predicted-actual differences are largest in dollar terms for Research Universities I of any of the six categories of institutions and are smallest for Comprehensive Universities and Colleges. Indeed, for Research Universities I for the biological and physical sciences, the difference between the predicted and actual average salaries is most surprising. In those sciences, a great majority of the male faculty received salaries in 1969 that ranged roughly from $1,000 to $7,500 above the predicted salaries on the basis of the female regression equation, and slightly under 10 percent of the male faculty in those sciences received salaries $10,000 to $13,000 above the predicted amounts (Carnegie Commission, 1973*b*, p. 116 and Chart 14, p. 117). In considering the magnitude of those differentials, one should bear in mind the average salary figures for university faculty in the 1968–69 salary survey of the American Association of University Professors; they ranged from an average of $10,534 for assistant professors to an average of $17,000 for full professors ("The Threat of Inflationary Erosion," 1969, Appendix Table 5, p. 208).

Questions can be raised about the validity of the predicted salaries themselves, and the soundness of their use for assessing actual responsibility for discrimination. Those aspects will be considered after attention is given to the Astin-Bayer study that uses the same basic data and similar methods of analysis.

Before considering the Astin-Bayer study it should be mentioned that Scott also compared differences in faculty salaries associated with race by a similar method. There was a slight tendency for the predicted average salary of black male faculty to be above the actual average, on the basis of the equation for all men, and a slight tendency for the predicted average salary of black women to be slightly below the average actual salary for female faculty, on the basis of the equation for all women. But the differences are not statistically significant (Carnegie Commission, 1973*b*, pp. 209 and 224).

The Astin-Bayer study uses multiple-regression analysis to predict salaries of male faculty compared with female faculty and also to make similar predictions with respect to academic rank and tenure. Instead of using the regression equation of the opposite sex, Astin and Bayer apply to the women's data the regression weights of the predictor variables calculated from the men's sample.

The difference between actual average salary and predicted average salary for women for the whole sample is $1,040—actual salary averaged that much less than predicted salary (Astin & Bayer, 1973, p. 353). The authors say that it is a minimum figure because the regression weights of the predictor variables for the male sample are used, and the result does not include salary discrimination attributable to discrimination in rank. Astin and Bayer do not provide breakdowns by disciplinary areas or type of institution.

With respect to both the Scott and Astin-Bayer studies it should be pointed out that the use of large numbers of predictor variables as a basis for judging the existence and extent of sex discrimination in salary is subject to serious weaknesses. Only quantifiable aspects of each variable are included in the analysis. Unmeasurable, quality aspects of teaching, research and publications, and administrative service, although usually important in determining an individual's "productivity," tend to be neglected. Scheduled teaching hours are not all equal, as Scott clearly recognizes. Successful teaching of advanced courses and lecturing to large numbers of undergraduates in a rapidly changing field are more demanding in terms of scarce competencies than teaching sections in an elementary course, year after year. The former is more likely to be done by men, the latter by women in some departments.

Qualitative differences that affect productivity can be illustrated by examples. In many universities, a significant part of the instruction in courses in non-Western languages is given by native-speaking persons, mostly women. Some of them may ultimately earn a Ph.D. degree but still be qualified mostly for language teaching and not for advanced courses in literature or history. Their teaching per hour cannot be considered equal to that of a distinguished professor in the literature or history of the country where that language is the native tongue. Also Astin and Bayer make no allowance for part-time as distinguished from full-time teaching although, for reasons indicated in the Johnson-Stafford paper, part-time service may have important implications for salary in future years.[37]

[37] Briefly, the reason is that inclusion in the analysis of part-time service years as years of experience can be misleading if the rest of the person's time while on part-time teaching was occupied with nonprofessional activities, which means a decline or interruption in the development of professional skills and reputation that influence "productivity" and earnings.

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Furthermore, it is noteworthy that neither Scott nor Astin-Bayer compare the salaries of single women and male faculty. As already explained, the pattern of advancement in rank and salary for single women resembles that for men and presumably would show little sex differences in salary.

Certainly, one cannot assume that 30 predictor variables can serve to predict the average salary that women would be paid if there were no sex discrimination in salary determination on the part of institutions of higher education. The difference between the predicted average salary and the actual salary of female faculty in the two studies is in the nature of a residual still to be explained. At least part of that residual could be due to weaknesses in the predictor variables or to sex differences in productivity factors (e.g., career motivation, ability to perform demanding teaching assignments, standing in the discipline and the profession) not taken into account in the analysis.

It should be noted that analyses of faculty salaries by sex made in individual major universities, some in field investigations under the Federal Equal Pay Act, generally do not find a "pervasive pattern" of lower salaries for female faculty of the magnitude indicated by the Scott and Astin-Bayer calculations and especially by Scott's calculations for biological and physical sciences in major universities, where laboratory research contributions (often with graduate students) are such an important factor in academic reputation and in faculty salary determination. Faculty salary studies by individual institution (microeconomic case studies)[38] are likely to provide much more reliable results than macro-type analyses based on the use of many predictor variables.

The Johnson-Stafford study analyzes factors that may explain much of the differential in faculty salaries between men and women. Their analysis is based mainly on data from the National Register of Scientific and Technical Personnel for 1970.[39] Six disciplines are chosen for particular examination. They are anthropology, biology, economics, mathematics, physics, and sociology.

Johnson and Stafford point out that salary data for the first academic appointment after completing the Ph.D. degree show comparatively small differences by sex in most of the disciplines. At that point, the average differential between men's and women's salaries in academia ranged from women's salaries 4 to 8 percent lower in five disciplines to 12 percent lower in biology.

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[38] For such a microeconomic case study, see Malkiel and Malkiel (1973).

[39] Source of data: Tapes of the National Register of Scientific and Technical Personnel, National Science Foundation.

For all six disciplines, the percentage differential between male and female salaries widens during the first 20 years of experience after acquiring the Ph.D. degree. During those 20 years, the sex differential widened for the six disciplines as follows: anthropology, 8 to 23 percent; biology, 11 to 26 percent; economics, 5 to 15 percent; mathematics, 6 to 26 percent; physics, 6 to 22 percent; and sociology, 4 to 14 percent. The salary differential widened most rapidly between the fifth and fifteenth years of postdoctoral and professional experience. Generally, during those 10 years the women were between 35 and 45 years of age, when they were most likely to have heavy household and child-care responsibilities.

Johnson and Stafford also made an analysis of salaries and experience of faculty members who, in 1972, were assistant, associate, and full professors at Michigan State University in the six disciplines. They found that the starting salaries for the female faculty in those disciplines averaged only 3 percent lower than corresponding salaries for male faculty, and that figure does not have much statistical significance. At 15 years of reported academic experience, the differential had grown to 20 percent, and thereafter it declined somewhat with more years of experience above 15.

The National Register data also show a narrowing of the sex differential in half of the six disciplines after a certain period of experience. Classifying experience by five-year intervals up to 30 years, the sex salary-differential is largest in percentage terms at 20 years for economics and physics, at 25 years for sociology, and at 30 years for anthropology, biology, and mathematics. In other words, in the first three disciplines the sex differential for salaries narrowed somewhat (1, 2, or 3 percentage points) after 20 or 25 years of experience; in the other three disciplines the sex differential continued to enlarge a few percentage points up to the thirtieth year of experience, the final year included in the analysis.

The changes in the size of the sex salary-differential over time are explained by Johnson and Stafford largely in terms of difference in time devoted to improving earning capacity—investment in "human capital." They point out that, at the time of completion of the Ph.D., the earning capacity and the learning ability of males and females are approximately equal, and so are their salaries. Thereafter, however, married women, in general, are not likely to devote as much time and effort to increasing their earning capacity and preventing its obsolescence as is generally the case for male faculty, especially during the first 15 years of their academic careers.

Two factors help to explain a significant divergence in women's capacity or "productivity" as teacher-scholars after starting with no apparent overall difference in career preparation and capacity at the point of Ph.D. completion. One is the individual's expectation that she will have a period when family obligations will necessarily cause some curtailment of time and effort that she can devote to professional development. That expectation tends to affect women's career aims, motivation, and planning. Two, a woman's job preferences and her stress on job components may favor teaching (drawing heavily on existing stock of "human capital" from previous training, which may experience significant obsolescence) and put less emphasis on research (that helps to develop and renew the teacher-scholar's capital, not only through the results of the research but also the process of interchange with teacher-scholars in the field concerning that research and research results of others in the field). Less time and effort are actually devoted to research and scholarship, which keep one intellectually alive and on top of one's subject, because so much time and attention, during a vital period for progress in one's profession, are taken up with family and household duties. Assessment of the value of the individual as a teacher-scholar by colleagues in the university and by persons in the discipline at other institutions is affected by a relative decline in the individual's "human capital" as a faculty member in the discipline. That is likely to influence recommendations for salary increase and promotion that are based on merit, and also the number and salary of outside job inquiries and offers.

The first 10 years after completing the Ph.D. requirements are especially important for progress in a career as a teacher-scholar in the arts and sciences. That is particularly true for laboratory sciences like the biological sciences, in which the reputation of teacher-scholars depends so heavily on instruction of advanced students in the laboratory and on the quality of one's research contributions. Competition is keen in those terms, and obsolescence of knowledge is quite rapid in most subject areas.

The Johnson-Stafford study indicates additional dangers in drawing conclusions about sex discrimination from cross-sectional studies that neglect differences in the rate of individual professional development over time. Studies of sex discrimination in university salaries and conclusions drawn from them about discrimination should take account of factors that influence the value of the individual as a teacher-scholar to the particular institution.

The material in this chapter shows the complications and pitfalls that attend attempts to calculate the amount of discrimination in faculty employment for which universities can be assigned the responsibility. A full analysis of the supply side should be a major element in any such calculation. The above material also indicates that numerical goals for a university's hiring of female and black faculty in particular fields, based on separate "pools" (by sex and race) of persons assumed to be qualified, can be significantly biased by incorrect estimates of qualified supply. That subject is treated in the next two chapters.

The data in this chapter show why a significant part of government affirmative action programs should be directed at improvement in the quality of supply of women and members of minorities for faculty appointments, especially in the upper reaches of the academic world. There can be no doubt that affirmative action efforts on the supply side are a necessary part of lasting improvement in the utilization of the talents of members of minorities and women as teacher-scholars in universities.

4. *Federal Guidelines for Faculty Employment*

This chapter and the next analyze the comprehensive federal scheme of regulation, developed under Executive orders and administrative rulings and designed to assure compliance by federal contractors (including universities holding research contracts) with the requirements in those orders and rulings. These two chapters will critically examine the labor market assumptions on which the enforcement requirements are based.

This chapter discusses the development by HEW of a set of guidelines for universities to follow in constructing and complying with their affirmative action plans and examines the special "availability-utilization" analysis that HEW requires universities to use to measure the extent of their alleged discrimination. Chapter 5 takes up various aspects of goal setting and goal enforcement and different kinds of affirmative action goals.

THE DEVELOPMENT OF HIGHER EDUCATION GUIDELINES

An indication at the outset of certain governmental features of the comprehensive scheme of regulation under Executive Order No. 11246 for federal contractors may help in understanding recent developments under the order and its application to universities.

As explained in Chapter 1, the contractor compliance scheme was developed in the Department of Labor, with HEW serving as the enforcement agency for universities and colleges. The scheme has been established and developed by Executive order, without Congressional consideration or endorsement. It is enforced exclusively by administrative-agency action. The penalty for noncompliance takes the form of withdrawal of part or all of the contractor's eligibility for federal contracts. Government regulation under Executive Order No. 11246 is separate from and in addition to, the fairly comprehensive, legislatively established programs for attacking employment discrimination discussed in Chapter 1.

As federal contractors, the major universities of this country, both public and private, are subject to Executive Order No. 11246 and to Executive Order No. 11375, which added "sex" to the protected categories. The faculties of the major universities (which include most of the top natural scientists, life scientists, social scientists, and humanities scholars in this country) and the positions they hold are subject to the rules and requirements of the applicable provisions of those Executive orders dealing with the employment, advancement, and compensation of workers.

Executive Order No. 11246 provides that all contractors must agree to abide by the following provision in all parts of their operations during the performance of such a contract:

> (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin.

Clearly, under that nondiscrimination clause, a university contractor must not discriminate either against or in favor of members of minority groups, women, or white males. There must be equal employment opportunity for each and every individual regardless of his or her race, color, religion, sex, or ethnic origin. Nevertheless, some provisions of the HEW Guidelines and some enforcement of the guidelines and regulations issued under Executive Order No. 11246 are not fully consistent with that provision.

Executive Order No. 11246 gives the Secretary of Labor the power to adopt rules, regulations, and orders as he deems necessary and appropriate to achieve the objectives of, and compliance with, that order. In that connection, the development of the notion of affirmative action under the Department of Labor's regulations is of interest. In the May 1968 regulation (Code of Federal Regulations, Title 41, Chapter 60-1), the kinds of affirmative actions specified were: to post the required statement of nondiscrimination in conspicuous places, to include it in all solicitations and advertisements for employees, and to notify any collective bargaining agent of the contractor's agreement not to discriminate. Provision was made for enforcement through the contractor furnishing information and reports and through investigation by the Department of Labor (or the appropriate federal agency designated by the Department of Labor) to ascertain compliance with the Executive order and with the rules, regulations, and relevant orders of the Secretary of Labor. If the investigation should reveal any lack of compliance (termed *deficiencies*), the contractor was (and still is) required to make a commitment to correct such deficiencies before the contractor can be found to be in compliance with the Executive order and, therefore, an eligible bidder on federal contracts.

On December 4, 1971, the Secretary of Labor added a whole new set of requirements for compliance. They provided that each federal contractor[1] in any line of activity must develop a written affirmative action program and must do so according to certain especially developed techniques. For determining deficiencies in the employment of women and minority-group members, the contractor must use a prescribed statistical method for calculating available and qualified supply for each job classification.[2] As we shall see, the method, though perhaps usable and appropriate for jobs requiring manual qualifications and skills, is inappropriate for quite individualized positions that require rare combinations of qualities, such as is the case for most tenure positions at major universities.

The contractor, using the prescribed statistical method, is required to calculate his deficiencies in numbers for women and members of minorities for each job classification, and to set forth specific hiring goals for women and members of minorities, in numerical terms and with hiring timetables attached to the numbers. Those numerical hiring goals, supposedly designed to remedy the calculated deficiencies, are not absolute commitments but are to be pursued by the contractor "applying every good faith effort to make all aspects of [his] affirmative action program work."

Strict adherence to proper rules and procedures to ensure that women and members of minorities are widely encouraged to apply for any job openings and are given equal opportunity for employment, training, promotion, and fair compensation no longer sufficed to meet compliance requirements. The additional concepts, method of determining and measuring discrimination, and other added requirements for compliance are embodied in a new Part 60-2 of Chapter 60 of Title 41 of the Code of Federal Regulations, commonly referred to as Revised Order No. 4.[3]

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[1] Specifically, each contractor or subcontractor with a federal contract of $50,000 or more and 50 or more employees. Public institutions and agencies with federal contracts were required to have written affirmative action plans beginning October 4, 1972.

[2] Job classification "meaning one or a group of jobs having similar content, wage rates, and opportunities"—a vague and unsatisfactory definition.

The methodological and goal requirements contained in Revised Order No. 4 were devised by the Department of Labor for more rapid and effective elimination of race discrimination in the building trades. The order spread that elaborate system to industry in general.

As the federal "administering agency" to enforce compliance by universities and colleges with the Executive orders and Revised Order No. 4, HEW had the task of making the rule modifications and adaptations necessary and desirable to fit the special characteristics and circumstances of the 900-odd institutions of higher education covered by those orders. In addition, the 10 regional offices were making inconsistent rulings and questionable interpretations in a way that caused great concern among universities. It had become clear by early 1972 that some written guidelines, rules, and interpretations of orders and regulations as applied to universities were badly needed.

After repeated delays, at the end of July 1972 a 100-page draft of guidelines for the application of the Executive orders and Revised Order No. 4 to institutions of higher education was prepared and sent to some two dozen university officials for their personal review and their comment by mid-August, as it was hoped that a guidelines document could be published by the opening of the academic year in September.

The 100-page draft was a most disturbing document. Written in a rather accusatory and involved manner, it added a set of new requirements not in any previous orders and rulings,[4] which would have involved considerable HEW intrusion into the internal affairs of universities—into educational policy and internal administration as well as employment practices. It was quite evident that those in authority in HEW's Office for Civil Rights had insufficient understanding of, or experience in, the operation of universities.

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[3] See *Federal Register* (1971*b*).

[4] For example, five pages were devoted to some 14 "principles" (really mostly practices) for the handling of employee complaints or grievances. Some of those principles were clearly unsound and inconsistent with accepted practice in industrial relations. Presented as a single set of conflict-resolution procedures to handle any complaint (whether related to proscribed discrimination in employment or not), they provided that every grievance should be heard by a committee containing representation of women and minority groups, that the grievant should have the right of access to any file he or she deemed necessary in connection with the complaint (presumably including the private files of faculty colleagues), that there should be a formal transcript or recording of the proceedings, and that the institution would be bound to accept whatever

Some of the university officials who had received the document presented to the appropriate officials in the Department of Labor their strong objections to parts of the HEW draft. The Director of Federal Contract Compliance in the Department of Labor has to approve any regulations, directives, or orders to be issued by a federal agency to which the Department of Labor has delegated compliance authority under Executive Order No. 11246 and Revised Order No. 4.[5]

The Department of Labor officials, recognizing that the 100-page draft was unnecessarily detailed, ambiguous, and intrusive, instructed HEW to develop a new draft cut down perhaps to one-third the size, tightly organized and objectively written. It was suggested that misconceptions such as were contained in the 100-page document could be avoided if HEW had available for consultation an advisory panel of persons well versed in the actual operations of institutions of higher education. This idea seemed to find some support in the Department of Labor but has not been used by HEW.

Without any further consultation with persons in the colleges or universities, HEW issued its guidelines in October 1972. For the most part, these guidelines follow the specifications stated by the Department of Labor. They are based on Revised Order No. 4, adopting, without much adaptation, its methodology and its scheme for determining numerical goals.

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decision such a grievance committee might make but the grievant had no obligation whatsoever to accept a committee decision. Although there is presumably no obligation for an institution to adopt any such grievance procedures under the Executive orders or Revised Order No. 4, the draft stated that the absence of such a grievance procedure "may be viewed by the Office for Civil Rights in the context of a review or investigation as evidence of a contractor's intention not to act affirmatively to eliminate discrimination prohibited by the executive order."

[5] The pertinent provision in Chapter 60 of Title 41 of the Code of Federal Regulations [60-1.6(c)] reads as follows: "*Agency regulations.* The head of each agency shall prescribe regulations for the administration of the order and the regulations in his part. Agency regulations, directives and orders for such purpose must be submitted to the Director prior to issuance and may be enforced upon approval of the Director or 60 days after submission if not disapproved by the Director" (*Federal Register,* 1971*b*).

The final HEW Guidelines issued in October do embody some improvements. The procedures for notification and conduct of on-site compliance investigations, for noncompliance determinations, and for hearings are more reasonable, but difficult issues (such as federal agency access to and use of confidential letters of evaluation of faculty members by prominent scholars in the field) remain unresolved. Provision seems to be made in the following statement for numerical hiring goals on a broad enough basis for the statistical law of averages to have some application: "In many institutions the appropriate unit for goals is the school or division (e.g., of humanities departments, social science departments, natural science departments) rather than the department" (Office for Civil Rights, 1972, p. J5). However, some regional offices have been insisting on hiring goals by academic department almost as though that statement did not exist.

The guidelines do seem to recognize that preferential treatment in the selection of faculty according to race, sex, religion, or national origin constitutes discrimination in violation of Executive Order No. 11246. However, the issue is confused by an extreme, untypical example. The guidelines' wording is as follows:

> In the area of academic appointments, a nondiscriminatory selection process does not mean that an institution should indulge in "reverse discrimination" or "preferred treatment" which leads to the selection of unqualified persons over qualified ones. Indeed to take such action on grounds of race, ethnicity, sex or religion constitutes discrimination in violation of the Executive Order (ibid., p. 8).

Of course, the appropriate example would be the more typical case of the hiring of a less-qualified person over a better-qualified person on grounds of sex, race, or other group or class affiliation in order to meet numerical goals.

The HEW Guidelines do not attempt to reconcile the conflicting aims of nondiscrimination and equal employment opportunity on the one hand and insistence on hiring of substantially more women and members of minorities to achieve proportional representation according to numerical hiring goals on the other. That dilemma puts universities in a difficult position. Section 703(j) of Title VII of the Civil Rights Act of 1964, which has applied to institutions of higher education since March 24, 1972, reads as follows:

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> Nothing contained in this title shall be interpreted to require an employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer . . . in comparison with the total number or percentage of such race, color, religion, sex, or national origin in any community, state, section, or other area, or in the available work force in any community, state, section, or other area.

Chief Justice Burger, speaking for the majority of the U.S. Supreme Court in *Griggs v. Duke Power* (1971) declared that under Title VII, "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." The Court went on to support individual merit as the basis for selection and reward, declaring: "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant."

"AVAILABILITY ANALYSIS" FOR MEASURING DISCRIMINATION

The HEW Guidelines instruct universities and colleges how to determine whether women and minority persons are "underutilized," and therefore, discriminated against "in any job classification or organizational unit" (Office for Civil Rights, 1972, pp. J1 to J5). The guidelines assume that each academic rank (e.g., professor, associate professor, assistant professor) is a separate job classification.

Referring to the "required analysis" as "a unique aspect of equal employment opportunity under the Executive Order," the guidelines recognize that there are problems in applying the "analysis" to "academic personnel" because "the recruiting area will vary from institution to institution" and "may be a national or even international one," and because "the skills required for a particular position are often quite specialized" so that "accurate information on availability may be more difficult to obtain."

The guidelines state that "for academic employees the basic national data on earned doctoral degrees will provide the basis for a utilization analysis of the contractor's work force, unless the contractor can otherwise demonstrate that the labor market upon which it draws is significantly different from this base." With respect to tenured faculty, the guidelines state: "To determine the number of women available for senior positions, the Office [for Civil Rights of HEW] recommends that the contractor use data available from the National Register of Scientific and Technical Personnel prepared by the National Science Foundation, and the U.S. Office of Education's annual reports on earned degrees" – presumably Ph.D. degrees – for university positions.[6]

Each university must compare, "by comparable job categories," "the number of women and minorities in its current workforce" with their estimated availability according to "availability analysis." "Wherever the comparison reveals that a hiring unit of the university (a department or section) is not employing minorities and women to the extent that they are available and qualified for work, it is then required to set" numerical hiring goals to overcome any such "deficiencies in the utilization of minorities and women."

The availability-utilization analysis is obviously a kind of supply-demand analysis, which assumes that nondiscrimination will always result in a university employing women and members of minorities in each "job category" and each "hiring unit" in exact proportion to their representation in the supply that is qualified for the demand. Such a statistical technique should, therefore, be applied only after a thorough analysis of the various qualifications that supply must have for particular faculty positions and a similar thorough analysis of the requirements for the faculty positions – the demand. Otherwise, any disproportions between calculated "utilization" and actual "utilization" may just be mistakes in the numbers used and not evidence of discrimination for which the university is alone responsible and which nondiscrimination on the part of the university would eliminate.

From various statements in the guidelines, it is obvious that the HEW enforcement staff have not made any careful analysis of qualified supply for different faculty positions in different disciplines. For example, repeatedly in the guidelines, the absence of women or members of minorities in an academic department is referred to as "exclusion" on the part of the institutions and as a "deficiency" (meaning discrimination by the institution), regardless of the amount of fully qualified supply of women or blacks actually available for each of the faculty positions in that discipline or department.

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[6] In any year, probably the sex representation among the top 10 percent of Ph.D. recipients in the country is about the same as that for all other Ph.D. recipients that year. However, there certainly could be a difference between the proportion of women in the top 10 percent and in the other 90 percent of Ph.D. recipients in particular disciplines and subfields of disciplines (e.g., theoretical and applied branches of a subject). It would be extremely difficult and quite costly for each major university to try to determine whether such differences actually exist for each subfield and each discipline and to do so in terms of the qualifications for particular faculty positions at that institution. More on this subject anon.

HEW avoids responsibility by requiring the universities themselves to make numerical estimates of their so-called deficiencies according to the prescribed technique, even though proper data may not be obtainable or the technique cannot properly be applied to some or all faculty positions in a particular department. However, if the university, using the technique with inadequate data, comes up with no deficiency or an exceedingly small one (a fraction of a person less than half),[7] the HEW compliance officials may refuse to approve the university's affirmative action plan on the grounds that the technique was not properly applied and that some specific hiring goals for such departments have to be included in the plan. The only appeal from such a decision presumably is higher up in the executive branch of the federal government. Persons in the federal government could hardly be sufficiently informed and expert to decide what the proper hiring goals at various faculty ranks in all disciplines in a particular university should be. Yet the staffs of HEW regional offices, who lack such expertise, negotiate with universities and approve or disapprove submitted affirmative action plans required to contain such goals. Under the circumstances, it is not surprising that they make a variety of "demands" on universities that go far beyond numerical goals.

THE INAPPROPRIATENESS OF "AVAILABILITY ANALYSIS"

From the analysis of supply and of demand for tenure positions in major universities set forth in Chapters 2 and 3, it is evident that the required "availability-utilization" technique cannot properly be applied to most tenure positions in such institutions. That technique, and the assumptions on which it is based, just will not provide proper answers about discrimination and proportional representation, given the facts of the situation. And to derive numerical goals by such a technique and to enforce compliance with them for the tenured faculty is almost bound to create some demand discrimination in faculty employment.

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[7] Such a result is likely in many disciplines, since blacks apparently hold no more than 1 percent of all Ph.D. degrees (Bryant, 1969) and since in particular disciplines women earned the following percentages of the Ph.D. degrees granted during the decade of the 1960s: engineering, 0.4 percent; physics, 2.0 percent; geology, 2.5 percent; business and commerce, 2.8 percent; religion in liberal arts, 4.5 percent; economics, 5.6 percent; mathematics, 6.5 percent; chemistry and statistics, 6.8 percent. The average size of academic departments in the arts and sciences at major private universities seems to be between 15 and 20 regular faculty.

The reasons that the technique is so unsuitable for the situation can be briefly explained by drawing on the conclusions in Chapters 2 and 3.

Dealing first with the supply side, it has been explained that great variation exists in the mental and other personal qualities that are basic considerations in faculty appointment in major universities: (1) teaching ability at various levels and by various methods in particular specialties, (2) ability to produce important research contributions and to make teaching and research mutually reinforcing, and (3) ability to contribute constructively to the career development of colleagues and to the effective operation of one's department and the university (collegial and managerial contributions).

The requisite qualifications for appointment to tenure are likely to be possessed by fewer and fewer persons (1) the higher the level of excellence of a university and (2) the rarer the qualities (including training) necessary for advanced teaching and scholarship in the specialty. That explains why the number of qualified persons anywhere in the world for particular tenure appointments at a distinguished American university are generally very small.

On top of that, the supply configuration for married women, in contrast to that for men and single women, generally is a pyramid that falls off sharply at the upper levels of tenure positions for major universities. Presumably that configuration for married women should be taken into account in any availability-utilization analysis.

As was noted in Chapter 3, qualified supply for tenured faculty positions in universities usually is specified in terms of a subfield or a combination of two subfields of the discipline. In an economics department, for example, the subfields might include the following 13: microeconomic theory, macroeconomic theory, econometrics, economic development and growth, economic history, industrial organization and price policy, international economics, labor economics, mathematical economics, money and financial institutions, public finance, urban economics, and centrally planned economies.

An economics department might have 30 to 35 faculty (say, two-thirds with tenure) distributed among those 13 subfields. Even within subfields, there is further specialization. A faculty position in international economics might stress specialization in international-trade theory, or commercial policy, or international finance, or international investment and foreign aid. A faculty position in labor economics might stress labor markets including wage theory, labor relations including unions, or manpower training and development. For a tenure opening in international-trade theory, persons in the other three specialties in the subfield would not be likely to qualify. For an opening in labor economics stressing theory, specialists in labor relations or manpower would not be likely to qualify. Thus, a proper availability analysis would, in most instances, need to be made on the basis of specialties within subfields within departments.

Where the number of women or blacks considered qualified for tenure in a department of a major university is quite small and that small number is scattered among several subfields, the use of availability analysis becomes exceedingly dubious. For instance, faculty in top-ranked mathematics departments, in connection with developing affirmative action plans, have stated that no more than one or possibly two female mathematicians in this country could at this time, on the basis of scholarly qualifications, be offered a tenure post in one of the top dozen mathematics departments. Similarly, in trying to apply availability analysis, the number of female economists considered by faculty in leading departments to be qualified for appointment to a tenure opening in one of the top dozen economics departments has been variously given as between 9 and 12, distributed among more than half a dozen subfields. Corresponding figures for blacks would apparently be none in mathematics and 4 or 5 in economics.[8]

With such small numbers and with tenure positions coming open on the average perhaps every 15 or 20 years (turnover of tenured faculty recently seems to have been averaging around 3 or 4 percent), the purpose to be served by requiring each economics department in major universities now to apply the required "availability" analysis and come up with numerical goals for women and black economists by department, making allowance for subfields, is unclear—unless it is to stimulate bidding for the female and black economists, several of whom have had all kinds of offers and do not seem to be movable. It is even more questionable to require the top mathematics departments to engage in the required analysis and to set numerical hiring goals for women and blacks for any tenure opening that may occur in one of a number of subfields as a result of death, retirement, or interinstitutional movement of faculty.

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[8] In view of the numbers of nontenured female faculty, particularly in economics, these numbers can be expected to increase somewhat over the next five years.

Under such circumstances, the prescribed "availability" analysis clearly does not measure discrimination in demand by a particular department. It is difficult to know just what it would measure.

To make a somewhat meaningful estimate of the qualified, available supply for all tenure positions at major institutions is a difficult task, even assuming a significant range for error. The academic departments in the arts and sciences at major institutions may average around 35 in number. The number of subfields per department may average 7 or 8.[9] Disregarding the need in many cases to take account of specialties in subfields, that could mean some 700 to 800 estimates (35 × 7 × 3—one for total number and one each for women and members of minorities, in the subfield). That quantity of estimates would be required, say, for 400 tenure positions in a total full-time faculty of perhaps 650. Separate estimates for tenured and nontenured faculty would seem necessary and would double the number of estimates in each case. Persons qualified for a nontenure appointment generally would not be qualified for a tenure appointment.

In addition to the large numbers of estimates needed and the conceptual problems, there is another complication. "Minorities" is an ambiguous, quite heterogeneous category consisting of "Negroes, Spanish-surnamed, American Indians, and Orientals." "Spanish-surnamed" includes Puerto Ricans, Cubans, Mexican-Americans, and descendants of Spanish immigrants—how far back and in what ratio of Spanish blood is unclear. Orientals are well represented in tenure positions in major universities, not only in positions in Chinese and Japanese art, literature, history, and politics but also in the distinguished mathematics, physics, economics, and engineering departments. Separate estimates presumably should be made, at least for some of the constituent minority groups; a single estimate for all of them combined may have little meaning for the question of discrimination.

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[9] History has perhaps the most subfields of any discipline with at least three types of limiting criteria for each position: (1) country or geographic area, (2) chronological period, and (3) special subject matter—diplomatic, political, cultural, intellectual, art, economic, urban, etc.

Although availability analysis may be inappropriate and biasing for tenured faculty, it can have some validity and usefulness for application to the large numbers finishing their Ph.D. requirements and seeking term appointments as assistant professor or instructor. In a sense there is a labor market for the new Ph.D. recipients who seek appointment each year to instructorships and assistant professorships. In this country, some 18,000 to 20,000 Ph.D. degrees are earned annually by graduate students in the sciences, the social sciences, and the humanities. As explained in Chapter 2, most of them seek academic appointments early in the calendar year in which they plan to complete their Ph.D. training. A relatively high turnover in instructorships and assistant professorships is characteristic of major universities. On the average probably 15 to 20 percent of their assistant professorships become open each year compared with a figure of around 3 or 4 percent for tenure positions.

The supply of new Ph.D.'s coming on the market each year is, of course, differentiated in many important respects. They include intellectual capacity, quality of graduate training, field and subfield of study, probable abilities in teaching, potential for significant research, gifts for academic administration, etc. Nevertheless, one would expect that at that point in career development, there would be no significant sex differential in ability and potential as teacher-scholars. In other words, one would assume that the top 10 percent in qualifications (appropriately measured) should be distributed by sex in about the same ratio as the next 25 percent of all new Ph.D.'s. The same sex ratio might not hold, however, for (say) the top 10 percent in a discipline, particularly one in which women earn relatively few Ph.D.'s, such as astrophysics, economics, various branches of engineering, geology, mathematics, and physics. On the other hand, the proportion of women in the top 10 percent of the new Ph.D.'s in English and certain foreign languages and literatures might be relatively high. Also, one could expect some deviation from the overall sex ratio in certain subfields, partly perhaps in terms of their degree of abstraction. Indeed, although differentiation by subfield is generally not very far along at the time of Ph.D. completion, such differentiation can make the assumption of normal sex distribution of talent and training for individual subfields very questionable. The case for stating a numerical hiring goal for, say, three similar disciplines combined instead of one, rests in good part on the likelihood of unusual supply conditions with respect to some particular openings.

Despite such problems, material presented above shows that differentiation and specialization on the supply side are much greater five or seven years after receipt of the Ph.D. degree. For that reason, properly based, numerical hiring goals for faculty of major institutions are more appropriate at the new Ph.D. level than they are at a later stage in faculty careers.

The characteristics of demand for faculty at the new Ph.D. stage are likely to fit with the supply characteristics in a higher percentage of cases than is true at later career stages. Partly that is because there is apt to be less differentiation on both sides of the market at the new assistant professor stage. The demand for new assistant professors is likely to involve considerable teaching in elementary courses and over a wider range of subfields, since the candidates will have just completed their graduate training and recently taken their general examinations. The demand by academic institutions is, of course, also concentrated heavily in the early months of the calendar year, and the numbers of candidates considered fully qualified for assistant professorships in major universities is generally much larger than is true for tenure openings.

Consideration of the difficulties with the prescribed availability analysis and analysis of supply-and-demand conditions in this chapter provide a basis for examination of government-required hiring goals for university faculty—the subject of the next chapter.

5. *Affirmative Action Goals for Faculty*

The federal government's current program to eliminate bias in university employment through federal contract regulation rests mainly on numerical hiring goals[1] and schedules ("timetables") for fulfillment of the goals. As applied to major universities, the scheme of goal requirements raises such troublesome questions as the following:

1 What notions concerning the causes and cures for race and sex bias in faculty employment underlie HEW's scheme of numerical goals with timetables?

2 To what extent is "proportional representation" by sex, race, or religion a soundly conceived goal for faculty employment, both tenure and nontenure?

3 To what extent will numerical goals derived by the prescribed method and negotiated with HEW lead to inflated goals that can only be met by giving some women and minority-group members preference in hiring, promotion, and/or salary?

4 What provisions are there in the present HEW scheme to determine whether the numerical goals universities have actually set are too high in some disciplines for some ranks?

5 To what extent will inflated goals and pressures for their achievement create new, additional discrimination and tend to develop a two-standard faculty?

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[1] They really are hiring and promotion goals, since HEW has, in some cases, not only asked universities for the number of hires but also required that the goals include "the projected overall composition of the faculty in the unit"—in other words, the sex and race composition of the department one, two, three, or more years hence by rank.

6 What are the effects of numerical hiring and promotion goals on the integrity of departmental and university arrangements for determining appointment, promotion, and salary on the basis of merit?

7 If a particular academic department should fail to meet its numerical hiring goal, should sanctions be imposed on the department and its individual members, or would such sanctions be unjust and violate individuals' academic rights and academic freedom?

8 What attention and weight should be given to other goals such as improving the quality of supply or achieving "diversity" in the faculty?

Those questions will be taken up in order, after a brief look at directive statements concerning numerical goals and timetables in Revised Order No. 4, which is the basic document.

Federal contractors covered by that order are required to conduct "availability analyses" both to measure disproportionality (that is, discrimination on the demand side) and to determine the precise numbers, as goals for hiring, that a contractor must adopt. To quote again from the order:

> An acceptable affirmative action program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and thus to increase materially the utilization of minorities and women, at all levels and in all segments of his work force where deficiencies exist.

It is further stated that "goals should be specific for planned results, with timetables for completion," and "must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work."

Those statements contain four significant facts about the mandatory numerical goals in affirmative action plans. One, such goals are based entirely on availability analysis and, therefore, raise all the questions that such analysis raises and are invalid to the extent that that analysis is invalid. Two, numerical goals take the supply side as given and assume that the demand side is responsible for any "deficiencies" (discrimination) and that the demand side must, therefore, take the affirmative actions through the hiring and promotion of members of minorities and women. Three, numerical goals assume that proportional representation, as measured by availability analysis, is the norm for all sections of university faculties and that proportional representation for women and minority groups would exist throughout a faculty if there were no discrimination on the demand side. Four, the goal setting and timetables are in terms of actual hires; they are result-oriented instead of process-oriented, with no account taken by the enforcement agency (HEW for higher education) of their discrimination-creating potential. Specifically, all the pressures and incentives are directed toward achieving a particular number of women and members of minorities among the new hires.

BASIS FOR HEW-PRESCRIBED GOALS

In placing primary emphasis on goal making by colleges and universities, the HEW Guidelines assume that most of the responsibility for race or sex bias in faculties of universities and colleges rests on the demand side. The primacy of goal making and goal enforcement also assumes that race and sex bias in faculties can be largely overcome through government pressures to achieve certain quantities of appointments and promotions for women and blacks and members of other minorities.

As material already presented has indicated, those assumptions are not well founded. In many disciplines of the arts and sciences, serious deficiencies exist on the supply side, especially for positions in the upper faculty ranks in major universities. The need for a significant supply component in a federal antibias program has already been explained, so it is not necessary to belabor the matter here. Chapter 9 contains a specific proposal for post-Ph.D. training while on regular faculty appointment that would significantly increase the number of women and members of minorities qualified for tenure appointments in major universities in fields where they are now quite scarce.

Further attention, however, needs to be given to such matters as (1) the proper base for proportionality calculations for goal purposes and (2) the validity of applying proportionality with timetables to certain faculty positions.

With respect to faculty in major institutions, what is the base or unit of "qualified" supply from which to establish a numerical goal? Under the HEW Guidelines, a hiring goal is to be determined by the difference between the proportion of each race, sex, etc., in the total qualified supply available to the university for appointment in the unit and the proportion actually employed in that unit by the university.

The proper unit for goal making and goal enforcement, thus, is a crucial matter. Should all numerical goals be calculated and enforced by a unit that is defined as the faculty of the arts and sciences college as a whole, a division of that college (for example, physical sciences, social sciences, humanities), each academic department, each subfield of a discipline, each faculty rank in the units just mentioned, or a particular opening (for example, a position in medieval history, modern Chinese politics, or public finance)?

On the appropriate unit for goal making and goal enforcement, the HEW Guidelines are equivocal and unenlightening. The wording is as follows:

> In many institutions the appropriate unit for goals is the school or division, rather than the department. While estimates of availability in academic employment can best be determined on a disciplinary basis, anticipated turnover and vacancies can usually be calculated on a wider basis. While a school, division or college may be the organizational unit which assumes responsibility for setting and achieving goals, departments which have traditionally excluded women or minorities from their ranks are expected to make particular efforts to recruit, hire and promote women and minorities. In other words, the Office for Civil Rights will be concerned not only with whether a school meets its overall goals, but also whether apparent general success has been achieved only by strenuous efforts on the part of a few departments (Office for Civil Rights, 1972, p. J5).

Note that the absence of women from a department's "ranks" is assumed to be a result of the department's "traditional exclusion" on the demand side and that "success" is assumed to be directly related to the "strenuousness" of the university's efforts.

Certainly the most appropriate unit would be one in which the supply—overall and by sex and by race—was sufficiently homogeneous to warrant the application of the principle of proportionality as a norm. For most tenure positions in major universities, such a supply situation does not exist. It is on those grounds that the calculation of numerical goals for tenured faculty of major universities and their enforcement by HEW is considered unwarranted and misleading.

As explained in Chapter 4, the serious objections to the HEW method can be partly met if the composition of the unit for goal making is confined to persons seeking their first regular faculty appointment as assistant professor at the end of their Ph.D. training, and if the unit is broad enough to include three or more departments so that there are sufficient openings each year and a sufficient supply in total and by sex or race for the combined openings. At the point of Ph.D. completion, the supply has a considerable amount of common, up-to-date training. The demand is likely, even at that stage, to be differentiated to a significant extent by subfield or subfields, though much less so than at a later stage in career development. However, with a sufficiently large unit, those subfield differences would tend to average out. It is assumed that, for such a unit, the distribution of supply of women, and perhaps blacks, according to qualifications for appointment might have much the same configuration as for white males.

On that basis, numerical goals might be calculated and projected by sex and race within a range of probability for first post-Ph.D. appointment as assistant professor. A proposal to that effect is set forth in some detail in Chapter 9.

INFLATED GOALS AND THEIR CONSEQUENCES

The HEW method, particularly if applied by academic departments to tenure positions in major universities, is likely to lead to inflated goals. That is so for several reasons. One, the assumption that the demand side is responsible for any disproportionality and that such disproportionality must be corrected through hiring enough women and members of minorities in itself tends to lead to inflated numerical goals. It inflates the responsibility of the demand side. Two, both HEW and the universities, in the absence of proper supply figures for each institution for each departmental subfield in which a vacancy is predicted, use the total of Ph.D. holders in the discipline or the Ph.D. recipients during a past period, say 5 to 15 years before. Such figures tend to inflate the numbers for women and blacks because they do not take account of the amount and quality of developmental experience during the first five to seven years as assistant professor. Three, in many cases, the numbers of tenured faculty in a department are so small that the proportionate figure for women (or "underrepresented" minority groups combined) is only a fraction—frequently well under one-half. The tendency is to round the figure to one if only to avoid the misinterpretation that the department considers no woman or minority person qualified for any tenure openings in that department in the near future.[2] Four, several universities may independently assume that each of them will be able to attract one out of (say) a dozen women in the country qualified for tenure appointment. If all three to four dozen major universities project as a goal one woman on tenure in that department, the resulting goals taken together are inflated. Assuming that each of 36 major universities has a numerical goal of one female professor with tenure in a particular discipline and that 12 of the 36 have a female professor in that department, then the other 24 should seek to fulfill their goal of one by making a tenure offer to a woman at least by the time their timetable indicates. In other words, the potential demand for female professors in those major institutions has been tripled by the goal-setting process. As the 24 institutions make offers designed to attract some or all of the 12 women away from their existing positions, such actions will bid up these women's salaries above those for comparable males. A dual market will tend to develop—one for females and one for males. However, only 12 of the 36 universities will have a female tenured faculty member in that discipline after all the bidding has taken place. The other 24 will continue to have a "deficiency" as long as the supply of qualified women is not increased sufficiently or until they decide to lower standards in order to appoint a woman.[3] Acceleration of the timing of offers through unduly fast timetables—even too fast for appropriate openings to develop— serves, of course, as an additional demand-inflating factor. In some negotiations with universities, HEW field staff seem to be operating on the basis of the naïve statement in the HEW Guidelines that "in many cases" full accomplishment of numerical goals "within 5 years" would be "a reasonable time" and that in other cases "more time or less time will be required" (Office for Civil Rights, 1972, p. J4).

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[2] This goal-inflation factor is undoubtedly one reason that HEW presses for numerical goals by department and is reluctant to accept a zero goal for a department even though the calculated figure for blacks and women is actually only a small fraction of one person. It is apparently on such grounds that MIT's affirmative action plan contains the statement that as of April 1973 "women and minorities are underrepresented in most academic positions within the Institute, particularly in faculty positions, both tenured and untenured" (see *Tech Talk*, 1973*a*).

[3] A university could hire a female assistant professor in hopes of developing her into a qualified professor with tenure or possibly bid such an assistant professor away from another institution that had a female assistant professor who was about qualified for a tenure appointment.

HEW assumes no responsibility for any inflation in numerical goals, even though it may reject proposed affirmative action plans on the grounds that some of the numerical goals are not large enough or the timetables for their accomplishment are too extended. Also, HEW does not have a reporting system or statistical analyses designed to evaluate the extent to which the numerical goals of covered universities, or a category of institutions such as major universities, are inflated.

The smaller the unit for goal setting, the more necessary it becomes to predict the sex or race of individual appointments and promotions within that unit. Expectations and presumptions become attached to particular positions, and pressures, both internal and external (for example, by HEW and advocacy groups), are focused in a very specific, concrete manner. Thus, particular numerical goals exert a coercive influence.

The combination of inflated goals and strong pressures for their achievement have serious implications for a faculty system of appointment, promotion, and salary based on professional qualifications and performance. Selection of female and minority-group faculty members partly on grounds of sex or race is likely to create additional discrimination and can have quite undesirable effects on the utilization of the teaching and research resources of a university. Numerical goals that assume the promotion of particular female or minority-group assistant professors to tenure can be especially injurious over an extended period because they imply some disregard of open competition under merit-based systems for the determination of tenure appointments.

Significant deviations from choice of the best available person for a tenure position as judged by mature teacher-scholars under proper procedures is likely to cause faculty members, both tenured and nontenured, to lose confidence in the integrity of the system of professional determination of promotions and appointments to tenure. The number and ratio of "mistakes" that develop over time would increase, with adverse consequences described in Chapter 2. A two-status faculty would tend to develop: those who were chosen because their qualifications were judged by their professional peers to be the best for a position in open competition and those whose appointment occurred, in part, because of their physical characteristics—race or sex. The latter would begin to be considered as special EEO appointments and, if their effectiveness as teacher-scholars turned out to be comparatively low, they would be thought of as EEO "mistakes."

Such a situation could be embarrassing to all concerned. The opinions of colleagues and students would become evident in course elections and teaching assignments. The costs to the institution would take various forms, including faculty discontent, reduced faculty effectiveness, and less drawing power for able students and able faculty. Sex-conscious and race-conscious favoritism could also expose the university to charges of discrimination against the most able white, male applicants or assistant professors.

THE QUESTION OF SANCTIONS

Revised Order No. 4 states: "Supervisors should be made to understand that their work performance is being evaluated on the basis of their equal employment opportunity efforts and results, as well as other criteria" [par. 60-2.22(b) (8)]. Applying that idea to university faculty, it has been proposed that universities institute a system of sanctions to ensure compliance with affirmative action goals (Weitzman, 1973, pp. 500–501). Among the sanctions on a department and its individual members suggested by Professor Lenore J. Weitzman is the denial of salary increases to members of those departments that have not met affirmative action goals. Weitzman also suggests "linking" the following to "affirmative action progress:" the size of the departmental budget, the amount of university research funds granted to the department, university approval of members' applications for outside research grants, and travel allowances to professional meetings.

Such individual and collective sanctions would clearly involve attempting to coerce individual faculty in their judgments concerning the best-qualified persons for faculty appointments. Such coercion would threaten academic freedom. It would be destructive of systems of faculty appointment according to qualifications and salary increases based on performance. Such individual sanctions applied in a collective manner would be unjust to individual nontenured and tenured faculty members. Some of those selective sanctions, such as denial of salary increases, nonapproval of research applications, and selective restrictions on travel funds, would violate the tenure rights of professors in the penalized departments. The suggestion of such sanctions shows the dangers of overemphasis on the achievement of numerical hiring and promotion goals, even assuming that the goals were appropriate and were properly determined.

The federal government had not, at the time of writing, applied the sanction of partial or complete block on the flow of research funds to an institution because it had failed to achieve one or more of its numerical goals. The likelihood that such failure could be explained has meant that some university administrators are not as concerned as they should be if some of their numerical goals seem unrealistically high.

OTHER AFFIRMATIVE ACTION GOALS

As already explained, the most serious defect in the HEW program of affirmative action goals for university faculty is the absence of goals for the supply side. Such goals should be formulated primarily in terms of training and development—both Ph.D. training and on-the-job development to qualify for a position with tenure, particularly at major institutions.

Such a program for improving the supply of highly qualified female and minority-group teacher-scholars in selected disciplines is presented in detail in the appendix to Chapter 9. Under the program, universities would submit affirmative action supply plans that would aim at certain numbers of women and blacks to be trained in a Ph.D. program in a discipline or to receive further on-the-job development in a discipline while serving as full-time or part-time assistant professors. The federal government would select from among the plans offered, certain university plans, either Ph.D. or postdoctoral, for approval. The approved plans would become part of a university's overall affirmative action program.

The purpose of the affirmative action supply program would be to attract and train a sufficient number of women and blacks in teaching and scholarship so that the discipline would have a critical mass of leading teacher-scholars with excellent doctoral and postdoctoral training. The present affirmative action plans specify only the numerical composition of demand. In disciplines where the number of women and blacks with Ph.D. degrees is quite small, they tend to spread the female and minority-group faculty around, with perhaps only one in each department. Such separation may seem to be "tokenism" and may have the psychological disadvantages of "singleness."

Sex and race discrimination in university faculties have various psychological aspects. Career aspirations and expectancies are affected by colleagues' attitudes, students' attitudes, social pressures and slights. Undoubtedly, wider and deeper understanding among male white faculty of the problems of a woman or a minority person on the faculty aids in progress toward the elimination of conscious and unconscious sex and race prejudices. However, it is difficult to conceive of specific goals or targets that could be developed and used for compliance purposes.

A number of groups have proposed diversity in the faculty as a hiring objective for colleges and universities. Unfortunately, the proposers are generally vague about the kinds of diversity they have in mind. And one cannot be sure whether "diversity" is proposed as an additional goal, as a substitute for numerical hiring goals aimed at proportional representation, or as part of those goals.

Diversity is stressed as a general kind of goal and is discussed from various angles in the 1973 report of the Committee on Discrimination of the American Association of University Professors ("Affirmative Action in Higher Education," 1973). The report begins with the statement that affirmative action must be "devised wholly consistent with the highest aspirations of universities and colleges for excellence and outstanding quality and that affirmative action should in no way use the very instrument of racial or sexual discrimination which it deplores." The committee then inconsistently commends "plans in which 'preference' and 'compensation' are words of positive connotation." "Compensation" is "for past failures to reach the actual market of intellectual resources available to higher education."[4] "Preference" seems to mean "affirmative consideration of race or sex," and preference to achieve "diversity" appears to the committee "to state a neutral, principled, and altogether precedented policy of preference" (ibid., p. 181). What the committee has in mind, however, is not clear from those statements.

As discussion of this subject in Chapter 2 indicates, diversity in university faculties has many dimensions besides race and sex. Particular kinds of diversity serve particular educational purposes. Consequently, it is necessary to think in terms of the kind of diversity necessary for particular departments and institutions and to recognize the need for balance among various values and objectives.

Unfortunately, the committee does not explain what diversity as a goal would mean in operational terms—how it should be defined, balanced against other values, and, particularly, how much weight should be given to diversity in selecting tenured or nontenured faculty compared with the stress put on the regular criteria of teaching, scholarship, and other contributions to the well-being of a university. Also there is the question whether the same kind of diversity is to be the goal in all departments in a uniform pattern. For enforcement by HEW compliance officers, some definite answers would need to be at hand.

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[4] "Affirmative Action in Higher Education" (1973, p. 178). To an economist "failure to reach an actual market" might seem to imply deficiency on the supply side – failure to apply for a job – but it is evident in subsequent remarks that a deficiency in demand is assumed.

The committee also proposes that a university "deliberately reserve discretion to depart from standards and criteria" generally applied in the selection and promotion of faculty, presumably including for tenure positions. It recommends that such "experimentation" be part of "the standard of a department or institution" in order to "help broaden the design of [an affirmative action] plan" (ibid., p. 178). However, the committee does not explain how an institution, following its advice, convinces a compliance officer that no sex discrimination has occurred when, as an experiment, a white male is appointed because, say, he seemed the best representative of the views of the radical left, or the radical right, or some particular religious or ethnic group. It is no answer to such problems to say, as the committee report does, that "at the present moment, the politics of reaction are a greater source for concern than the possibility that affirmative action might lend itself to heavy-handed bureaucratic misapplication" (ibid., p. 178).

The nation's leading universities have much to contribute to the solution of the problems of race, sex, and religious prejudice in career development and worklife in this country. Unwittingly to insist that they conform to a single design for affirmative action plans and goals, developed for industries like building construction and steel, is heavy-handed bureaucratic regulation. As the preceding pages have indicated and the chapters that follow further explain, HEW regulation of universities does have serious implications for their future progress.

STATEMENTS OF THE CARNEGIE COMMISSION

Chapters 1 through 5 of this study were in first draft in September 1973, before the Carnegie Commission's "Report and Recommendations" contained in *Opportunities for Women in Higher Education* was issued. On the basis of the material presented in the first five chapters, the author would question the wisdom of the following Commission recommendation concerning an affirmative action goal and timetable for each academic department:

> 2. Every department and school in an academic institution should establish, in consultation with the administration of the college or university, a goal relating to the relative representation of women on its regular faculty (assistant professor to full professor). In determining these goals, every appropriate source of information on the relative size of available pools of qualified women and men should be consulted—not just those indicated in the federal guidelines. A reasonable timetable for achieving the goals should be developed, but allowance should be made for special difficulties that may be encountered in adhering to the timetable, especially in fields in which there are currently relatively few women with doctor's degrees and in which competition among institutions for this limited pool of talent is likely to be intense (Carnegie Commission, 1973*b*, p. 148).

Questions can also be raised concerning the validity of the following statement:

> The Commission believes that the evidence we have presented in Section 7 relating to the representation of women on college and university faculties, and to the lower salaries women receive, indicates clearly that a serious problem of discrimination exists and that the problem is particularly acute in the leading research universities and in the departments in those universities that have traditionally had predominantly male faculties (Carnegie Commission, 1973*b*, pp. 136–137).

The evidence referred to is in large measure the Scott study discussed toward the end of Chapter 3. That the problem of sex discrimination in salaries is "particularly acute" in the academic departments of major universities that have "predominantly male faculties" is doubtful. The material presented in Chapter 3 would indicate that if all factors are taken into account, especially on the supply side, the reverse is probably the case. Sex discrimination in salary, properly calculated, is probably less prevalent and less significant in the teaching faculties in arts and sciences in major universities than in other universities and colleges as a group.

6. Faculty Cases under Federal and State Laws

The differences in aim and legal basis between the HEW Guidelines and equal employment opportunity legislation come into focus in individual complaint cases. The federal Civil Rights Act of 1964 and the state fair employment practices laws[1] provide equal protection for all—males and females, black and white—based on qualifications. The HEW Guidelines, requiring specific, result-oriented hiring goals and timetables by sex and race, stimulate discrimination in favor of women and members of minorities. That is especially true where numerical goals are inflated.[2]

Generally speaking, preferential hiring for members of a particular race or sex, if practiced in individual cases, is likely to be in violation of the Civil Rights Act of 1964 and most of the state fair employment practices laws. Also, statistics can be used to support a complaint that a woman or a minority person was given preferential treatment in hiring or in promotion just as they have been used to support charges of discrimination against women and minority groups. For example, an affirmative action plan of a Midwestern university's politics department contains numerical goals as follows: a net increase in three years of 1 façulty member to a total of 49, to be achieved by decreasing the male faculty by 8 and increasing the minority-group and female faculty from 6 to 15. In the New York State University system between the fall of 1970 and the fall of 1971, the total number of faculty increased from 9,492 to 9,608, or by 116. Of that increase of 116 faculty members, 111 were reported as "identified" with a minority group including women (Office of Equal Employment Opportunity Programs, 1972, p. 13). It might be difficult to explain how those results could be obtained without preferential hiring. Indeed, there is evidence that during that period women and members of minorities were given preference for appointment to certain faculty positions at the State University of New York at Albany and at other locations, in order to achieve affirmative action goals.[3]

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[1] Thirty-seven states have fair employment practices laws, but not all of those laws cover both public and private institutions of higher education. Also some cities, including Cleveland, New York, Philadelphia, Pittsburgh, and St. Louis, have municipal fair employment practices laws.

[2] Some writers contend that, under American constitutional law, there are serious doubts whether government-required, affirmative action hiring programs, which are "result-oriented" and aim at racial or sex balance in terms of specific numbers, are constitutional under the conditions in most universities. That is because they involve using race and sex as a criterion for employment and result in restricting the employment opportunities of "nonminority" individuals because of their race or sex. See Sherain (1973) and Bickel (1973, no. 73-235).

CORRECTION OF BIAS

Extending back for decades, in many institutions of higher education, female faculty have been discriminated against by receiving less than equal pay[4] and having less than equal opportunity to advance in rank. Individuals have been handicapped in their career development by such discrimination in ways that often cannot, years later, be fully corrected.

In the case of female and minority-group faculty, the appropriate remedy would seem to be one aimed at correcting the situation insofar as that is possible for the particular faculty member or class of faculty members directly affected by discrimination. That is the aim and method of the Equal Employment Opportunity Commission, the state fair employment practices agencies, and the Equal Pay Division of the Department of Labor in enforcing the law against discrimination involving race, sex, color, or national origin. Individual complaints are filed with those agencies, which investigate the complaints, and if there are reasonable grounds to believe that discrimination has occurred, prosecute the cases for the complainants, if necessary in court, and seek to achieve proper compensation and academic status. Corrective action may involve requiring a university to carry out some specific affirmative action program directed to the complaint in question.

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[3] See Statement of the Anti-Defamation League of B'nai B'rith, submitted to the New York State Advisory Committee to the U.S. Commission on Civil Rights for inclusion in the Hearings in Albany on June 6 and 7, 1973, dealing with problems concerning Equal Employment Opportunity within the State University of New York.

[4] Equal pay for women for the performance of equal work is provided in the Fair Labor Standards Act administered by the Wage-Hour Division of the U.S. Department of Labor (university faculty have been covered since mid-1972) and in equal pay laws in 34 states, many of which have coverage that includes universities. The Fair Labor Standards Act also requires equal pay for men by forbidding employers to discriminate between male and female employees by paying lower wages or salaries to employees of one sex than to those of the other sex for equal work performed under similar working conditions that require equal skill, effort, and responsibility. The equal-pay provisions of the Fair Labor Standards Act apply only to discrimination based on sex and require that the lower rates of pay for one sex be raised to the higher rates for the other sex where a differential is established to be discriminatory.

By contrast, the HEW requirements for affirmative action programs are not designed to remedy specific discrimination against individuals. Rather, they aim to increase the hiring of women and blacks and members of other minorities in universities, whether those women and minority-group members have themselves ever been discriminated against in connection with university employment or not.

INCREASING NUMBER OF FORMAL COMPLAINTS

The number of complaints filed by faculty alleging discrimination in connection with their employment has been increasing and is expected to grow significantly in volume over the next two or three years. Some women's groups have recently been promoting the use of the courts. The 1972 amendments to the Civil Rights Act of 1964 extended its nondiscrimination provisions to all institutions of higher education and strengthened the powers of the Equal Employment Opportunity Commission (EEOC) to enforce Title VII of the act.

The total number of faculty complaints of discrimination filed with the government agencies and the courts at any one time is not known. There is no central reporting of all job discrimination complaints filed against colleges and universities with the Office for Civil Rights of HEW, the federal Equal Employment Opportunity Commission, the Department of Labor under the Equal Pay Act, the state and city agencies enforcing fair employment practices laws, and with the state and federal courts. Often the same complaint is filed with a number of agencies; a complaint may get settled at various points in the procedure; and complaints against higher education institutions are generally not separated into faculty and nonfaculty categories.

A basic reason for increasing faculty complaints of job bias is inconsistency in the federal programs themselves. As previously explained, the HEW Guidelines stimulate discrimination in favor of women and minority groups. They do so through alleging deficiencies that, in some cases, are not due to discrimination on the demand side, but must, the compliance officers insist, be corrected by the institution stating numerical hiring goals and using "good-faith efforts" to meet those goals.

On the other hand, the Civil Rights Act of 1964 clearly states that it is an unlawful employment practice to discriminate because of an individual's race, color, religion, sex, or national origin. Much the same language is in the state fair-practices acts. They provide that each job applicant must be treated as an individual, without regard to sex or race, and that employment or pay cannot be based on race, sex, or religion. The institutions of higher education are in the middle of a conflict between the guidelines as applied and enforced by HEW and the Civil Rights Act as interpreted by the U.S. Supreme Court.

Another reason for an increase in the number of complaints filed with the federal and state agencies is that those agencies often pay little or no attention to the existence and use of established faculty procedures for the settlement of charges of discrimination. The HEW Guidelines urge that universities have procedures for the fair handling of grievances as part of their affirmative action plans, but federal and state agencies handling individual complaints have often disregarded a complainant's failure or refusal to use the university's faculty grievance procedure before filing a complaint. Moreover, the government agency takes up a person's complaint free of charge and can seek to have the courts require that a university, if found in violation, increase the complainant's pay, compensate for past insufficiency through back pay, reappoint the complainant, appoint him or her if discrimination occurred in the appointment of someone else, and promote an assistant professor to tenure. Also, the federal or state agency has power to acquire data and access to confidential files and to hold open hearings or prosecute a case, if necessary, through the courts, on behalf of a complainant.

The HEW Office for Civil Rights assumes no responsibility if a university, following the instructions of an HEW compliance officer, is for that reason charged by EEOC, or a state agency, or a court, with discrimination against a white male applicant by hiring a less-qualified woman or black. In other words, a university can be charged at the same time with discrimination against women and blacks (by HEW because it has alleged "deficiencies" that must be "corrected" or by the EEOC or a state agency in individual cases of alleged past discrimination) and with discrimination against nonminority males (because the university favored women or blacks in hiring, which was the only way it could fulfill its affirmative action goals and meet timetables established according to instructions by HEW regional civil rights officials).

By October 1973, EEOC had some 600[5] individual complaints filed against colleges and universities, and HEW had received about 150 individual complaints of discrimination against nonminority males (in favor of women or blacks) or against women (in favor of blacks) in colleges and universities. It was not known against how many individual institutions complaints had been filed in both categories—discrimination against women and blacks and against nonminority whites. Since EEOC had a backlog of some 80,000 charges of employment discrimination, with 50,000 being filed each year, considerable delay in the handling of such complaints was to be expected.

The growing scarcity of faculty openings (with 100 to 500 applicants responding to an advertisement for an assistant professor opening in many disciplines) serves to enlarge the number of complaints of bias filed with government agencies or with the courts.

Under such conditions, failure to obtain a desirable faculty position for which one applied or into which one hoped to be promoted can prove to be quite a loss to the individual. Correspondingly, gaining a three-year appointment or a promotion to continuous tenure by filing a complaint followed by government action, can be quite valuable for the complainant.[6]

RESORT TO GOVERNMENT AGENCIES AND THE COURTS

The staffs of federal and state civil rights agencies and the courts are not well qualified to assess and decide the relative competencies and promise of individual teacher-scholars for a particular tenure position at a university. They lack the long years of academic experience and the professional knowledge in the academic subfields. Therefore, alleged cases of discrimination in promotion or appointment to a tenure position are difficult for them to handle with assurance. They can, presumably, make some judgment regarding the adequacy of the recruitment, of the information available, and of the procedures followed.

For the staffs of government agencies and the courts to review in open hearings the validity of appointment, promotion, and salary decisions made under the procedures explained in Chapter 2 raises other serious issues. Under assurance of strictly confidential use in order to encourage candor, assessments by distinguished teacher-scholars are obtained comparing the complainant's qualifications for a position or promotion to tenure with other faculty at that university and elsewhere. To reveal such confidential assessments as comparative evidence in open hearings or in court would not only discourage frank assessments in the future but also would involve invasion of the privacy of persons not directly party to the case and could seriously injure their professional reputations.

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[5] Increased to 1,500 by April 1974.

[6] A tenure position at a major university usually means a professor's salary and benefits for 30 to 35 years, which is roughly the yearly income from (say) $600,000 of capital funds.

In addition, the tenured members of a department, members of ad hoc or standing faculty committees, and academic administrators could be required to testify as to their group discussions and decisions concerning the faculty member and to testify in detail about the weaknesses and strengths of various candidates and about past mistakes made in promotion to tenure. Such a requirement would discourage candid judgments in the future because of possible exposure in hearings and thus would reduce the effectiveness of evaluative procedures. It would also tend to discourage use of the principle of salary increases according to merit and would encourage automatic and uniform increases or increases according to length of service in the rank or some other formula applied without direct relationship to performance. Small differences in salary increase might seem too difficult to explain with several persons participating in the decision.

For these reasons, reliance on statistics to determine the existence or nonexistence of discrimination in faculty employment could be quite incorrect and actually misleading. Unverifiable claims that particular statements were made in conversation between the complainant and, say, the departmental chairman can make a case seem to rest heavily on one person's word against another's. Therefore, there is a need to reduce to writing messages to individual faculty about the quality of their work and for department chairmen and deans to maintain written summaries of meetings where statements and evaluations of a faculty member's performance and prospects are made.

Adversary proceedings between a faculty member and a university—which are really directed mainly at those faculty who participated in the evaluations and decisions alleged to be discriminatory—that take place in open hearings held by a government agency or in court can cause lasting rifts and bitterness in a department, especially where faculty enjoy academic freedom and tenure and the department is largely self-governing.

The faculty of major universities are but a very small fraction of the total employment covered either by Revised Order No. 4[7] or by the Civil Rights Act of 1964 as amended. The danger to the universities is that federal and state rules, agency decisions, and federal and state court decisions will be based on the industrial model of employment and management and will fail to make proper allowance for university faculty systems of shared government, academic freedom plus academic tenure, and compensation and advancement according to evaluations of a candidate's performance and potential as a faculty member and contributor to progress in that field or subfield, made by mature teacher-scholars.

With the quality of a department and the university so importantly involved in making tenure appointments, government-agency and court decisions based on the industry model could have profound implications for the faculties of major universities.

EXPOSURE TO CHARGES

Experience clearly demonstrates that a university invites charges of discrimination whenever it deviates in a faculty appointment or promotion from the principle of selecting the candidate properly judged to be the best qualified to fulfill the requirements of the position. The same is true for the determination of individual salaries. Selection and reward according to individual performance and future promise based on past performance are basic for achieving equal employment opportunity, for providing proper incentives for accomplishment, and for maintaining the integrity of the institution.

Presumably the federal and state agencies and courts, in judging the validity of individual complaints of discrimination, should use that same standard. Both prejudice against, and preference for, persons on the basis of color, race, sex, or other nonperformance attributes are destructive of equal employment opportunity.

A university by its very nature may be especially vulnerable to a charge of discrimination both for and against faculty on such grounds as race, religion, sex, or national origin. Faculty are encouraged, by academic freedom and tenure and by academic training, to be independent thinkers and to explore various ideas and systems of thought. The classroom is a place for examining differing and conflicting views. It is not that faculty are especially bias-prone but only that they do and should express themselves freely in seminars, classes, and department or committee meetings.

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[7] Under the Executive orders, every enterprise with over 50 employees that has a federal contract or subcontracts totaling $50,000 must have a written affirmative action program for each of its establishments; every institution or organization holding a federal contract or subcontract of $10,000 or more must agree not to discriminate against any employee or applicant for employment with respect to race, color, religion, sex, or national origin.

The tenured members of a department usually play a key role in the selection and advancement of department faculty. Therefore, what one or more of them may say or write in letters, articles, private conversation, or the classroom may possibly be allowed as evidence of bias in an open hearing held by an agency or in a court. It is possible, therefore, that the adjudication of an individual complaint could raise a serious question concerning academic freedom and tenure as well as confidentiality of solicited letters of evaluation. In addition, apparently there is no time limit on the filing of discrimination charges or the distance back in time that statements and events can be used in such proceedings as evidence of personal bias on grounds of race, sex, religion, and national origin.

CONSEQUENCES OF GOVERNMENT PROSECUTION AND ADJUDICATION

It will be useful to explain in summary fashion the various short-run and long-term disadvantages to the parties that resort to government agency or court procedures for settlement may involve.

1 Once a complaint is filed with a federal or state agency or a court and a formal statement setting forth the alleged discrimination is presented to the institution, forces are set in motion on both sides aimed at preparing the strongest possible position. Both sides are likely to put their case in the hands of a lawyer, who will view the matter in the light of past court decisions, effective evidence, and legal tactics. Stress is put on arguing and winning the case.

2 With the complaint filed and lawyers working on the preparation and presentation of their case, things begin to happen to faculty relations in the department and the university. Faculty and administrators are cautioned on what they can and should say, because the complaint normally would be against a recommendation or decision by the tenured members of the department concerning the complainant's appointment, reappointment, promotion, or salary and

also presumably against action taken by any faculty or faculty-administration committee that reviews and acts on department recommendations. Tensions rise and sides are taken by faculty, administrators, and students, with publicity about the case appearing in the student paper and other media. (Some 400 female employees at the University of Pennsylvania are said to contribute to the legal expenses of women filing a sex discrimination case against the institution.)

3 The processing of a case by a civil rights agency or a court usually takes considerable time because of a backlog of cases. Often the preparation and presentation of the case are fairly expensive in terms of effort, money, and psychological wear and tear on the parties. Open hearings held by an agency or by a court tend to create tension and bitterness within the complainant's department and the university, as the tenured members of the department and members of the review committee testify and are cross-examined concerning the basis for their decisions with respect to the complainant's appointment and pay. Comparisons are likely to be drawn in terms of strengths, weaknesses, and rate of progress of faculty in the same or a higher rank in the department and in similar departments such as foreign languages and literatures. Use in public hearings of information and evaluations of other faculty for comparison with the complainant's qualities as a teacher, scholar, and colleague, and skill in administering programs is likely to be embarrassing to both the complainant and faculty used for such comparative purposes. If outside letters of evaluation have been obtained under promise of confidentiality, any requirement to reveal their contents in such hearings not only could be embarrassing but also could result in inability of the institution henceforth to obtain such valuable candid assessments.

4 A decision by a government agency or a court could be unsatisfactory to both parties. That is not too unlikely because agency staffs and judges cannot be expected to be highly knowledgeable concerning faculty practices and problems and are likely in decisions to follow precedents in cases decided according to the industry model rather than the academic-faculty model of operation. A decision may build in bitterness and conflict that will seriously hamper the effectiveness of the department and its members long into the future. Certain kinds of decisions could almost assure continued discord and subsequent filing of new charges of discrimination.

Because of the likelihood of such difficulties and disadvantages to the parties in cases processed through the agencies and the courts, it would be desirable if the parties had an option to use, if both wished to do so, a method of dispute settlement that might be more satisfactory, especially for faculty cases.

OUTSIDE MEDIATION-ARBITRATION

In view of the possible unsatisfactory consequences of processing faculty complaints of discrimination through government agencies and the courts, an optional alternative procedure is proposed for voluntary use where it is appropriate. Compared with agency-court processing of discrimination complaints, the optional procedure would, for many cases: (1) be quicker and less costly, (2) use persons who understand how universities do and should operate for factual investigation, mediation, and settlement decisions, (3) provide better assessment of the validity and value of comparative data and statements, without the necessity of faculty colleagues having to present, in open meeting, detailed assessments of the strengths and weaknesses of the complainant compared with others in the department and elsewhere, in terms of teaching, research, and general usefulness and value to the university, (4) be more likely to result in a mutually acceptable settlement through mediation (conciliation) than would be the case if handled by a government civil rights agency, and (5) where an outside decision is necessary, result in one that is more likely to be mutually face-saving and satisfactory to both parties over the long run.[8]

The essence of the proposal is to provide to the parties a choice of submitting a claim of discrimination in faculty employment that cannot be settled by means of internal procedures, to outside investigation, mediation, and, if necessary, arbitration. The mediator-arbitrators would be selected by the parties from a panel composed of faculty members at a number of institutions, most of whom would have had experience as labor arbitrators. The component parts of the proposal can be explained as follows:

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[8] In deciding on a remedy in the case of university faculty, account usually would need to be taken of the existence of specialization by subfield, the fact that only one expert may be needed in many subfields, and the practice of professors having continuing tenure. Such factors may sharply restrict transfer to another position and create the possibility of repeated appeals to the court over an extended period of time, whereas in industry there would generally be much more flexibility of adjustment to a court order to rehire or promote an employee.

1 Arrangements would be made for a public-service agency, with interest in the mediation and arbitration of disputes, to administer such a program. One suggested agency is the National Center for Dispute Settlement, a division of the American Arbitration Association. Established in mid-1968, with headquarters in Washington and local operations in eight cities across the country, it has been engaged in developing ways of providing third-party neutral assistance for resolving community, consumer, public-employment, and similar types of conflict through the services of experienced mediators and arbitrators.

2 The program could begin to operate either with a national panel of 100 to 200 faculty mediator-arbitrators and with selected universities and colleges around the country participating, or on a regional unit basis, with regional panels of faculty mediator-arbitrators and with participation by selected universities and colleges in the regional area. Examples of such regional areas are the following: the area within 100 miles of Boston, the New York–Philadelphia regional area, the area within 150 or 200 miles of Chicago, the area between Washington, D.C., and Durham–Chapel Hill in North Carolina, and the area between San Francisco and Los Angeles in California.

3 Persons named to a national or regional panel would be tenured faculty with sufficient independence, academic reputation, and (in most cases) arbitration experience, so that their investigation and mediation efforts and their arbitration decisions would be well respected. Because there is an insufficient number of experienced female and minority-group faculty members for such a program, it would be necessary to provide for the development of a more adequate supply. To some extent, that could be accomplished by having some of them gain experience by participating with others on individual cases.

4 At least in the early experimental stages, the cost of financing mediation-arbitration in each case (arbitrator's fees, travel, overhead) would be met by payment of at least half the cost by the institution. The remainder hopefully would be covered, at least

for an experimental period, by foundation support and possibly other sources. The complainant charging sex or race discrimination in employment could not be expected to pay part of such costs because he or she can have the case prosecuted free of charge by federal and state agencies. It might prove desirable to have some means of making sure that complaints submitted to the procedure actually should have that treatment, particularly if the costless aspect encouraged many requests for use of the method where that seemed unnecessary.

5 Outside mediator-arbitrators should have the right to examine all pertinent material, including confidential letters of evaluation, to interview all persons involved in the matter or useful for comparative purposes, and to obtain confidential assessments of their own. Private hearings would be usually held, with stress placed on getting all the facts in a calm, objective manner, without any publicity. Lawyers would not be necessary in many cases. In such ways, hostility and bitterness could be minimized.

6 After obtaining and assessing all the facts, the mediator-arbitrator(s) could talk tentatively with both parties separately about the directions that their thinking was taking and what those directions might imply with respect to a decision. Under such circumstances, a mediated settlement might be more possible than if a federal or state agency (the prosecutor) were to try to mediate the dispute.

7 A decision by the mediator-arbitrator(s) would be considered conclusive, unless the parties stipulated otherwise or court action modified or nullified the decision. In some cases, a university may be reluctant to allow outside arbitrators to grant continuous tenure as part of a binding arbitration decision. However, a complainant may insist, as a condition of entering the procedure, that the mediator-arbitrator(s) have the same power to levy remedies as a federal or state agency and the courts. Such conditions can be spelled out in the stipulation to arbitrate.

8 The procedures and decisions of mediator-arbitrator(s) can be more flexible and better adapted to the circumstances of the case and the academic department involved than would be the situation under agency and court action. Therefore, in many cases it is likely that a decision by faculty arbitrators would be more constructive over the long run than decisions handed down, after public adversary proceedings, by government agencies and the courts. An agency or court decision would be more likely to be based on precedents

developed in previous cases on the basis of industrial employment conditions.[9]

9 Either party would be free to agree to enter or decline to enter this sort of ad hoc arrangement for outside faculty mediation-arbitration, and each would be free to choose (say) one mediator-arbitrator from the panel, with a third panel member chosen by those two, by lot, or by some other means. In any decision, the mediator-arbitrators chosen would be constrained by the terms of stipulation to arbitrate drawn up and agreed to by the parties.

With a few exceptions, the proposal has met with a favorable response from university faculty, administrators, and representatives of women and minority groups. Its advantages in reducing the delay, bitterness, and costliness of alternative methods and the advantages of private handling of such cases by knowledgeable faculty from outside are well understood by persons who have had experience with a case carried through an agency procedure and the courts.

Discussion of the proposal with a variety of persons, including arbitrators and law professors, has indicated a number of possible problems that might develop. It would, therefore, seem best to start on a relatively small scale in selected areas in an experimental manner.

Some possible problems can be briefly indicated. One is that such an arrangement might encourage an unnecessarily large volume of complaints to be handled by that means. If experience so indicated, there might be a need, say, to develop some sort of advisory service by sympathetic faculty to help screen out complaints that need not or should not be submitted to the outside mediation-arbitration process.

Another problem could be the development of a sufficient number of tenured female and minority-group faculty as mediator-arbitrators. Some universities (for example, Cornell, UCLA, Berkeley) have programs for training arbitrators. However, in most cases, working with faculty experienced in mediation-arbitration should provide the principal component of training for faculty who initially may lack such experience. The panel from which a mediator-arbitrator or, say, three mediator-arbitrators are selected should be large enough to provide adequate choice and to keep the demand for any one person's service under the plan within reasonable bounds.

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[9] The significance of the application of the industrial model of employment to faculty may be indicated by the following provision in Revised Order No. 4, par. 60-2.24 (f)(s): "Neither minority nor female employees should be required to possess higher qualifications than those of the lowest qualified incumbent." It is rather surprising to find that provision cited with approval for application to university faculty in an article that also states that the regulations regarding promotion in Revised Order No. 4 "strengthen merit standards." See Weitzman (1973, pp. 472, 484).

A third problem is illustrated by the U.S. Supreme Court's decision in *Alexander v. Gardner-Denver Co.* (decided February 19, 1974).[10] The decision in that case held that an employee's submission of his claim to final arbitration under a nondiscrimination clause of a collective-bargaining agreement does not foreclose his statutory right to a trial *de novo* under Title VII of the Civil Rights Act of 1964. In considering an employee's claim in a court action, "the federal court may admit the arbitral decision as evidence and accord it such weight as may be appropriate under the facts and circumstances of each case."

The Supreme Court points out that "presumably an employee may waive his" right of court action under Title VII as part of a voluntary settlement and that arbitration "may satisfy an employee's perceived need to resort to the judicial forum, thus saving" both parties the costs and aggravations associated with a lawsuit.

The mediation-arbitration proposal presented here differs in a number of respects from arbitration of a grievance under a collective-bargaining agreement. Under such an agreement, the grievance procedure and the arbitrator are predetermined by the management and the union; the union may not have a significant interest in representing the rights of the grievant under antidiscrimination legislation; and the arbitrator is supposed to interpret and apply the collective-bargaining agreement in ruling on the complaint.

The mediation-arbitration proposal for faculty is not subject to those constraints. The parties are free to use or not to use this means for resolving the complaint. They participate in the selection of the mediator-arbitrator(s) on an ad hoc basis for this particular case. The mediator-arbitrator(s) are subject to the stipulation to arbitrate, which the parties agreed upon to govern the arbitration process and to be the basis for an award. The case is directly concerned with an issue of discrimination in employment alleged to be on grounds of race, sex, religion, or national origin as specified in the federal and state legislation. Thus the rights of the complainant under Title VII of the Civil Rights Act and under state fair employment practices laws would be taken into account in a mediated settlement or an arbitration award.[11]

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[10] For the full text of the decision, see *Daily Labor Report* (1974).

Presumably such factors would be taken into account by the federal courts, should individuals bring a Title VII suit following a decision under the program of outside mediation-arbitration for faculty. Also, that program should considerably reduce resort to court action. Nevertheless the decision in *Alexander v. Gardner-Denver Co.* (1974) clearly indicates that the federal courts have the ultimate powers to enforce Title VII. That fact would need to be taken into account in designing and operating the mediation-arbitration program.

The financing of the program beyond the first year or two could present a problem. It has been suggested that universities and colleges might be willing to pay most or all of the cost of operation. Full payment by the institution, however, could raise an objection that such financing might possibly affect the outcome of the process. Perhaps it would be desirable to experiment in one area to see whether that sort of objection has any validity. Undoubtedly, partial support could be developed from outside sources if the total was not a large sum.

In the operation of a new program, of course, unanticipated problems are bound to arise. Many would be administrative in character.

The benefits of such a program have, for the most part, been already explained. They are the effective operation of the faculty systems of self-government and reward according to merit as determined by professional evaluation, relatively prompt enforcement of justice and rectification of injustice in faculty affairs, and effective operation of academic departments. The development and operation of such a program would present university faculty and administrators with the opportunity and challenge to work out the necessary adaptations of their systems of government and justice for faculty to meet changing conditions and developments in public policy.

[11] One might also observe again that a large part of the total university faculty in the country, both male and female, are, according to surveys, very sympathetic to fair, and even preferential, treatment of minority persons and women in faculty employment.

7. Administration of Regulations and Laws

Federal and state agencies have had difficulties in trying to administer their enforcement programs as applied to university faculty. Several factors help to explain their difficulties.

Generally, the enforcement programs are not altogether clear concerning their short-run and long-run objectives. As previously explained, the HEW program of contract compliance tries to pursue two objectives that are not fully consistent: nondiscrimination and pressures to favor racial minority groups and women, on grounds that persons belonging to those categories have in the past suffered from discrimination in many kinds of employment. In addition to such inconsistency, the HEW Guidelines (based on Revised Order No. 4) are, as has been pointed out, ill-suited for much faculty employment. Consequently, as is explained more fully below, HEW's 10 civil rights regional offices are uneven in their interpretations and in their demands with respect to items to be included in affirmative action plans and the depth of intrusion into a university's internal operations. Also, university faculty are so unusual in their methods of operation that the staffs of federal and state compliance agencies encounter difficulties when they try to apply uniformly to universities the program rules and assumptions that grow out of conditions in industry and construction or even public grade and high schools or hospitals. Most members of the staffs of compliance agencies have had little experience as regular faculty members or academic administrators in a university. Without such experience they may not be well qualified for the task of developing appropriate applications of complicated rules and statistical calculations to the special circumstances of faculty operations.

For an institution to be in compliance, its affirmative action plan must be acceptable to the HEW Office for Civil Rights. Under delegation from the Director of the Office of Federal Contract Compliance in the Department of Labor, the Office for Civil Rights in HEW has the power to issue special rules and regulations to apply to universities and colleges, to conduct compliance reviews, and to approve or disapprove written affirmative action plans of colleges and universities. Such HEW approval, or HEW disapproval that leads to withdrawal of federal contract eligibility, is subject to review and confirmation by the Department of Labor. Thus, the HEW Office for Civil Rights has responsibility for determining in the first instance whether a contractor is in compliance or is able to comply as the result of the submission of an acceptable affirmative action plan. The extent to which one of HEW's regional offices has the authority to approve or disapprove of a proposed affirmative action plan seems to have varied from time to time. In 1973 regional offices apparently had the power to disapprove a plan but could only recommend approval to the Washington headquarters. If a proposal raises an issue or issues that have not been decided in rulings already made, the matter is submitted to HEW headquarters in Washington and, if necessary, to the Department of Labor, for ultimate determination.

In case a university or college is found to be in noncompliance, HEW's Office for Civil Rights recommends to the Department of Labor possible enforcement action, which would normally take the form of placing the institution on complete or partial ineligibility for new contracts or renewal of existing contracts. Authority for such action rests in the Department of Labor. As indicated in Chapter 1, by the end of 1973 some 20 universities had been subjected to a temporary block of new contracts or renewals, on grounds of noncompliance. In the case of universities and colleges, the federal government has not proceeded to the stage of formal termination of a contract or formal ineligibility proceedings.[1]

Largely because compliance reviews, approval and disapproval of university affirmative action plans, and prosecution of individual complaints by EEOC and state agencies each come up one university at a time, the administration of government enforcement agencies and programs has not had an objective, critical review by scholars. No such careful review and analysis are attempted here.

[1] Disapprovals of proposed affirmative action plans generally mean further negotiation of a plan that is acceptable. Depending on the circumstances, an institution could be declared ineligible for contract renewal or new contracts while negotiations about revisions of its proposed affirmative action program are proceeding.

It is necessary, however, to pay some attention to administrative problems, because the difficulties they raise are important for understanding the need for serious reworking of the HEW Guidelines.

THE STAFFS OF ENFORCEMENT AGENCIES

The staff of HEW engaged in compliance enforcement for institutions of higher education is quite small when one considers the tasks that enforcement of the HEW Guidelines presumably involve. As of June 30, 1973, a total of 74 persons were engaged in compliance reviews, in criticism and decisions with respect to affirmative action plans presented by colleges and universities, and in other aspects of enforcement. Of the 74 total, 16 were in the Washington headquarters and 58 in the 10 regional offices, ranging from 10 in the New York and Atlanta offices to 3 in the Philadelphia and the Seattle offices. No one was reported as officially assigned to the Higher Education Division in the Kansas City office. In regional offices there may be some temporary shifting of personnel between divisions (for example, from elementary and secondary education and vice versa) as the need requires.[2]

The size of the staff has remained fairly constant since the Higher Education Division was established in April 1972. However, significant changes in personnel have occurred in several of the regional offices in the past three years. In fact, the turnover in some regional offices has been extremely high, with staff members leaving for higher pay in industry. For example, of the staff of seven in the Chicago office in November 1973, only one had been there in 1970.

Women and especially blacks are overrepresented among the 74 staff members in the Higher Education Division. On June 30, 1973, about one-half (35) were women, almost three-fifths (43) were members of minorities, and approximately one-half (35) were blacks. The 58 regional compliance officers were distributed as follows: 25 women (13 blacks, 10 whites, and 2 members of other minorities) and 33 males (13 blacks, 14 whites, and 6 members of other minorities).

The level of staff appointments for the 58 in the field is not, for the group as a whole, very high. At the end of June 1973, some two-thirds (40) were in grades G.S. 11 to 14 (minimum basic salaries for the first year from around $14,000 to $23,000);[3] the other third (18) were in grades G.S. 6 to 9 (minimum basic salaries for the first year from around $8,500 to $11,600).

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[2] Data on the Higher Education Division staff are provided in a letter (with 12 pages of tables) from Gweldolyn H. Gregory, Director of Office of Policy Communication, Office for Civil Rights, HEW, to Sheldon E. Steinbach, American Council on Education, dated Sept. 17, 1973.

On June 30, 1973, blacks occupied the top positions in the Higher Education Division in the following major regional offices: Boston, New York, Philadelphia, Atlanta, Chicago, and San Francisco. Blacks were in grade 14 in four of those offices; a black and a white shared the highest grade of 13 in the Chicago office; and a black was acting head as a grade 12 in the Philadelphia office. In addition, blacks were in the grade just below the top grade as follows: 1 out of 2 in Boston, 1 out of 2 in New York, 3 out of 7 in Atlanta, 2 out of 2 in Chicago, and 1 out of 4 in San Francisco. The blacks holding the high-level positions in the regional offices have come heavily from the civil rights movement.

Women held high positions in the Higher Education Division in regional offices as follows: 1 out of 2 in the highest grade in Chicago and second highest in grade level among the Higher Education Division staff in 1 out of 2 persons in Boston and in New York, 1 out of 1 in Philadelphia, and 2 out of 7 in Atlanta.

Just how much blacks and women are overrepresented on the higher education staff in the regional offices (and white males are underrepresented) may be difficult to determine. Here also there is a problem of how to define and measure the pool of available and qualified persons for the field staff of the Higher Education Division of HEW's Office for Civil Rights. However, it would be difficult by any definition to conclude that the staff of mid-1973 was proportional by race or sex to the pool of qualified persons.

There would seem to have been a conscious attempt to achieve overrepresentation of blacks and women, and to do so even though the resulting staff was generally deficient in background experience and detailed knowledge about the systems of faculty self-determination and governance in American universities. Lack of full understanding of the peculiarities of university operations apparently helps to explain why some of the demands of regional offices have been inappropriate and why university officials have experienced some difficulties in communicating with HEW regional personnel.

Only 14 of the 74 staff at headquarters or in the field are reported to have had some experience in the faculty or in the administrative or consultative positions in a college or university. Few have had extensive experience in a university as a member of a faculty or the academic administration. In an effort to help remedy such deficiencies in the staff, various three-day seminars or training programs have been held, and new employees in regional offices are considered for the first three months to be in an orientation-training program under the auspices of the regional branch chief.

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[3] Seven were in grade 14, 10 in grade 13, 14 in grade 12, and 9 in grade 11. The salary schedule for federal employees was raised effective October 1, 1973.

It would be desirable for the staff to have more understanding and appreciation of (1) the importance of independence and diversity for university educational programs, (2) the need for considerable involvement of faculty in university governance and managerial responsibilities and what that implies for compliance enforcement, (3) the vital significance of maintaining merit as the main basis for faculty selection and individual salaries, (4) the characteristics of faculty labor supply by discipline and subfield and by type of institution, and (5) the differences between tenure and nontenure positions in terms of supply, demand, and responsibilities in different departments and universities. Also, some training in statistical analysis and labor market analysis would be helpful. Lack of such background and understanding is evident in the demands and comments that the compliance staff make and the rather rigid manner in which, in some cases in particular regions, the inappropriate language and concepts of Revised Order No. 4 are rigidly applied to university faculties.

The staffs of EEOC and the state civil rights agencies are likely to be even less conscious of the implications for compliance enforcement of the professional practices and the collegial methods of decision making in universities. Also, the compliance thinking in those agencies is more likely to be influenced by legal concerns and decisions in previous court cases arising in manufacturing and other lines of business. The field staff of the Department of Labor's Wage-Hour Division, which investigates for violations of the Equal Pay Act, likewise tends to think in terms of conditions and practices that have prevailed in industry over a long period of time.

DECISIONS ON AFFIRMATIVE ACTION PLANS

The Higher Education Division of HEW's Office for Civil Rights has been slow in approving or disapproving affirmative action plans. Some universities have waited a year or more after submitting a plan without learning whether it is considered approvable or not. Also some regional offices have rejected a surprisingly high proportion of the affirmative action plans submitted to them.

Table 8 contains interesting information with respect to the

TABLE 8 ***HEW action on affirmative action plans of colleges and universities, by regions,* November 16, 1971 through December 31, 1972***

Regional office	*Plans submitted*	*Plans given interim or final approval*	*Plans rejected*	*Plans pending*
Boston	16	1	0	15
New York	31	1	13	17
Philadelphia	4	1	0	3
Atlanta	12	0	6	6
Chicago	24	0	0	24
Dallas	25	11	5	9
Kansas City	11	0	11	0
Denver	34	8	5	21
San Francisco	32	7	8	17
Seattle	8	1	3	4
TOTAL	197	30	51	116

*Coverage of regional offices: (I) Boston – Massachusetts, Connecticut, Maine, New Hampshire, Rhode Island, Vermont; (II) New York City – New York, New Jersey, Puerto Rico, Virgin Islands; (III) Philadelphia – Pennsylvania, Maryland, West Virginia, Virginia; (IV) Atlanta – Georgia, Alabama, Florida, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee; (V) Chicago – Illinois, Ohio, Indiana, Michigan, Wisconsin; (VI) Dallas – Arkansas, Louisiana, Oklahoma, Texas, New Mexico; (VII) Kansas City – Missouri, Iowa, Kansas, Nebraska; (VIII) Denver – Colorado, Utah, Wyoming, North and South Dakota, Montana; (IX) San Francisco – California, Nevada, Arizona; (X) Seattle – Washington, Oregon, Idaho.

SOURCE: Letter to Sheldon Steinbach of the American Council on Education from Gwendolyn H. Gregory, Director of Office of Policy Communication, Office for Civil Rights, HEW, dated Sept. 17, 1973.

concentrated character of the HEW enforcement program among the nation's 916 institutions of higher education that are said to be subject to federal contract compliance. Up to the end of 1972, only 30 plans had been approved and 26 of them were in three regions: Dallas, Denver, and San Francisco. The Chicago regional office had not formally approved or disapproved any plans, although some had been reviewed and 24 were pending. The Kansas City office had rejected 11 plans and approved none, and had none pending (presumably under review); New York had accepted one and rejected 13.[4] The rejection rate is surprisingly high – 51 out of 81 plans. Such unevenness in the record can be explained in part by the circumstances in the HEW regional offices, such as turnover of personnel and different conceptions of the requirements for an approvable plan.

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[4] The author was unable to obtain full confirmation of these figures at the New York regional office, and at least two universities claim to have had affirmative action plans accepted by the New York regional office during that period. The San Francisco office claims that no plans have been approved since December 1971 so that the figure in Table 8 is questionable.

Furthermore, during the seven months from January 1, 1973, to July 23, 1973, only three additional affirmative action plans were given approval by the 10 regional offices. The other 115 that were pending at the end of 1972 were either rejected or were still pending. That is remarkably slow action. It might seem to indicate that the affirmative action plans submitted by colleges and universities are being generally subjected to fairly exacting requirements, but partly it is due to lack of expertise sufficient to judge the validity of goals and other technical aspects of the plans submitted.

The distribution of the power of approval and disapproval of affirmative action plans between the regional offices and the Washington headquarters remains unclear. The impression has been given that considerable decentralization of authority has occurred, yet letters to university presidents are said to have been held for as long as three months in Washington for official clearance. Certainly there is significant variation in enforcement demands and in decisions on affirmative action plans among the regions, apparently due in part to the personal characteristics of the leadership in the regional offices.

The instructions that regional enforcement officials give universities and colleges in connection with the findings of a compliance review, the development of an affirmative action plan, and the rejection of affirmative action plans are based on the HEW Guidelines and Revised Order No. 4. On the basis of the experience of many universities, a letter from the regional director of the Office for Civil Rights of HEW to the president of a university rejecting its affirmative action plan as submitted might include such statements (in part, "demands")[5] as the following:

> 1. The main reason for rejection of the ____________ University's affirmative action plan is lack of the required utilization analysis for female and minority-group personnel necessary to determine deficiencies and to establish goals and timetables by department or organizational unit for the elimination of all deficiencies. Your affirmative action plan must address itself to each item in Revised Order No. 4. Each department chairman

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[5] The word "demands" is used here in a labor relations sense, because there may be some leeway or margin for "negotiations" if the university can give good reasons for its position or can explain why the requests of the regional director are not reasonable or are inappropriate.

and other officer with hiring authority is required to determine availability data for women and minorities in each discipline.

2. The required utilization analysis is necessary to determine whether goals and timetables have been accurately drawn. The Higher Education Guidelines provide that goals should be set in order to overcome identified deficiencies "within a reasonable time." In Appendix J the guidelines state: "In many cases this can be accomplished within 5 years; in others more time or less time will be required." The goals and timetables to overcome underutilization in a particular organization unit must reflect not only the number of new hires but also the projected overall composition of the faculty in that unit.

3. Provide an organizational chart covering all operations of the university. Detail all lines of authority and link the various levels of supervisory authority as they relate to employment.

4. Clearly set forth the roles, relationships, and authority of the university's affirmative action officer. Section 41CFR60-2.22 of Revised Order No. 4 delineates the duties with which the affirmative action officer should be charged. The affirmative action plan should set forth the responsibility of the affirmative action officer for monitoring such aspects of the affirmative action plan as new hires and promotion and tenure decisions.

5. Give the function, authority, and composition by race and sex of all university committees and the provision for equitable representation of the protected class members on such committees. The equal employment opportunity (EEO) committee should have the same type of authority in administering the affirmative action plan as other committees have in administering their respective programs.

6. It is necessary to develop and validate a full job description for each category of employee including faculty.

7. Give a detailed explanation of the criteria used and their relative weighting for appointment and promotion of each category of employee including faculty.

8. All selection criteria and techniques for assessing qualifications must be validated to prove that they clearly relate to job performance and do not have an adverse impact on women or minorities. Such validation is required by Revised Order No. 4.[6]

9. Analyze the composition of applicant flow by minority-group status and sex.

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[6] Revised Order No. 4 (Title 41, Code of Federal Regulations, Part 60-3, Oct. 2, 1971, in the *Federal Register*) sets forth a definition of selection "tests" that includes various selection techniques, including "casual interviews" and "unscored personal history and background requirements," for which validation

10. Analyze the number of women and minorities considered for and granted tenure compared with nonminority faculty in the same classifications in order to make certain that women and minorities have equal opportunity for tenure.

11. Provide that the work performance of all supervisory personnel should be evaluated on the basis of their EEO efforts and results, with sanctions for failure to adhere to equal employment principles.

12. Before a contractor can be found in compliance with the executive order, it must make a specific commitment, in writing, indicating the specific steps it will take to correct any and all deficiencies. The affirmative action plan of ____________ University must fulfill that requirement in order to be approved.

Certain conclusions can be drawn from such statements. One, HEW enforcement officers generally think and act within the framework of the concepts and requirements of Revised Order No. 4, on which the HEW Guidelines are based. Their efforts are to a considerable extent directed at inducing universities and colleges to have their operations, including faculty, conform to the industry pattern of authority, employment practices, and personnel management.

Two, HEW enforcement officers in some regions seek to make numerical goals and timetables by department or "hiring unit" a key element in affirmative action programs, including for faculty, regardless of the size or appropriateness of the department. The authority structure they tend to favor conflicts with the collegial or faculty system of shared responsibility in decision making by mature teacher-scholars. The HEW enforcement officers, interested in certain results more than in procedures to assure the best professional judgments, seem desirous of enhancing the authority of a university's newly appointed equal employment opportunity officers and coordinators, who, for the most part, have not been drawn from the faculty and are not responsible to the faculty.

Three, the HEW enforcement officers seek to induce greater use of women and members of minorities on committees, in administrative activities, and in other internal governmental functions.

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may be necessary. Where there are "data suggesting the possibility of discrimination, such as higher rates of rejection of minority candidates than of nonminority candidates for the same job" or where there is "underutilization" of minority-group personnel in certain types of jobs, validation studies must be made or the conditions suggestive of employment discrimination must be eliminated.

They apparently do not appreciate that heavy involvement in such activities can significantly reduce the time and effort that a faculty member is able to devote to teaching and scholarship and, thus, can have adverse effects on their qualifications for advancement as teacher-scholars.

Four, the HEW enforcement officials apparently do not appreciate that some of the instructions they give universities (based on the industrial model of Revised Order No. 4) are not appropriate for a system of faculty self-government. Partly for that reason, the data are costly to develop.

Five, through their power to approve or disapprove affirmative action plans, HEW enforcement officials are, either consciously or unconsciously, attempting to alter the structure of authority and governance in universities in line with the industrial model embodied in Revised Order No. 4. In doing so, they are tending to undermine faculty self-government, to create conflicts of group interest within universities and, as was explained in the preceding chapter, to expose universities to new liabilities under the federal and state antidiscrimination laws.

Six, too often the resulting provisions in an institutions's affirmative action plan are the result of negotiations by persons with different conceptions and objectives. The resulting document is, therefore, likely to be a compromise between university principles and government guidelines.

It is said that HEW enforcement activities have led to improvements in the industrial relations programs of universities, especially for nonacademic personnel, for whom universities have had to modernize their programs of personnel management. That is true in many cases, and undoubtedly represents some benefit or improvement in certain institutions. However, one should not overlook the costs involved in preparing and negotiating approvable affirmative action plans and the effects that government regulation seems likely to have on the effective operation of universities in the long run if present policies continue.

The kinds of programs for governance and for staffing decisions that universities should have in academic and in nonacademic operations is a question that neither the universities nor the government have fully analyzed and answered. It is becoming more and more difficult to maintain a significant difference between the academic system and the system of hierarchical authority in nonacademic employment. This subject is considered in some detail in the next chapter.

THE INCREASING INTRICACY OF REGULATION

For individual universities, each successive affirmative action plan is much longer, more detailed, and more interventionist than the previous one. Disapproval of a plan inevitably means that the university is instructed to provide a still more elaborate plan, and approvals are often accompanied by instructions to supply even more details and additional provisions of substance.

Expansion of government regulation is almost an inevitable development. Growth in regulatory activity is especially likely to occur with respect to faculty employment in major universities because the HEW civil rights officials are trying (1) to apply the industrial model to university faculty where it does not fit, (2) to determine "deficiencies in the hiring and promotion of minorities and women" by a technique that in practice has serious deficiencies for that purpose, (3) to use a concession negotiated at one university as a pattern to spread to others, and (4) to alter the distribution of influence and authority for faculty hiring and promotion in line with the concepts and assumptions of Revised Order No. 4.

The way that regulation tends to expand can be illustrated by an example. On May 1, 1973, Harvard submitted to the HEW regional office its third affirmative action plan. The previous two had been submitted in February 1970 and November 1971. In mid-June, Harvard received word that this plan was rejected as "inadequate and unresponsive to the Executive order," because it did not include a "utilization analysis" and a numerical goal for each of 30-odd departments in the arts and sciences. Harvard then submitted at the end of July a five-volume plan in line with the HEW instructions.

In mid-November, the HEW regional office notified Harvard that its plan was "an acceptable standard upon which the University can build and implement an effective affirmative action program" (*Harvard University Gazette,* 1973). However, HEW asked Harvard to develop and submit material on 10 items "for future inclusion" in its plan with a view to "building a truly comprehensive program." Among the 10 items (all said to be "required by Revised Order No. 4") were the following five:

1. Develop a Salary Equity Analysis as per Attachment [see Exhibit 1] for Minorities and Women.
2. Develop and submit job descriptions for every category of employment, especially for Exempt Employees and for Faculty by Department where these have not been previously submitted.
3. Develop and submit detailed criteria for selection and promotion for

each job category and for faculty by rank by department where these have not been previously submitted.

4. Validate all tests presently used in selection, upgrading, or promotion.

5. Develop a comprehensive program to increase the number of minority and female contractors and vendors.

By requiring the first four items, HEW is insisting that the techniques of job analysis and evaluation used in industry be applied to the hiring, promotion, and pay for Harvard faculty in the arts and sciences where they are not likely to be appropriate. As explained in Chapters 2 and 3, the tenured faculty of a leading university like Harvard are usually hired and paid on the basis of their personal distinction as teacher-scholars in their fields and not according to the contents of their "job." Their job content could be essentially the same as that of a number of assistant professors in the same department or the university. If detailed job descriptions are requested, they might be different for each faculty member and change as his or her teaching and research changed. Such detailed descriptions would indicate the unique characteristics of each distinguished professor, whereas the exercise is based on common characteristics and classifications.

The development of detailed criteria for the selection and promotion of faculty by rank and by department (with set weights for each criterion according to the salary equity analysis scheme in Exhibit 1) also is not suitable for direct application to the tenured faculty of major institutions. The primary criteria for appointment or promotion to tenure in major institutions are teaching and scholarship at the highest level. For different positions more weight may be put on one or another of those criteria but, as has been observed, completely separate consideration of each is incorrect as they are reinforcing and combine in human-capital building. A separate set of criteria for each department of the arts and sciences is generally considered unnecessary and undesirable.

A HEW request that a university "validate" all tests used in selection and promotion, if interpreted to cover faculty procedures, raises a host of serious questions. As indicated in the preceding footnote, Revised Order No. 4 contains such a requirement but it has not yet been widely applied to university faculty. As this is written in January 1974, a set of proposed regulations entitled "The Uniform Guidelines on Employee Selection Procedures" has been circulated for comment prior to publication in the *Federal Register* and application. The 27-page document, developed by the

Equal Employment Opportunity Coordinating Council of the federal government,[7] would not only regulate tests for aptitude and mechanical abilities but also any and all techniques used by employers to judge employees' relative qualifications for appointment and advancement. It is assumed in Washington that faculty appointments and promotions would come under the "uniform guidelines." That would involve government regulation enforced through insistence of "validation" of all means for judging the qualifications of teacher-scholars for particular openings. Those means include résumés stating one's educational credentials and record of work experience, scholarly publications, evaluations of applicants' published research results in professional reviews, systematic student evaluations of teaching, letters from prominent professors in a subfield giving their comparative evaluations of possible candidates, the unstructured interviewing of candidates, a lecture or seminar given by a candidate, etc. For each selection device, the burden of proof is placed on the federal contractor to prove lack of sex or race bias—no deviation from proportionality measured from some base. It is not clear how far HEW is asking Harvard to go into that thicket.

The salary equity analysis set forth in Exhibit 1 would, for faculty of major institutions, be quite unsatisfactory, and would be on a completely different basis from that used in enforcement of the equal-pay legislation. Essentially it is a crude six-factor analysis, with such gross data as "number of publications" and "number of committees"[8] on which the individual serves. As was explained in Chapter 3, use of 30 factors or variables in multiple-regression analysis to try to discover the extent of sex discrimination in faculty salaries is open to serious question and error. Years of faculty experience are subject to the differences that Johnson and Stafford's salary analysis demonstrates. For HEW to instruct Harvard to make salary equity analyses for women and minority persons according to the method and factors stated in Exhibit 1 indicates a

[7] The council agencies that drafted the document were the Office of Federal Contract Compliance of the Department of Labor, the Equal Employment Opportunity Commission, the Civil Rights Commission, the Civil Service Commission, and the Department of Justice.

[8] The inclusion of "number of committees" as one of the six factors is interesting. It is not included in the 30-odd variables used by Scott or Astin and Bayer. Among the requests to Harvard in HEW's letter of acceptance is a statement that "in line with the requirements of Revised Order No. 4," "each faculty" at Harvard should have an "affirmative action committee" with minority-group members and women who would "have a role in monitoring all appointments."

serious lack of understanding of the problem. Certainly it would be unsound to conclude that the "differential" so calculated "should be discriminatory."

The 10 items involve fundamental issues of administration and procedure. Yet Harvard was instructed as follows:

> We are aware of the necessary time constraints in developing satisfactory responses to each of the above items but would ask that a timetable be developed and submitted for each item detailing the proposed methodology for accomplishment of the task and the person or persons responsible. We will expect a response and commitment to the above within the next ten (10) days.

Obviously, those instructions assume no faculty participation in the decision with regard to the acceptance of items that could have a profound effect on faculty procedures and self-government. Within 10 days is hardly time for any serious consideration of such demands by the faculty of arts and sciences and the professional schools under the collegial system of shared responsibility.

AN IMPOSSIBLE TASK

In the midst of all this regulatory activity, the field staff of the HEW Office for Civil Rights has been given an almost impossible task. It is supposed to determine whether 916 colleges and universities, out of a total of approximately 2,500, are in compliance with Revised Order No. 4 and the HEW Guidelines. That is an average of about 16 institutions for each of the 58 field staff in the Higher Education Division of HEW's Office for Civil Rights.

The methods HEW uses for judging compliance or noncompliance are (1) on-site investigations, (2) negotiation with universities and approval or disapproval of their proposed affirmative action plans, (3) analysis of statistical reports and explanations from institutions, and (4) inquiries of the institution based on charges of discrimination affecting groups of employees, which are sent in to the regional offices from various sources. It is by such means that HEW's regional offices are supposed to determine whether the insitution is in compliance and whether it is using "good-faith efforts" to make an approved affirmative action plan work.

The HEW field staff generally do not have sufficient knowledge and experience to judge how appropriate numerical goals are for different academic departments in the arts and sciences in particular universities. They cannot be expected to know the demand and supply situation in each academic discipline in order to judge what numerical goals, if fulfilled, would or would not require reverse discrimination against white male faculty under the Civil Rights Act or equal-pay laws.

It is not surprising, therefore, that HEW "letters of findings" following on-site compliance reviews, or letters giving instructions with regard to substantive changes in proposed affirmative action plans, contain remarks that reveal lack of understanding of the way universities and faculty members operate. Also, it is not surprising that HEW refuses to accept responsibility for any action that a university takes in compliance with HEW Guidelines and an approved affirmative action plan.

The difficulties of the task assigned to the field staff are greatly enhanced by the deficiencies in the HEW Guidelines. Basic for reasonable and sensible enforcement with the kind of staff HEW can and will recruit is a less complicated and more suitable set of guidelines for affirmative action by universities and colleges. Proper guidelines for higher education would mean that university faculties at least, should no longer be regulated according to the provisions of Revised Order No. 4, which assumes the industry model of employment.

ONE REGULATORY STAFF FOR ALL MAJOR UNIVERSITIES

It is particularly inappropriate to have major universities divided among the regional offices for purposes of compliance review and determination of affirmative action requirements. Insistence that major institutions negotiate their numerical goals and administrative arrangements with the regional office staff, one at a time, is bound to mean unequal, inconsistent, and rather arbitrary treatment of universities, which are not regional but worldwide in reputation, drawing faculty and students from throughout the country and internationally.

To require the three or four dozen major universities to deal only with and through a regional staff is not sensible or appropriate for the following reasons: (1) four years of experience (1970 to 1974) have demonstrated that regional units vary widely in their understanding of how major universities operate, and need to operate, in their compliance practices and demands, and in the pace of their decision making; (2) the major universities compete nationwide for students and faculty (with significant numbers coming from abroad), they train most of the Ph.D. pool for the nation, and their faculties contain most of the outstanding teacher-scholars in the nation and are oriented to a considerable extent by discipline internationally; (3) the problems that major universities encounter under affirmative action and the contributions they can make to improve supply deficiencies of minority persons and women are similar and could be better handled by a cooperative approach on a national basis; (4) it is especially important to preserve the independence and effectiveness of the major universities because of the quality of their research and instructional contributions and their leadership in the academic world. There is need for HEW to explore the idea of joint planning for affirmative action with the major universities—planning on a cooperative basis for constructive purposes while recognizing institutional independence and differences.

It is unfortunate that certain HEW regional staff have insisted that one or more major universities conform to a certain set of affirmative action requirements, whereas directly competing institutions located in other regions, for a variety of personal and other reasons, have not been subjected to the same kind and intensity of federal regulation by HEW regional staff. Apparently, the regional offices have the power to reject proposed affirmative action plans but regional approval of a plan can be given only after Washington has approved the regional office's recommendation. By the time the regional office recommends approval to Washington, however, the regional staff has molded the plan in line with its views through the demands it has made and the negotiations it has carried on with the institution, sometimes backed by statements on what Washington will or will not approve.

National handling throughout by a single staff well versed in university operations would eliminate much of the arbitrary and inconsistent actions by regional offices and could help to develop a more constructive attitude and more intelligent programs. Single-staff handling of affirmative action plans for major universities is presented in Chapter 9 as part of a proposed program for government enforcement of nondiscrimination in faculty employment.

EXHIBIT 1: SALARY EQUITY ANALYSIS[9]

A salary equity analysis is required for all employees. The purpose of this is to determine whether or not employees engaged in similar work are paid different salaries due to their race and/or sex. To accomplish this it is necessary to determine if there is a salary differential and if that differential is actually the result of discriminatory practices rather than "bona fide" criteria. This analysis must be preceded by three (3) steps:

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[9] This salary equity analysis is from "Attachment A" to a letter from John G. Bynoe, Regional Civil Rights Director, to President Derek C. Bok, Harvard University, dated Nov. 12, 1973, accepting Harvard's affirmative action plan.

1. The development of detailed job position descriptions for each employee.
2. The validation of job position descriptions against the actual work performed by the employee or employees covered by the description.
3. The collecting of all job position descriptions into appropriate job classifications.

(These three (3) steps are covered in another part of this document.)

There are five (5) steps to accomplishing a salary equity analysis:

1. Establish all criteria relevant to a position.
2. Set weights on each criteria which reflect the relative importance of each criteria to the position. These weights should approximate as closely as possible the actual proportion of their values.
3. Do an aggregate comparison of white males and all females in each job position using means for each criteria and showing the means for annual salary increases and current salary.

Show in this comparison the percent of the female mean to the male mean for each criteria and salary increases and current salary. Do the same type of comparison for majority group members and minority group members in each job position. Following is an example of this comparison for males and females.

EXAMPLE A

Criteria	*White Male*	*Female as % Male*	*All Female*
1. years at institution			
2. years in current job classification			
3. education level			
4. years of job-related experience			
5. number of publications			
6. number of committees			
Average annual salary increase			
Current Salary			

4 Validate the originally assigned weights according to the results of the aggregate comparisons for all white males in a position and adjust the weights accordingly to the final comparison. List criteria in descending order according to weight. These adjusted weights will appropriate the actual proportion of their values.

5 Compare each female to the white male with closest total weighting. Compare average annual salary increase and current salary. Do the same for each minority group member in each job position.

Female employees or minority employees with comparable weighed qualifications should have comparable salaries. If in the instance of equivalent standard point totals, the actual salaries are not equivalent, the differential should be considered discriminatory and the burden of proof shifts to the college to explain the differential. This must be explained in a narrative. Also, if the qualifications and standard value totals are similar but not equivalent, the system can be used to ascertain which portion of a difference in salary could be considered bona fide and which discriminatory.

8. *Government Regulation and University Effectiveness*

A university typically operates two different types of governing and personnel systems—one for faculty and the other for the supporting staff (clerical and administrative employees, food service personnel, grounds and building maintenance workers, and many others).

The faculty, or academic, system is characterized by collegial decision making by a community of scholars. It is basically democratic. Individual faculty in a department, school, and the university as a whole enjoy essentially the same professional rights and freedoms. In their teaching and research, most of them are fairly free from any direction and supervision by a management structure of authority.

For the most part, the supporting staff is subject to supervision and direction under a hierarchical authority system, similar to the governing arrangements in industry and in the administration of federal and state programs. In contrast to the largely democratic, self-directed system for faculty, the supporting staff is subject to a pyramid-type management exercised largely from the top down through a loose chain of command, with each level of operation under the supervision of, and subordinate to, the level above. It is understandable that many in the supporting staff of universities, and particularly professionals in research and library operations who consider themselves academics, have sought to achieve many of the privileges, freedoms, and self-governing advantages that faculty enjoy. Thus, features and practices of the faculty system have tended to spread into some nonfaculty areas, especially those where professional employees are in leadership positions.

Government programs of antidiscrimination enforcement have been designed and based on the industry-government model of personnel practice and authority. On bureaucratic grounds, rather uniform application of a regulatory program is generally considered essential for effective enforcement. University faculty are, of course, only a small fraction of the total coverage of such programs and generally constitute well under half of the university's own employment. Consequently, government compliance personnel, with backgrounds in business or government, cannot be expected to be interested in preserving and strengthening the faculty system of governance. Instead, as will be explained subsequently, through the rather inflexible application of rules designed for industry-model situations, their actions tend to weaken the faculty system and strengthen centralization of authority and control within the university. Thus, outside pressures are exerted in the name of antibias regulation that tend to undermine a system of work arrangements for faculty that nurtures independence of thought, creativity, and work satisfaction and has features that industrial relations specialists consider as part of the more meaningful and satisfying work life envisaged as a goal for industry in the future.

This chapter examines the implications of government regulation of universities under antibias enforcement based on the industry model. The faculty system will be discussed in terms of its significance for effective university operations and the problem of maintaining institutional integrity that arises with two different systems of governance and personnel practice in a university.

THE FACULTY SYSTEM AND INSTITUTIONAL INTEGRITY

As explained in Chapter 2, a university's reputation and contributions depend on the caliber of its faculty. The excellence of its faculty is likely, in considerable measure, to hinge on working arrangements that faculty find congenial and on rewards according to individual merit as judged by colleagues in the discipline.

The conditions that faculty in major universities consider ideal for their work satisfaction are in sharp contrast to the way business enterprises or government bureaucracies function. Distinguished faculty stress: (1) self-determination in their teaching and research, (2) departmental self-government through peer sharing of responsibility for the department's management and personnel decisions, and (3) professional evaluation of individual merit and performance, with reward according to such evaluation.

A large measure of professional responsibility for the staffing of academic departments is obviously necessary in major universities. It is unlikely that others in administrative positions (for example, the president, the provost, the deans, or the chairman of the university research board) would be competent to assess the comparative contributions that a distinguished scholar makes in his or her disciplinary specialty. They can, of course, and often do, participate in reviewing the documentation (including evaluations) submitted by a department in support of a proposed appointment or promotion.

The academic department, usually discipline-oriented, is the basic unit of organization in the arts and sciences. It is a loosely organized community with decisions made by collegial consent. There usually are no lines of authority within a department. The chairman, whose selection customarily involves consent of the professors in the department, is not in a superior or supervisory position compared with other faculty and may not enjoy as much intellectual authority in the department or the university as some other more academically prestigious members of the department. Also chairmanships are usually not held for more than two to five years, as teacher-scholars find that administrative duties cut into the heavy time-demands needed for maintaining distinction as a teacher and a scholar in a rapidly moving field. Because, in faculty matters, intellectual leadership rather than authority of position is important in decision making, HEW regional-office requests that universities include in their affirmative action plans an organization chart with lines of authority for faculty show a misconception of how faculty do and should function in major universities.

The collegial organization of department and university faculty provides each member with wide scope for individual initiative, for self-direction, and for professional creativity of a high order (Anderson, 1973). Academic freedoms, the academic work conditions, and the association with professional colleagues and able students serve to make a faculty career attractive to creative minds.

The nonacademic supporting staff has a regular scheduled work week, is directed by supervision during that period, and is subject to the discipline that goes with managerial authority. Selection among applicants for a nonacademic opening is usually made by one or more higher level administrators or academics serving in an administrative capacity. Supporting staff, except high-level administrators and professionals, are likely to be subject to many of the personnel practices in industry such as job descriptions, job evaluation, wage and salary administration, and performance appraisal by the supervisor. Nonacademic employees usually do not have tenure, paid leaves of absence for a term or an academic year, or vacation periods that amount to three or four months a year.

Many universities and colleges have sought to have certain items common to both faculty and supporting staff. For example, both may be covered by the same retirement, hospitalization, and other insurance programs. Dollar pools for annual wage and salary increases may be the same percentage of payroll for both, so that they have an identical average increase in percentage terms. However, the method of determining individual increases and the shape of their distribution statistically may be quite different.

The operation of two distinct systems of employment management and work life in a university can lead to misunderstanding and claims of apparent inconsistency and discrimination in status. The necessary differences between the two systems are not well understood and appreciated by government enforcement officials who lack academic experience. It is difficult, for example, for some government officials to appreciate that, with faculty, rank is based on individual qualifications and contributions and not job content and that a faculty member's job content usually does not change a bit with promotion to a higher rank. In contrast, promotion in industry and nonprofessional employment in the supporting staff of a university generally involves a change in job content—job levels and rates of pay are geared to the content or requirements of the job.[1]

The faculty compare work conditions, pay, and benefits with corresponding faculty in competing institutions throughout the country. For terms and conditions of employment and work management, most of the supporting staff generally are oriented toward corresponding work opportunities in industry in the local area for maintenance craftsmen, food-service workers, clerks and secretaries, and similar occupations.

The operation of two distinct systems of work management—one basically democratic and nationally oriented, the other mainly governed under hierarchal authority and locally oriented—can cause strains on grounds of unequal treatment and raise questions of institutional integrity.

[1] Edwin Young, chancellor of the University of Wisconsin at Madison points out that to tie faculty salaries to job descriptions and job content would "destroy" a major university's "ability to attract and reward the indispensable scholars and teachers." See Young (1973, p. 202).

Allegations of inequity and challenges to institutional integrity are stimulated by the existence of a third separate and different system for part-time student employment in the university, both in supporting services and as assistants to faculty in research. Generally, student employment is administered under student aid, so that it is not part of either the faculty or the supporting-staff employment systems. Hiring arrangements, pay levels, and record keeping for student work are usually handled separately from the other two systems.

In practice, personnel administration and management supervision are likely to be more mixed in character among supporting staff than the foregoing description may imply. Universities have been slow to adopt uniformly the systematic programs and techniques of personnel management found in most business corporations. Partly that has been because many of the supervisors of supporting staff are faculty who serve as chairmen of academic departments, academics who are directors of research programs or projects, and other professionally trained persons who perform supervisory functions as librarians, medical doctors, lawyers, architects, and electrical engineers running computer centers.

Both faculty and nonfaculty professionals are apt to be influenced in their thinking about management and personnel practices by the faculty system. In recent years there has been a definite movement on the part of some nonteaching professionals (for example, professional librarians and professional research staff) at universities to achieve more of the privileges and self-governing features of faculty life. Members of the professional research staffs have especially coveted the prestige and job security of faculty status. In addition, the development of university senates or councils composed of members selected from the administration, faculty, supporting staff, and students, who serve as part of the structure of university governance, is a further development toward participatory democracy for nonfaculty sections in the university.

Enforcement agencies (especially some HEW regional offices) and interest groups have put pressures on universities for uniformity of treatment for all employees. Through compliance reviews, complaints of discrimination filed with government agencies and the courts, and the threat of sizable liabilities under equal-pay laws, universities and colleges have been shocked into examining and improving their personnel policies and practices as applied to supporting staffs, especially from a legal viewpoint. The improvements have included good procedures for handling employee grievances and well-considered leave of absence arrangements. Unfortunately, government compliance officials may fail to appreciate that rules and practices suitable for the supporting-staff system of personnel management may not be appropriate for invariant application to the quite different work arrangements and work conditions for faculty.

GOVERNMENT PRESSURES ON THE FACULTY SYSTEM

Government agencies, through their directions, administrative rules, Executive orders, and oral and written inquiries and demands, try to move institutions of higher education toward the industry model in their academic operations. Government regulation is, for the most part, applied in a fairly uniform fashion to the two quite different systems of faculty and supporting staff.

The principal difficulties for universities with respect to faculty are (1) that HEW's administrative requirements for institutions restrict faculty self-determination and encourage pressures by minority and women interest groups, (2) that the federal government's increasing pressures for "validation" of faculty methods and techniques of selection[2] for faculty appointments and promotions calls into question the system of professional selection by mature teacher-scholars in a discipline and favors use only of methods that assure equality of results to be calculated on an uncertain base[3] and (3) that the application of equal-pay laws, which focus on the characteristics common to particular jobs rather than on the unique characteristics of individual teacher-scholars, tend to stress minimal qualifications for promotion and to undermine the merit system of faculty pay. Back of all these difficulties with government requirements is the underlying assumption that discrimination in employment will somehow disappear if only proportional representation for minority groups and women across the faculty board is forced on universities.

[2] As explained in the preceding chapter, validation for nonbias can be requested in connection with the use of any device or criterion (several are usually used together for screening purposes) such as résumés of education and experience, comparative evaluations by former teachers and leading scholars in the field, evaluation of the person's scholarly publications, student questionnaire evaluations of teaching in courses, results from interviewing the person, evaluations of a lecture or seminar given by a candidate.

[3] The persons to be included in the base or universe from which deviations from proportionality are to be calculated (total applicants for a position or only persons selected by some standard?) is usually unstated and unclear; this permits arbitrary application of the requirements. Total applicants could be a quite biased base.

The HEW Guidelines specify a required administrative arrangement for the implementation of an affirmative action program. An "executive," who "should be a person knowledgeable of and sensitive to the problems of women and minority groups," must be appointed "director" or "manager" of EEO programs. The establishment of one or more committees or task forces, "composed in substantial part of women and minority persons" is suggested to facilitate "the task of the EEO officer" and to enhance "the prospects of success for the affirmative action program in the institution."

The HEW Guidelines refer to Revised Order No. 4 for a statement of the activities and responsibilities of the EEO director. As stated there they include: development of "policy statements" and "affirmative action programs"; serving "as liaison between the contractor and enforcement agencies"; serving "as liaison between the contractor and minority organizations and community action groups concerned with employment opportunities of minorities and women"; having "active involvement with local minority organizations, women's organizations, community action groups and community service programs"; and reviewing "the qualifications of all employees to insure that minorities and women are given full opportunities for transfers and promotions."

Many universities have followed those instructions and suggestions, establishing a new position or positions in the office of the president, chancellor (provost), or both, and also establishing a universitywide committee or two (one for minority-group affairs and one for women's affairs) to aid the EEO officer (and the coordinator or director for women's affairs where there is such an office). In universities, persons appointed as EEO director or coordinator seem generally to be blacks or women. The EEO officer on his or her own authority, or with the support of the EEO committee, is likely to be able to influence recruitment procedures for faculty and supporting staff, to review actual recruitment in individual cases with respect to compliance, and to postpone or block action on a department's recommendation for a faculty appointment. It is understandable that a HEW regional office, in reviewing and negotiating with a university about a proposed affirmative action plan or developments under it, may be concerned with the actual authority that the EEO officer and/or the committee may have "to initiate and enforce remedies to problems or deficiencies." HEW seeks to have that person play a significant part in the compliance program.

In their capacity as liaison with HEW and other enforcement agencies, it may sometimes be unclear to what extent EEO officers are agents of the university and agents of HEW or other organizations. A black or female EEO officer can perform an important educational function within the university because of the experience he or she may bring to consideration of a problem or policy. However, insertion of another layer of administration with power to exercise a measure of influence and control over faculty appointments and promotions is likely to mean some restriction and restraint on the faculty system of professional evaluation and selection of faculty in a discipline and to result in additional centralization of power and control in the university.

Administrative pressures by HEW to make faculty selection and pay structures conform more closely to the industry model are also exerted through such means as (1) insistence that methods for the selection and promotion of faculty be validated on the basis of proportionality of results, (2) attempts under equal-pay enforcement to use job content rather than the individual's intellectual qualifications for specialized tenure positions in major universities, and (3) insistence that affirmative action numerical goals be calculated according to the prescribed method of an estimated labor market pool of qualified and available persons applied to all academic ranks and specialties. In such matters, HEW and other enforcement agencies have been prone to deny or disregard essential differences between the faculty system and the industry system.

The requirement that a university validate the selection methods used for faculty as well as supporting staff shows how the federal government may force the use of concepts from industry practice that are often ill-suited and of questionable validity when applied to faculty and faculty procedures. HEW compliance officials may insist that a university must, nevertheless, apply a test of proportionality of result to each element in the complex process of selection to fill a tenure opening by promotion from within or appointment from outside.

A part of federal effort to eliminate discrimination in employment is the provision that only elements proved not to have a biased impact on hiring and promotion can be used in selection for appointment or advancement. Sample surveys indicate that, due to affirmative action requirements and antidiscrimination legislation, a high proportion of business firms altered their selection criteria and revised their testing programs, changing or eliminating the use of preemployment tests and educational requirements that could not be closely related to performance on the particular job.[4]

As Chapter 2 explained, the criteria used in the selection of faculty—teaching, research, and other service to department and university—as applied to a particular professorship in a major university are likely to involve quite special and unusual qualifications, including a high degree of scholarly creativity. Consequently, university procedures place heavy reliance on the judgment of mature teacher-scholars in the discipline or subfield of the discipline, based on a variety of sources of information and evaluation.

The material used in the selection of a new faculty member would normally include: comparative analysis of the candidates' résumés showing their pertinent experience and accomplishments; letters from faculty in the field evaluating a candidate's relative standing and promise; student evaluations of various aspects of the individual's teaching in courses; critical reviews of the person's published and unpublished scholarly work; and conclusions of members of the department from personal interviews, from a class or seminar or lecture given on the campus, or from a paper delivered at a professional meeting. On the basis of such information and assessments, perhaps reviewed first by a search or screening committee that reports to the department, the tenured members of the department meet, discuss the relative merits of various candidates, and select a first choice and possibly a second one in case the top-ranking candidate rejects a proposed offer.

Evidently, it is practically impossible to validate in a formal manner each element in the procedure and the procedure as a whole, in order to prove that no part has a disproportionate impact on any group. Each item or source is designed to provide more complete information and to check on information or assessments from other sources. Elimination of the use of one or more sources because of an alleged disproportionate impact by sex, race, religion, or national origin would not be likely to lead to a more intelligent or objective result. Basically, a system of professional, peer-group analysis and selection involves reliance on the process if the procedures are properly followed and if those participating in the process are well qualified to make professional judgments in that field.

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[4] See, for example, "Survey by BNA, ASPA Shows Impact of Equal Opportunity Requirements" (1973, especially p. C4). The sample consisted of 113 member firms of the American Society of Personnel Administration and was conducted by the Bureau of National Affairs.

Requests by compliance officers that standard tests used, say, in the selection of manual and clerical workers in a university's supporting staff be validated to make certain they contain no cultural or other bias are understandable as a part of enforcement of nondiscrimination in employment. The same is true of the requirement that a high school diploma is needed for the proper performance of low-level manual jobs.

However, a similar requirement for "validation" of the elements in the procedure for faculty selection and promotion may really involve a demand for radical change in the whole system of faculty selection. And it places in the hands of regional compliance officers a power of intrusion that can be quite arbitrarily applied one way to some institutions and rather differently, if at all, to others. Indeed, to require similar validation for faculty in major institutions is to question the very system of faculty self-determination.[5]

In a similar manner, the faculty system of compensation by relative merit, as determined by professional evaluation of individual performance and promise, is threatened by application of the concepts in the Equal Pay Act, which was extended to professional employees in mid-1972. That act requires the same rate of pay for men and women doing substantially similar tasks in the same place of employment. The act makes job content the controlling factor in determining compliance, and, thus, is difficult to apply to variations in the quality of intellectual performance and creativity.

Equal work is measured in terms of equal skill, equal effort, equal responsibility, and similar working conditions. These are all job traits. Again the government regulations with respect to sex discrimination are based on the industrial model, and are, therefore, ill-suited for faculty conditions and practice. As already explained, assistant, associate, and full professors may have the same job content in the department or in several departments. They may all teach at the same levels and be engaged in the same type of research. Their promotion from one rank to another is not based on a difference in job requirements so much as on the intellectual level of the teaching and research contribution and the corresponding academic reputation of the individual. The highest paid professor may be a person who has been in the same rank for 30 years. The base salary of department chairmen may be their regular salary as professors. On job-content grounds, professors of nuclear physics, economic theory, classics, and home economics might all seem required to have the same salary under equal-pay legislation.

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[5] The HEW Guidelines (Office for Civil Rights, 1972, p. 10) refer to "the validation of all criteria for promotion." Revised Order No. 4 (par. 60-2.24*b*) states: "The contractor should validate worker specifications by division, department, location or other organizational unit and by job category using job performance criteria. Special attention should be given to academic experience and skill requirements to insure that the requirements in themselves do not constitute inadvertent discrimination. Specifications should be consistent for the same job classification in all locations and should be free from bias as regards to race, color, religion, sex, or national origin, except where sex is a bona fide occupational qualification. Where requirements screen out a disproportionate number of minorities or women such requirements should be professionally validated to job performance."

Government regulation to eliminate sex discrimination in pay can result in a civil-service-like system of compensation for university faculty, with each rank defined in terms of minimum standards of skill, effort, and responsibility, and with specified pay grades within the rank through which the faculty member moves according to length of time in that rank or according to some other "objective" criterion.[6] In other words, application of equal-pay regulations can pose a threat to university methods and procedures for rewards and incentives for faculty.

The application of federal equal-pay legislation to university faculties raises another serious problem as a consequence of the demand for minority-group faculty stimulated by numerical goals in affirmative action plans. Many universities, in order to try to attract black faculty, have offered them salaries considerably above those for equally qualified white male and female faculty. Thus, in yielding to HEW pressures, those institutions have exposed themselves to a claim of unequal pay between some men and women. Under the law the women have grounds for lodging a formal complaint of sex discrimination, under which their pay would have to be brought up to the comparable level for black males. In turn, the white males could lodge a complaint of sex discrimination, under which their pay would be raised to that of white women.

Such a process is beginning to occur in certain institutions. It reveals the inconsistencies in the policies and in enforcement practice among different agencies of the federal government. Universities are being exposed to considerable cost for complying with the incompatible policies of government agencies under antibias legislation and contract compliance. It is understandable that university administrators and faculty are disturbed by confused signals from government in these matters.

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[6] Sheldon E. Steinbach (1973, p. 52) points out such implications if present equal-pay regulations are applied to academic as opposed to nonacademic personnel. See also "Equal Pay in Higher Education . . ." (1973).

THE PREDICAMENT OF UNIVERSITY ADMINISTRATORS

The application of government antibias programs to university faculty and supporting staffs has put many university presidents and top academic administrators in a difficult position. Generally they are—like most faculty—in full sympathy with the objectives of enlarging the opportunities for disadvantaged members of minorities and women to acquire adequate training for academic appointments, of expanding the scope of search for faculty, and of making the university's climate congenial for minority-group and female personnel. Most of them genuinely would like to be able to increase the minority-group and female component of the faculty.

A significant proportion of the presidents and top academic administrators have guilt feelings because studies have shown that some women in the faculty and supporting staff were being paid less than men for equivalent work. The central administration could be charged with condoning sex discrimination in such instances, because steps had not been taken earlier to eliminate such sex differentials, failure to do so being due perhaps to lack of attention and ignorance of the facts or to a belief that paying "the prevailing wage in the market" was a proper wage policy (Lester, 1948, pp. 13–17, 38–41).

With general charges of discrimination being made against most major institutions, university administrations and faculties moved to take corrective actions with respect to any proved discrimination among faculty or supporting staff. Corrective action was accelerated by pressures exerted by interest groups (in the student body, the faculty, the supporting staff, and outside organizations). Also, individual and class complaints were filed with federal and state agencies and the courts. Women's liberation was on the move, especially in the universities and colleges.

Some university administrators and faculty in 1972 and 1973 expressed concern that various pressures were being exerted on universities to force discrimination in favor of minority groups and women, to have institutions hire and promote some who were not the best qualified in order to rectify past race and sex discrimination. But top administrators of many universities, especially some large state institutions, were not in a strong position morally, politically, or legally to resist pressures for preference in hiring in view of past history, faculty and student opinion, the HEW Guidelines, and regional-office demands.

Morally, many university administrations and faculty were on the defensive. In some institutions, members of the faculty and/or supporting staff had received from their university "equity compensation" in response to their claims of sex discrimination or (rarely) race discrimination. In addition, the institution might seem to have admitted guilt when, according to government order, it calculated "deficiencies" and adopted numerical goals designed to eliminate those deficiencies. The invalid suppositions that underlie many calculated hiring goals have been fully explained in preceding chapters. Nevertheless the government scheme for hiring goals, by attributing all blame for sex and race disproportionality in a faculty to the demand side, puts university administrations and faculty under the burden of self-calculated sex and race bias.

University administrators were also in a weak public-relations position. Generally, they and their faculties favored federal action against race and sex discrimination in employment. It would have been difficult for them then to argue that antidiscrimination regulation under federal contracts was appropriate for industry but not for universities, or was possibly appropriate for the supporting staffs of universities but not for faculty, especially faculty of major institutions. That would leave them open to charges of elitism in a general climate of opinion favoring egalitarianism. Furthermore, the kind of analysis necessary to demonstrate the inappropriateness of numerical hiring goals for tenure faculty positions in distinguished universities or the inappropriateness of availability analysis and numerical goals with timetables, academic department by academic department, would be too complex and abstruse to be convincing to the general public.

Politically, the universities have also been in a weak position. They have found it difficult to take a strong, consistent stand, because the nature and timing of the impact of antidiscrimination enforcement has varied so widely among individual community colleges, four-year public colleges (some of which were former teachers colleges), four-year private colleges, and public and private universities. The associations of universities and colleges headquartered in Washington have, therefore, had trouble presenting a common front to the Nixon administration and Congress. With federal enforcement spread among four federal agencies (really 10 regional offices for HEW) and possibly between two state agencies (as well as the federal and state courts) and with enforcement action applied one institution at a time, the universities have been unable to marshal forces for more appropriate guidelines for governmental programs of antidiscrimination as applied to university faculty. In 1972 a number of university officials expressed to HEW and the Department of Labor strong opposition against any requirement of numerical goals with timetables for faculty, especially on a single-department basis. The HEW Guidelines of October 1972 seemed to recognize the persuasiveness of that presentation. As already explained, those guidelines state that a school, division, or a college "in many institutions" may be "the appropriate unit for goals." However, when Harvard in 1973 submitted an affirmative action plan, it was rejected by the regional office until Harvard capitulated and submitted a plan with numerical goals for each of its 30-odd departments of the arts and sciences faculty.

By the fall of 1973 a number of developments had increased the concern of universities with government enforcement programs and activities as they affect faculties and the opportunity of various groups for faculty employment. More universities and colleges were being pressed by HEW regional offices to comply strictly with the industrial-model requirements of Revised Order No. 4. The faculty system of professional evaluation for faculty appointments and promotions was being threatened by the proposed "Uniform Guidelines on Employee Selection Procedures."[7] Enforcement of equal-pay legislation was threatening to force some vulnerable universities to bring women's and then white males' pay up to the higher levels being paid to blacks. The inconsistencies between some regional enforcement of the HEW Guidelines and the race and sex blindness of the Civil Rights Act were threatening universities with suits charging discrimination against women and suits charging discrimination in favor of blacks and women. Some white males just acquiring Ph.D. degrees and some white male assistant professors pressing for promotion to tenure were complaining that their employment opportunities were being curtailed by preferences given to women and blacks. The EEOC was bringing an increasing number of court cases against universities for discrimination against women, and some courts were using industry-model concepts in deciding faculty cases.

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[7] See p. 114.

Given the weak political position of institutions of higher education, the outcome of such developments is difficult to predict. But it has become increasingly clear to university administrators that the only intelligent policy is consistently to follow the principle of equal employment opportunity – to have faculty appointed and promoted who, on the basis of their past performance, are judged by mature teacher-scholars to be the best available in terms of the requirements of the position. Also, that policy is consistent with the most effective pursuit of a university's educational goals.

Experience has demonstrated the need to work out a more intelligent and constructive program of affirmative action between government and universities. Such a program would involve more attention to the contribution that universities and government could cooperatively make to develop a larger supply of well-qualified women and minority persons for academic and other professional positions. Also there is need for some intelligent analysis of affirmative action and antibias enforcement on the demand side in the cases of universities. The next chapter deals with those subjects.

9. A Program for Enforcement of Nondiscrimination

This chapter sets forth a program for government enforcement of nondiscrimination in faculty employment that has been developed by the author. The program deals primarily with Executive order enforcement policy as applied by HEW.

One could argue that a comprehensive scheme of antibias regulation of universities, conducted by an administrative agency under Executive order, is not so necessary now that institutions of higher education are under the fairly comprehensive programs of antidiscrimination, involved in enforcing Title VII of the Civil Rights Act, the Equal Employment Opportunity Act of 1972, and the Equal Pay Act amendments of 1972 as well as state fair employment practices and equal-pay laws.

The program presented here assumes that properly formulated and properly enforced antidiscrimination guidelines under contract compliance could, on balance, provide sufficient positive benefits in terms of nondiscrimination in faculty employment to justify having such government regulation for several more years. In view of all the other antibias regulation of universities, however, the program under Executive order should be designed so that, at the appropriate time, it could be considerably contracted, if not completely terminated, with respect to university faculty.

Any program for Executive order enforcement as applied to faculty should be essentially in accord with the basic legislation for nondiscrimination in employment and pay as applied to faculty. Otherwise, a university's efforts to comply with all government agency directions and demands can only lead to inconsistent appointment and promotion decisions, which can expose the university to simultaneous charges of discrimination in favor of and against the same group, on grounds of race or sex.

The proposed program is designed to improve Executive order enforcement of nondiscrimination in a number of respects: soundness of conceptions, consistency of policies, suitability for the special needs of higher education, avoidance of adverse effects on the educational objectives of institutions, restraint on the regulatory propensity for undue intrusion, and economy and efficiency of administration. In developing affirmative action guidelines, stress on those aims and considerations is important for gaining enlightened acceptance and pursuing intelligent enforcement.

This chapter first takes up the aims and considerations that experience indicates need stressing in a government program to enforce nondiscrimination in faculty employment under federal contract compliance. Next attention is given to the need for the government, as an important part of its compliance activity, to collect faculty data on a nationwide basis, covering projected and actual hirings, the terms of offers made, faculty movement among institutions, and individual charges of discrimination and their disposition. With timely data of that sort, the program could be monitored centrally, on a nationwide basis and for different segments of higher education. Analysis of the data could show the progress that is being made, the troublesome problems that are developing, and the revisions in the program that seem called for by experience.

Then, in the final section, the main elements in the proposed program are presented in fairly concise form. The program is designed primarily as a revision of the HEW Guidelines. It would also involve some changes in the jurisdiction or policies of other federal agencies, particularly in the Department of Labor. In addition, the voluntary program of private mediation-arbitration discussed in Chapter 6 is included as a significant element in the total program.

IMPORTANT CONSIDERATIONS IN DEVELOPING A PROGRAM

Experience is an acute teacher. Use of the HEW Guidelines for more than a year has taught both positive and negative lessons. We have learned which policies are appropriate and have desirable effects and which are ill-conceived and have unfortunate consequences. Much has also been learned about the administration of government antibias programs that seek to enforce nondiscrimination and various kinds of "affirmative action."

1 Guidelines for affirmative action plans should be based on a knowledge of the facts, a well-considered formulation of objectives, clear

definitions and concepts, appropriate analytical methods, and arrangements for intelligent, sensible enforcement.

Higher education guidelines designed to apply to faculty should be geared to the special, rather unique systems for hiring and promotion for teacher-scholars, particularly at major universities. Therefore, guidelines for the antibias regulation of university faculty should be conceptually and administratively distinct from those for industry or for the nonacademic, supporting staffs of universities. Revised Order No. 4 as presently conceived and applied is inappropriate for application to most tenure faculty positions in major institutions. The facts of academic life, including specialization by a subfield of a discipline and considerable differences in abilities and competencies among experienced teacher-scholars in a subfield, make highly questionable any attempt to apply unsophisticated notions of availability, utilization, deficiency, proportionality, and numerical goals with timetables to faculty positions beyond those to be filled by new Ph.D's beginning their teaching-research careers.

2 All parts of the federal effort to achieve nondiscrimination in higher education should be consistent in aim and policy. Federal authorities should be clear and in agreement with respect to proper policies:

(a) To rectify past discrimination in individual and class cases and prevent such discrimination in the future

(b) To correct university policies (for example, employee benefits, leaves for childbearing and child-rearing, part-time tenure appointments, antinepotism rules) that may operate in a discriminatory fashion

(c) To prevent new discrimination in hiring, promotion, or compensation

A set of federal guidelines that results in inflated numerical goals and stimulates pressures for preferential hiring and promotion by race and sex serves to increase the amount of discrimination,[1] which is inconsistent with the provisions of federal legislation and the stated aims of federal agencies. Guidelines for higher education should be clear of purpose and consistent in practice with respect to those matters.

Given the very special features of the faculty system of appointment and promotion, a strong case can be made for a single federal

[1] Preferential hiring and preference in promotion discriminate for some groups and against others, thus adding to the amount of discrimination, as Daniel Seligman (1973) points out.

regulatory agency for antibias enforcement, at least for the faculties of institutions of higher education. It may not be possible to have the necessary consistency of enforcement goals, policy, procedure, and data requirements if enforcement is parceled out to four or more different federal agencies (HEW, the Office of Contract Compliance and the Wage-Hour Division of the Employment Standards Administration in the U.S. Department of Labor, and the Equal Employment Opportunity Commission plus the Civil Rights Commission and the Department of Justice).

3 Under the affirmative action plans of major universities, stress should be placed on, and ample credit given for, developing a larger supply of female and minority-group faculty qualified for tenure appointment at high-ranking institutions. Such accomplishment could constitute the most significant affirmative action contribution that some major universities could make toward equalizing the chances of female and minority-group faculty to achieve high-level appointments. The working out, under government regulation, of incentives and credits for the appropriate recruiting and training of graduate students and assistant professors prior to a tenure appointment would present some practical problems, which are treated below.

4 The importance of intellectual autonomy for universities should be recognized and care should be taken to avoid, as much as possible, any detailed regulation of their internal operations. That includes forgoing efforts to restructure and redistribute authority and actions that would increase the centralization of power and authority in the university at the expense of faculty self-government and professional assessment of faculty qualifications. Care should be taken to avoid, through federal regulation, a weakening or displacement of the faculty system of professional decision making on faculty staffing by insistence on the application to faculty of personnel-management techniques based on an industrial model. Unintelligent, dysfunctional regulation along those lines is likely to hamper universities in the most effective pursuit of their educational and research goals over the long run.

5 In the enforcement of equal opportunity for all faculty, due recognition should be given to the primacy of the basic objectives—the mission—of a major university, namely:

(a) The discovery of important new knowledge
(b) The cultivation, through faculty instruction, of an understanding of

existing knowledge, the ability to use that knowledge, and the competence to develop new knowledge

(c) The training of students in professional schools in the understanding and practice of a systematic body of specialized knowledge

Care should be taken that government regulations and enforcement demands do not adversely affect a university's ability to pursue those basic objectives. It should be recognized that the quality of mind of the faculty member, of his or her faculty colleagues, and of the students (as well as the academic atmosphere and opportunities in the department and the institution) affect the quality of the results achieved through both teaching and research.

Those five points or considerations should be carefully taken into account in framing and enforcing federal guidelines for nondiscrimination and appropriate affirmative action at institutions of higher education. The program presented below has been designed with them firmly in mind.

ROLE OF DATA COLLECTION AND ANALYSIS

Proper reporting by all universities and colleges covered by HEW regulation could provide the basis for the development and operation of a more intelligent, equitable, effective, and economical program of federal antibias regulation of institutions of higher education than the present one. Comparative analyses of the faculty data so collected would help the federal government to monitor the program on a nationwide basis and by separate parts of higher education as well as by individual institution.

For the most part the reports from individual institutions would supply quantitative data, accompanied by explanations for certain figures. More descriptive would be reports on recruitment efforts and complaints. Comparative analyses of both quantitative and qualitative material in reports would enable government analysts to draw general conclusions on the mismatch between demand and supply by discipline and subfield, broken down by race and sex for assistant professor positions and tenure openings. Such analyses could be used to draw conclusions about the extent and nature of discrimination against or in favor of different races and sexes, in different disciplines, in different categories of institutions, and in different regions.

The kinds of data and information that would be most helpful to collect and analyze for program and enforcement purposes (including leads for field investigations) are the following:

1 Each institution would be required to report each July the numerical hiring goals for the nontenure ranks in its affirmative action plan, by race and sex for the succeeding two years.

2 Each institution would report each January its faculty hires and terminations for the previous six months (July to December), and each July its faculty hires and terminations for the preceding six months' period from January through June, giving the salary and rank offered to each new minority person or woman hired and the salary and rank for each nonminority male hired. For the same periods, all faculty terminations would be reported with a brief comment concerning each termination.

3 Each institution would report each year in July the number of faculty in each department (and professional school) by rank, broken down by race and sex, who were employed on May 1.[2]

4 Each institution that grants an average of 10 or more Ph.D.'s a year would report in June each year *(a)* the number of such degrees granted by department, broken down by race and sex, and *(b)* the experience in placing its Ph.D. candidates and recipients in academic positions outside the institution.

5 Each institution should gather and maintain in one office a full record of the recruitment efforts, the selection process, and the offer or offers made for each faculty opening.[3] In that way the material would be well organized and readily available for examination by compliance officials checking on the compliance of that institution with respect to faculty hiring.

6 Each institution should report to HEW[4] whenever a faculty member (or applicant for a faculty position) lodges a complaint of discrimination in employment against the institution with a federal or state agency or a court, giving the essentials of the allegation. HEW would arrange for reporting by other federal agencies of faculty complaints of discrimination in employment filed with them.

[2] Salary is not asked for existing employees as it is for new hires, because comparisons of salary figures, apart from a knowledge of individual qualifications and experience, are not very meaningful or informative, especially where the numbers are too small (particularly for minority persons and women by rank in most departments) to calculate statistically valid averages for comparison by sex and race.

[3] A form for organizing such material could be adopted by the federal government for use by the institutions.

[4] This assumes that HEW would be the central agency for antibias regulation of institutions of higher education.

The institutions would report to HEW periodically with respect to progress in settlement of each case and its final disposition.

7 HEW would add up the projected nontenure hiring goals in affirmative action plans by race and sex and the total nontenure hires by race and sex for the same period, and compare and analyze them by category of institution. HEW would also analyze for faculty the terminations by race and sex and type of institution, and the terms of offers made and accepted by persons coming from a regular faculty position in another institution.

8 HEW would classify and analyze individual complaint data to determine the incidence of such complaints, the experience with their settlement, and the implications of the data and experience for government antibias programs and for enforcement policies and practices.

Such a set of reports and their analysis would have a number of advantages from the point of view of intelligent operation of the program and equity in the functioning of compliance review and analysis. A systematic program for data reporting would put all covered institutions on a par in terms of reporting requirements, timing of a review of their data, and analysis of their relative standing and rate of progress.

The preparation and findings of periodic reports can stimulate thought and discussion concerning the institution's efforts and relative position, by the administration, faculty, and others in the university community. No university or college will have reason to lack concern because of apparent neglect by HEW. Without such a reporting system, it will be years before HEW makes any significant contact with all of some 900 universities and colleges, or even half of them, that it covers.

Such systematic reporting would facilitate intelligent and objective selecting and scheduling of institutions for field investigation. Comparative analysis of submitted data, and not such factors as nearness to the regional office or militancy of particular advocacy groups, would provide the basis for determining the timing and frequency of HEW field investigations at particular institutions. The collection and analysis of such comparable data should also serve to reduce the time spent by HEW staff in field investigation.

Such a system of periodic data reports might seem to place a heavy burden on colleges and universities. If the other federal agencies could work out with HEW a standard form for such data that would meet the needs of all of them, and perhaps the state agencies as well, that would reduce the time university personnel spend on separate, uncoordinated reports in connection with antibias regulation. Also, lessening the time spent by university administrators and faculty with field investigations would mean added saving for the institutions. On net balance, such a data reporting system could prove economical for most institutions.

The chief benefit provided by such data and analyses of them would be a better factual basis for guiding administration of the program, for drawing conclusions about the impact of the program, and for making appropriate revisions and improvements in the program and its enforcement.

ESSENTIALS OF AN APPROPRIATE, EFFECTIVE PROGRAM

This section presents the substance of a positive program for both the development of larger numbers of highly qualified female and minority-group faculty and the enforcement of equal opportunity in faculty employment, with major universities especially in mind. In developing this program, attention has been given to the five considerations discussed earlier in this chapter, and the program assumes that a data-reporting system such as the one just outlined is in operation.

First, the main components or features of the program are presented in outline form. They are six in number. The reasoning or basis of support for those components has, for the most part, been given in the preceding chapters. For some elements or aspects further elaboration may, however, be needed. Such elaboration is presented sequentially after the outline statement of the six components, which follows.

An affirmative action program for increasing the supply of highly qualified female and minority-group teacher-scholars in certain academic disciplines and fields of professional practice where the supply of teacher-researchers is exceedingly thin. The mechanism for developing much larger numbers of supply qualified for high-level faculty appointments in selected fields is competitive submission of "affirmative action supply programs" by universities for HEW selection and approval. The plans would provide for unrestricted selection by the university of those female and minority-group applicants to participate in that university's program for supply development. (This proposal is explained in some detail in an appendix to this chapter.)

2 Use of availability-utilization analysis and numerical goals to achieve "proportionality" to be confined to first regular appointments of new and prospective Ph.D. holders to the position of assistant professor or advanced instructor on the ladder of professional advancement. Thus, "affirmative action demand plans" would be focused on those who are at the same stage of career development, namely, recent completion or practical completion of Ph.D. requirements.

3 For enforcement of nondiscrimination for faculty appointments other than first appointment as assistant professor and for promotions within the professorial ranks, use of *(a)* analysis of data in the periodic reports of institutions, *(b)* field examination of the institution's central file of information on each faculty appointment and promotion, *(c)* the procedures for settling individual faculty complaints of discrimination, including the system of mediation-arbitration presented in Chapter 6, *(d)* the Equal Employment Opportunity Commission and state agencies for antidiscrimination enforcement, and *(e)* the courts.

4 Concentration in a single agency (HEW) of the administrative oversight of affirmative action plans and compliance, as applied to faculty (including professional research staffs) in higher education. That would mean removing faculty of colleges and universities from the Department of Labor's jurisdiction for contract compliance and, thus, from the provisions of Revised Order No. 4. Supporting staffs generally would, on the other hand, remain under Revised Order No. 4 as long as it applies to similar operations and occupations in industry.

5 HEW regulation for the faculty of major universities and other institutions that recruit a majority of their faculty in the national market to be handled by one well-qualified unit instead of ten regional offices. That would mean central handling of such faculty with respect to affirmative action supply plans and affirmative action demand plans, data analysis, and compliance enforcement.

6 A restructuring and strengthening of the staff of the Higher Education Division of the Office for Civil Rights in HEW, so that it is suited to meet the added responsibilities and functions to be placed upon it, especially the central unit to handle major universities and other institutions recruiting nationally, and to analyze the data reports.

Much of the factual background and the analytical bases for the six main components of the proposed program have been discussed in Chapters 2 through 8. Nevertheless, it may be helpful to comment briefly on each of the six and their interrelationships.

1 Failure to take account of the supply aspects in developing affirmative action plans and the need to increase the supply of women and minority persons qualified for appointments as tenured faculty were pointed out in Chapters 3 and 5. Experience in this country and abroad, particularly Russia, clearly indicates the need for vigorous, well-supported efforts to develop a critical mass of women and blacks qualified for tenure appointments in the natural sciences and engineering. Such faculty supply is needed to teach graduate courses and do research in disciplines that have a bearing on problems such as energy, pollution, and transportation, so that female and minority-group researchers would be attracted into and trained for work in those areas. Without special efforts on the supply side, experience and data show that the development of a proper supply will be a slow and lengthy process.

A specific proposal for increasing significantly the supply of female and black faculty well qualified for tenure appointments in fields where their supply is quite thin is spelled out in some detail in the appendix to this chapter. The proposal involves universities submitting affirmative action supply (AAS) plans, from which HEW would select the needed numbers for approval. The AAS plans would be for graduate training for the Ph.D. degree and postdoctoral training as teacher-scholars while on assistant professor appointments. It is suggested that the fields for such a breakthrough action on the supply side might include, in the arts and sciences, the disciplines of chemistry, economics, geology, mathematics, physics, and statistics, and among the professional schools: architecture and urban planning, business administration, engineering, and public administration.

As is explained in the appendix, an approved affirmative action supply plan would be taken into account favorably in considering a university's whole program for equal employment opportunity for faculty. It would be necessary to protect the process of selection by a university of graduate students and assistant professors for participation under an AAS plan from vulnerability to charges of discrimination against white males on account of their exclusion from a plan's purview. The university would still be subject to nondiscrimination requirements—under legislation and contract compliance—for all faculty employment not included in approved AAS plans. The AAS plans would not involve government control over faculty selection of female and minority-group graduate students and junior faculty to participate in such plans nor would they give cause for any regulation that would tend to alter or weaken faculty self-government and the faculty's role in selection and promotion of faculty.

2 The grounds for the proposal to confine availability-utilization analysis and numerical goals based on that type of analysis to the first regular appointment as assistant professor (or advanced instructor) were fully explained in Chapter 4. Chapters 3 and 4 also explained why supply and demand conditions for tenure positions at major universities were generally inappropriate for such availability-utilization analysis and for numerical goals based on such analysis.

3 The third component deals with the detection and determination of noncompliance and discrimination in faculty employment, especially for areas where the method of utilization analysis and numerical goals is inappropriate and leads to erroneous conclusions. It suggests reliance, in part, on the kinds of data analysis discussed earlier in this chapter. The results of such analysis should assist in the selection of institutions and areas for questioning and further examination, including field investigation if necessary.

Individual complaints can be an effective method of enforcement, especially if nondiscrimination or the elimination of demand discrimination, and not calculated numerical goals, is the compliance objective.

The purpose in establishing a faculty complaint procedure and in proposing the system of mediation-arbitration by experienced outside faculty in Chapter 6 was to facilitate prompt submission of faculty complaints of discrimination and to have them settled intelligently and correctly—by private settlement within the faculty system if possible. In addition, complaint can be made directly to federal and state antidiscrimination agencies and the courts.

HEW personnel are prone to overstress numerical goals and to underestimate the enforcement power of individual complaints, especially by faculty who enjoy certain customary and legal protections growing out of faculty status. That may be because HEW itself had so much difficulty and was relatively ineffective in handling individual complaints of discrimination and "reverse discrimination" that were filed prior to mid-1972, when individual complaints of discrimination against institutions of higher education were transferred to the Equal Employment Opportunity Commission.

4 The advantages to both the government and the institutions of having a single agency collect the data and administer the various aspects of affirmative action and antidiscrimination for faculty (except for individual complaints filed with federal and state agencies under the Civil Rights Act and state antidiscrimination legislation and legal actions handled by the Justice Department) should be obvious. Federal antibias regulation for faculty could be administered much more consistently, intelligently, and economically. Responsibility for planning, administering programs, and conducting enforcement activities would be in the hands of one agency, which should consequently have knowledgeable and qualified staff. The institutions of higher education would have one agency to deal with and one set of comprehensive reports to make, thus reducing confusion, frustration, and cost. A set of relationships could be developed between that agency and the institutions of higher education that would be constructive and effective in promoting mutual interests and goals.

5 The grounds for proposing that a single administrative unit within HEW handle faculty of major universities were explained in the last section of Chapter 7. With central collection and analysis of data and with enforcement activities partly based on such analysis, a good case can be made for single administrative handling of the faculty of universities and colleges that recruit the bulk of their faculty in a national market. Admittedly there could be practical difficulties in drawing a line between institutions on that basis. Nevertheless a strong argument can be made for national handling of at least faculty recruitment, initial appointment, and interinstitutional movement in connection with new appointments, in the case of those institutions that compete largely in the national market for faculty.

6 Chapter 7 explained the need for increasing the qualifications of the staff of the Higher Education Division of HEW, especially with respect to knowledge of and experience in the faculty systems of recruitment, appointment, and promotion, particularly in major universities. Assuming the adoption of all or most of the previous five components, the need for bringing to the staff more knowledgeable and analytically qualified personnel is all the greater. In dealing with programs and regulations to apply to faculty, mutual understanding and respect contribute to constructive solutions.

These six components of a program are presented here, not as a completely finished product but as basic elements for discussion and a foundation for the development of a federal program for assuring equal employment opportunity and nondiscrimination in faculties of institutions of higher learning, while at the same time not decreasing, but hopefully increasing, the effectiveness of their instructional and research programs.

Obviously, the legal and practical aspects of such a program would need to be given much more detailed consideration.[5] With respect to constitutional questions, it should be pointed out that the proposal for affirmative action supply plans differs significantly from the present program of affirmative action plans on the demand side under the HEW Guidelines. The latter program is applied uniformly to all institutions of higher education with federal contracts. Therefore, it encompasses the bulk of the market for university faculty.

The program of affirmative action supply plans, on the other hand, would apply only to selected fields in selected institutions, and then only to a part of the graduate students or junior faculty in those fields at those institutions. In the case of graduate-student AAS plans, it could well be that the numbers would simply be added to the institution's regular complement of graduate students so that no displacement would be involved. Even if there were some displacement at that institution, the opportunity for male white graduate students to obtain excellent graduate instruction would be restricted to only a small extent in view of the large numbers of universities that would be offering graduate instruction without an approved AAS plan in those fields.

The impact of AAS plans for nontenure faculty positions might be more significant because the possibility of expansion in number of faculty at a particular institution is likely to be less than for graduate students. That difference could be reduced by an expansion of government contracts that would increase research opportunities in the discipline at that institution. In any case, the restricted areas of faculty employment under AAS plans would be in specified fields and for only a part of the nontenured faculty employment — usually much less than half — in the field or fields at that institution. Again, in view of the large number of universities without AAS plans, the overall restriction on opportunities for nontenured faculty employment for white males would be small. That is especially the case in view of the fact those fields were selected because they have few female and minority-group faculty throughout the nation.

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[5] It is possible, for example, that the following provision of Title IX of the Higher Education Amendments of 1972 would need to be amended if federal fellowships were to be provided for graduate students under AAS plans: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

The proposed AAS plans further illustrate how government antidiscrimination plans can, by intelligent planning and working with universities on specific problems, avoid detailed intervention in the internal operations of universities.

The next chapter discusses the role that academic leadership might play in moving forward the kind of program presented in this chapter.

APPENDIX TO CHAPTER 9: Proposal for Affirmative Action on the Supply Side

This is an elaboration of the first component of the proposed program discussed in the last section of Chapter 9, pages 146–147.

Purpose This proposal is designed to increase significantly the supply of female and minority-group faculty who are qualified for university positions carrying tenure in fields where they have heretofore been quite rare. The aim would be to develop enough women and minority persons as outstanding teacher-scholars to provide a critical mass, and thus to eliminate a sense of peculiarity, separateness, and other restraints on the development and use of their talents for such a career. By providing a critical mass, the proposal would hope to reduce subtle barriers and to provide the momentum for further increases after the government's affirmative supply effort in that field is discontinued.

Fields for supply development Criteria for the selection of fields for such supply development would include: (1) the scarcity of female and/or minority-group senior faculty in the field and (2) the relative need for talented female and minority-group teacher-scholars in the field to help train female and minority-group practitioners and teacher-scholars for the future. Among the fields that should be considered in the arts and sciences are chemistry, economics, geology, mathematics, physics, and statistics; and among the professional schools: architecture and urban planning, business administration, engineering, and public administration.

Kinds of training and development For increasing the supply of well-qualified female and minority-group faculty in a selected field, government encouragement and support would be needed for the two stages of advanced training and development: (1) graduate training for the Ph.D. or its equivalent and (2) postdoctoral development as a teacher-scholar during the first five to seven years as a regular faculty member, when one needs the opportunities to make a reputation as a teacher-researcher that would qualify him or her for a tenure post at a respected institution of higher education.

The duration of graduate training for the Ph.D. might be considered four years. The development period as assistant professor is usually five to seven years. Together they amount to about ten years but, of course, each stage could be handled separately. What these time intervals do indicate is the rather long training period to achieve prominence as a teacher-scholar.

Encouragement of affirmative action supply plans The federal government, after selecting the fields for such special supply-increase efforts and deciding for each field the increase in numbers it wishes at each stage each year, would establish the terms of encouragement and support that such plans would have. To help attract female and minority-group Ph.D. candidates into those fields and to demonstrate the federal government's interest in doing so, probably some federal support for fellowships would be needed in addition to university and possibly foundation fellowship funds. That would also provide some incentive for universities to submit affirmative action supply plans for Ph.D. training.

For teacher-scholar development of assistant professors, probably no federal financial support would be necessary. The individuals selected would be paid regular salaries for regular faculty service. Universities would presumably be interested in submitting AAS plans for such reasons as the following: (1) the institution's faculty and administration have a genuine desire to expand the number of highly qualified female and minority-group faculty in the field, (2) credit would be given to such an effort in terms of contract compliance, and (3) the numbers of female and/or minority-group assistant professors in an AAS plan would displace the numerical goals for such assistant professors in the institution's affirmative action demand plan, and such goals would be difficult to work out for those fields in any case. Furthermore, it would be necessary to recognize that female and/or minority-group assistant professors recruited under plans for supply increase would not be likely to have the same opportunities for promotion to tenure at their institution as assistant professors appointed on the basis of open competition, with the prospects for a tenure opening more definitely in mind. Those differences should, however, in no way preclude promotion of assistant professors appointed under a supply-increase plan, if that is warranted in open competition, or perhaps inviting them back at a later date. Those possibilities could be among the potential benefits of the plan for the institution.

Content of AAS plans The federal government would specify the material that should be submitted by institutions in the competition to obtain government approval for an AAS plan for Ph.D. training, for the development of able and effective teacher-scholars, or both. An institution's graduate-student AAS plan would specify by year the number of female and minority-group graduate students to be in Ph.D. training under the plan. An institution's faculty-development AAS plan would specify the number of female and/or minority-group assistant professors (and advanced instructors where that is the initial appointment) to be on the faculty each year.

In a graduate student plan, the institution would describe its Ph.D. degree requirements and the nature and content of its graduate training in the field, including the quality of the faculty, the research training facilities and opportunities for graduate students, the quality and numbers of graduate students, the average length of time to complete Ph.D. requirements, the record of the institution's Ph.D. recipients later as teacher-scholars, and similar data.

In the faculty-development plan, the institution would need to set forth the opportunities for its assistant professors to achieve outstanding records in teaching and research. The pertinent material would include: teaching opportunities in undergraduate and graduate courses, teaching loads, quality of students, paid and unpaid leaves of absence for research, research opportunities and support, library and computer facilities, quality of tenured and nontenured faculty, opportunities for discussion with tenured faculty concerning professional matters, and other aspects of teaching and research at the institution. Assurance would need to be given that assistant professors under the AAS plan would have the same rights, privileges, and opportunities as other assistant professors.

Under an accepted AAS plan the university would be free to recruit and select female and minority-group graduate students and junior faculty according to the institution's (faculty and deans) judgment of the persons best qualified for its graduate training or assistant professor teaching and research, from among the candidates it is able to recruit. In other words, the institutions would retain freedom of selection of graduate students and junior faculty, and the students and Ph.D. holders seeking assistant professorships would have freedom of choice of university.

Selection and oversight of AAS plans The federal government, in deciding which among the AAS plans submitted it will accept, would base the decision mainly on the quality of the instruction in that field at that institution in the case of graduate-training AAS plans and on the opportunities for developing into outstanding teacher-scholars there in the case of faculty AAS plans.

Government oversight of the accepted plans would be confined to ascertaining whether the institution was performing according to the provisions of its plan as officially accepted. Judgment on that score could be based largely on written reports. Failure to comply with its accepted plan, if not corrected, could lead to withdrawal of acceptance, along with the attendant government support and privileges.

10. Academic Leadership and Constructive Action

The preceding chapters have presented an analysis of the federal government's program of antibias regulation as it is being applied to the faculties of universities. They have shown that the federal program has been flawed by some misconceptions, inappropriate methods of analysis, and erroneous conclusions based on faulty analysis. The main defects in the program can be summarized as follows:

1 Failure to recognize and take into account the fact that demand for tenured faculty is highly individualistic and selective, based on personal achievement of the highest quality as a teacher-scholar and stimulated by competition for excellence of faculty (Chapter 2)

2 Failure to make a proper analysis of supply differences by sex and race for academic disciplines and subfields, and to take special account, in affirmative action plans, of human-capital development on the job during the five to seven years after receipt of the Ph.D. degree (Chapter 3)

3 Flaws in the conception and measurement of discrimination under availability-utilization analysis that result in placing undue blame and remedial responsibility on the demand side and lead to inflated numerical hiring goals (Chapters 4 and 5)

4 Pressures for discriminatory hiring to meet inflated goals, resulting in additional, new discrimination and the likelihood of an increasing number of "mistakes" in the selection of tenured faculty (Chapters 2, 3, and 5)

5 Government application of the industry model of authority and personnel management to university faculty operations, with the consequent threat to the faculty system of collegial decision making based on professional assessment of merit (Chapters 7 and 8)

6 Increasingly involved and intrusive regulation of faculty decision making, with the negotiation and enforcement of each successive affirmative action plan (Chapters 7 and 8)

7 Inconsistent government policies and regulatory treatment between government agencies and different HEW field offices, opening up added legal liabilities for universities and affecting arbitrarily and unevenly their ability to compete for faculty, students, and resources, nationwide and internationally (Chapters 4 and 6)

Those seven defects characterize the federal regulatory system as applied to universities and colleges generally. They are defects from the viewpoint of most of the 900-odd universities and colleges covered by the HEW system of antibias regulation. HEW's mistaken assumptions and policies are likely to be about as inappropriate for nonmajor institutions of higher education as they are for major universities.

Indeed, the particular interests of the nonmajors are likely to receive even less consideration by the HEW regional offices because they are not in as strong a position to resist singly the regulatory program of HEW. Patterns of affirmative action plans are being set by HEW regional-office negotiations with the major universities. Those patterns are not likely to take adequate account of the needs and special interests of different types of nonmajor institutions.

Generally speaking, a less prestigious institution will find it difficult to effectively resist pattern spreading negotiated by the one-institution-at-a-time enforcement tactic. Under that tactic, the other categories of institutions are not in a good position to press for needed and appropriate reform of the HEW regulatory system from their viewpoint.

RESPONSIBILITIES OF THE ACADEMIC COMMUNITY

If the programs of government regulation of universities and colleges for antidiscrimination purposes are to be intelligently formulated and properly applied, the faculties and administrations of universities need to consider the difficulties and implications of the present programs. For a variety of reasons, a surprising amount of ignorance exists among university faculty concerning the actual demands that HEW regional offices are making and the far-reaching implications that they and court cases can have for the future of higher education in this country.

Analysis of difficulties and defects of existing antibias enforcement can point the way to more appropriate solutions. Painful experience with adversary contests in agency hearings and the courts encouraged the development of the limited mediation-arbitration proposal for individual complaints of discrimination by faculty members in Chapter 6. It is a procedure for constructive settlement within the university community.

The fairly comprehensive program for government enforcement of equal opportunity for faculty proposed in the preceding chapter is designed especially to meet serious objections to and defects in the existing government programs of antibias enforcement in higher education.

Clearly in a matter as subtle and complicated as discrimination in employment in university faculty, one program cannot be expected to satisfy all the needs and concerns of the various interested parties. Although feelings of sex, race, or religious prejudice cannot be fully eliminated from university faculties, strenuous efforts must be made to assure equal opportunity to all to excel, and to avoid any adverse effects of such bias on the professional careers of individuals.

Some may consider the program set forth in Chapter 9 to be too attentive to the concerns and objectives of the leading universities – "the elite" of higher education. The analysis of government antibias regulation in this book has dealt with problems particularly of those institutions for three reasons: (1) HEW's mistaken assumptions concerning qualified supply and numerical hiring goals are very clear, and the potential for lasting injury to the nation's preeminent instructional and research resources is so evident, in the case of the leading institutions, (2) the world of higher education looks to the major universities for much of the leadership, especially in faculty matters, and (3) HEW appears to have chosen many of the prominent universities to achieve breakthroughs and pattern setting in government regulation of university faculty.[1]

The faculties and administrations of universities and colleges in other classifications could suggest additions or complementary features to the Chapter 9 program, needed to fit their circumstances. It is important that faculty members and administrators in various types of institutions consider the kind of government regulation that suits both the goal of equal employment opportunity and their particular needs.

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[1] In the letter stating the HEW found MIT's affirmative action plan "acceptable and in substantial compliance," the regional civil rights director noted that in some respects MIT had gone beyond minimum standards of compliance and was the first institution of higher education in Region I to work out with HEW numerical goals by academic department. With respect to such pattern setting, the director said: "We'll be able to help a lot of universities as a result of what you've done." (*Tech Talk*. 1973*b*, p. 1). Help has taken the form of HEW insistence that Harvard and other major institutions in Region I must have numerical goals by individual department in the arts and sciences.

Some in academia may argue that parts or all of HEW's program of affirmative action should be abandoned either as impractical or inappropriate and uncorrectable. For reasons presented at various points in these pages, abandonment of the affirmative action part of federal contract compliance at this stage of development would seem to be premature.

The case for excluding university and college faculty from coverage under the Equal Pay Act is more persuasive. That legislation uses "job content" as the basis for determining sex equity in the wage and salary structure at a particular location. That concept simply does not fit long-established promotion and salary-setting practices for university and college faculty. To bend universities' systems of salary and salary-increase determination to fit concepts of the Equal Pay Law could practically destroy their effectiveness.

University administrators may find it awkward and retrogressive—even elitist—to have different government regulatory programs and agencies for faculty and for supporting staff. It can be argued that the appointment of a new financial vice-president, a librarian, a director of admissions, or a personnel director for a university can involve individual supply aspects and search and selection processes not very different from those that apply in the selection of a professor of classical Greek philosophy, high-energy physics, or microeconomic theory. Distinguished professors in particular subfields may be more rare, but search for the best-qualified person for a top nonfaculty post in a particular university setting may demonstrate that the notion of a qualified pool does not fit that situation very well either.

Clearly, however, the answer is not that individual faculty should be treated differently because they are personally so different or somehow better than individual members of supporting staffs. It is that the system of teacher-scholar training, faculty operation, and selection for tenure posts is basically different, and that the differences are too important for effective operation of universities to have them obliterated by a common program of government regulation that is applied in a strictly conformist fashion. Undoubtedly in many universities, professionals on the supporting staff, such as professional researchers with Ph.D. degrees and perhaps professional librarians, should be included under a regulatory program for faculty.

The specifics of antibias regulation of universities and colleges should be carefully analyzed and thoroughly discussed, both on the campus and in Washington. Reform should be based on facts and experience, and on long-range planning as well as short-run concerns.

The faculties and administrations of universities have an obligation to provide intelligent leadership with respect to antibias regulation of higher education in this country. They have a large stake in the faculty system of professional evaluation of qualifications and responsibility for academic affairs. Universities have gained much of their strength and effectiveness from that faculty system, and should be prepared to take affirmative action to preserve and advance its values.

THE FACULTY SYSTEM UNDER PRESSURE

During the next five years, the faculty system of appointment and advancement according to professional judgment of individual merit will be under considerable pressure.

In the five academic years of 1969-70 through 1973-74 many blacks and women were appointed as assistant professors in university faculties. In a number of cases, they enjoyed some advantage or preference in connection with their initial appointment. Some risks were taken. During the next five years, most of those assistant professors will become subject to a decision on either promotion to tenure or termination of appointment.

HEW-enforced hiring and promotion goals have generated a new set of pressures. They, of course, are designed to increase the number of female and minority-group appointments in each department according to timetables under many affirmative action plans. However, any preferential treatment in promotion or appointment to tenure on grounds of race or sex would be likely to violate Title VII of the Civil Rights Act and could expose the university involved to heavy costs, including the possibility of duplicate tenure appointments for a single opening under a court decision.

The demand-supply situation is another complicating factor. The leveling off of demand for faculty – overall stability in faculty positions and openings since 1970 – has created in most disciplines a condition of general oversupply of persons with Ph.D. degrees desiring academic appointment. The quality of available supply is generally better than it was five or ten years ago. Thus, supply crowding exists and will continue to exist with respect to tenure appointments.

Over the years, various criticisms have been made of the system of faculty assessment of qualifications for appointment and promotion. Most of the criticism has been generated by cases that involved a negative decision on an assistant professor's promotion to tenure. As explained in Chapter 2, even in periods of faculty expansion and a more balanced demand-supply situation, only a fraction of all assistant professors were promoted to tenure at many major universities.

Campus criticisms and lessons learned from past mistakes have often resulted in improvements in the process of information gathering, in the quality and objectivity of evaluations, or in faculty procedures to assure due process. Also, a university's system of faculty selection is being tested constantly as offers are made to faculty at other institutions, as faculty move between universities, and as the results of decisions on promotion to tenure are reviewed. The long tenure period that individual faculty have makes it difficult for department members to overlook the lessons of past misjudgments.

Persons in academic life have exceptional opportunities to make individual reputations as teacher-scholars. Their qualities as a teacher become known through their students, departmental colleagues, oral presentations at professional meetings and seminars at other universities, and the textbooks they write. Their research contributions are made available for professional evaluation through articles in scholarly and scientific journals and through published books. In short, university faculty have the advantages of a large number of potential employers, many outlets for the presentation of their scholarly contributions, and a variety of sources for judgments of their work; they can literally teach and write their way to the top in open competition.

Although those opportunities for career advancement provide individuals considerable protection against the impediments of prejudice, they are less effective in a slack market for those who are not in the very top level of accomplishment and for those who are tied to a particular location. A married woman may, for example, need to pursue her academic career within a particular local institution.

University faculty and administrators should be in a position to defend the fairness of the faculty selection and promotion system at their institutions. Therefore, such systems should be examined in terms of the following questions:

- How well are the system's rationale and its actual operation understood by both nontenured and tenured faculty?[2]
- Are the procedures well designed to bring up for consideration those teacher-scholars from whom the best possible candidate for the position can be selected?
- Are the criteria and methods of assessing the merits of several alternative candidates well designed to lead to appointment of the one best qualified for the post?
- Is the information on the leading candidates to be used as the basis for department action as thorough and accurate as possible?
- Does the procedure provide for evaluation of the leading candidates' qualifications for the position by professionals well suited for that purpose, including outside distinguished scholars where external assessment would contribute to the making of an intelligent decision?
- Does the procedure provide for adequate consideration of the documentary information and evaluations prior to department action, with opportunity for individual members of the department to submit separate statements to the administration expressing their views?
- Does the procedure provide that a department recommendation for tenure appointment by promotion or appointment from outside (as well as a negative decision on promotion to tenure that requires termination) is subject to broader review by a committee composed of (say) members elected from the university or college faculty, selected faculty members and academic administrators, or a combination of distinguished scholars from outside and within the university?

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[2] For material explaining the aims and operation of particular systems of faculty selection and promotion, see *A Report of the University of Chicago . . .* (1972) and *An Information Statement for the Guidance of New Faculty at Princeton University* (1972). For a discussion of criteria, materials, procedures, and practices for tenure appointments at Harvard, see *Discussion Memorandum on Academic Tenure at Harvard* (1971), especially pp. 21–27, and Appendix B, "Preparation of Materials for Ad Hoc Committees on Permanent Appointments in the Faculty of Arts and Sciences," pp. 36–40.

The aim in filling a tenure post presumably is to appoint the candidate who, in that post, would make the greatest contribution to the educational objectives of that university. An assistant professor on the ground whose performance in teaching, scholarship, and general advancement of the intellectual life on the campus have been outstanding would tend to have an inside track on a tenure opening if one developed that just suited his or her abilities, training, and academic interests. A major university should generally apply the same standards for tenure appointments whether candidates are from within or outside. However, distinguished performance in that university's setting should provide a fairly firm basis for predicting the quality of the individual's future achievement. For that reason, mature teacher-scholars in the discipline would be inclined to favor a candidate with proven local experience.

There is a need to make certain that each assistant professor understands the application of the system to his or her case and does not develop unrealistic expectations concerning prospects for promotion to tenure at that university. One way to accomplish those purposes is to have the department chairman, at least once a year, discuss with each assistant professor in the department individually his or her performance as a teacher, researcher, and colleague, and the assistant professor's prospects for a tenure appointment at that university. The chairman's statements should be based on a discussion with the tenured professors concerning each assistant professor and the likelihood of the development of a tenure opening in the right subfield during the limited period one can hold an assistant professorship. Such a department discussion can appropriately be held in connection with the annual salary review in institutions where department faculty of higher rank make department recommendations on individual salary increases on the basis of merit.

The vital importance of distinguished appointments to the tenured faculty of a major university is well stated by the Committee on the Criteria of Academic Appointment of the University of Chicago as follows:

> The function of appointive bodies is to bring to the academic staff of the University individuals who will perform at the highest level the functions of research, teaching, and training and the maintenance of the intellectual community of the Universtiy. A university which does not perform at this level will lose its standing in the world and therewith its power to attract outstanding faculty members and outstanding students. Its failure to at-

tract them will in turn reduce the quality of its performance. Every appointment of a mediocre candidate makes it more difficult to appoint a distinguished candidate later and makes it more difficult to bring outstanding students to the University. This is why scrupulous insistence on the most demanding criteria in the act of appointment is so decisive for the University (*A Report of the University of Chicago . . .*, 1972).

CONCERN AND OPPORTUNITY

The continuing drive of talented women and members of minorities to excel in the arts and sciences and in professional careers presents the universities and the nation with a magnificent opportunity. That momentum, flowering under equal opportunity, can over time greatly enrich professional talent in this country and especially in university faculties in various disciplines.

It would be unfortunate, indeed, if inept regulation, promoting discrimination under a dual standard, should discredit the program. The university community has a responsibility to save the HEW antibias program from that fate.

The faculties and administrations of universities must work for the adoption of suitable and constructive programs, by the institutions and the government, to assure equal employment opportunity for members of minorities and women in the faculties of universities. Basic facts and considerations that need to be taken into account in designing antiprejudice programs of faculty appointment and advancement have been set forth above. Hopefully, the analysis and proposals offered in these pages will stimulate appropriate "affirmative action" on the part of leadership elements in academia and in government.

[From the Wall Street Journal, July 27, 1972]

Do Colleges Practice Reverse Bias?

(By John H. Bunzel)

A person under serious consideration for a faculty position at a state university received the following letter this spring:

Dear ——— ———

I am sorry to report that although the Department of ——— saw you as our top candidate we will not be able to make you an offer for our new position.

Our university is an Affirmative Action Employer and the Department must attempt to fill the new position with an individual from a recognized oppressed minority group. Although the Department initially viewed your ——— ancestry as satisfying the requirements of Affirmative Action, consultation with our institutional advisors on the Affirmative Action Program indicated to us that your ancestry does not qualify you as an opressed minority.

I wish you the best of luck in your future, and I am deeply sorry we were not able to extend an offer to you.

Apart from the heavy-handedness demonstrated in the handling of this particular case, the more serious matter of reverse bias and discrimination is not so easily dismissed. Another candidate, also very much in contention for a faculty appointment, was told in writing that "only ethnic minorities or women are to be considered for all job openings." The question he posed in a letter was simply stated: "What are qualified Caucasian males supposed to do?"

NO EASY ANSWER

The fact is there is no easy or ready answer. But this much is clear: (1) federal regulations require colleges and universities to develop Affirmative Action programs establishing specific recruitment goals and timetables to assure an immediate increase in the percentage of minority and women faculty members and staff employes, and (2) the Department of Health, Education and Welfare is responsible for accepting or rejecting programs proposed by individual campuses. The critical question is how these Affirmative Action programs are to be implemented.

Like most of my academic colleagues I strongly support federal objectives of recruiting more women and minorities as faculty members on an equal opportunity and nondiscriminatory basis. Women in particular have not been accorded fair and equal treatment by the academic world and it is time we admitted it. But I am opposed to the use of any form of quota system that would move to the concept of race or sex as an exclusive or predominant criterion for faculty hiring.

The distinction is important because the debate over Affirmative Action is increasingly being cast in a familiar idiom: if you are not actively with us, you are actively against us. When applied to the academic world, the moral absolution of this simplistic characterization denies legitimacy to complicated and inevitably vexing questions.

J. Stanley Pottinger, the conscientious and personable director of HEW's Office of Civil Rights, recently told the National Association of College and University Attorneys that he "never understood academic freedom to deny a qualified person an opportunity for appointment or advancement because of race or sex, or the right to pay one person less than a person of another race or sex performing the same job." He is absolutely right, just as he is right in pointing out that the "real objective of the law against discrimination is to ensure equal opportunity to all persons regardless of their race, sex, religion, color or national origin." There can be no quarrel with Mr. Pottinger on these points, or with his conviction that university administrators and faculties must examine "their own practices and profiles to determine whether discrimination exists and how it may best be remedied." It is also reassuring to learn from him that an individual's professional qualifications are still "the primary standard for hiring and are at the heart of the Executive Order that HEW enforces."

But are they? Or are colleges and universities being encouraged to introduce into the appointment process non-academic criteria such as race and sex? This is the kind of question (among many others) that needs to be talked about if we are to examine the real or potential effects of Affirmative Action. We need to move from the abstract level of generalities and rhetoric to specific and concrete concerns—in short, to questions of implementation that occur on a day-to-day, department-by-department basis.

The intent and meaning of Affirmative Action are considerably clouded., The issue is not simply "doing the right thing," but one of the other competing and legitimate values and their relationship to many practical problems. The truth is that Affirmative Action involves a collision of rights and principles. The important question is how one balances one's obligations amidst a conflict of assertions and assumptions. Some examples:

> As a society we need to remove the many injustices (educational, economic, cultural, political and social) to the disadvantaged and minorities. It is an urgent priority.
>
> But: Colleges and universities must not adopt unjust or undemocratic means to achieve laudable goals. It is one thing to enable those who have been unfairly disadvantaged to compete fairly and fully—and this we must do. It is something else again to do away with competition altogether or to provide the real or alleged victims of discrimination with redress by discriminating against others. If we set aside a white candidate who is more qualified than a black or brown competitor BECAUSE he is white, we will be discriminating according to race. Once that process gets legitimated, there is no stopping it.
>
> Blacks, Mexican-Americans, and other groups are not heavily represented on college faculties. Some say that our colleges and universities should therefore move at once to bring about a statistically acceptable representation of women and minorities on their faculties. Others even go so far as to say there should be proportional representation of races and sexes in conformance with the percentage of those groups in the general population or the surrounding geographical community.
>
> But: A university should not make faculty appointments the way the Democratic Party chooses convention delegates. The proper goal for a college or university is to hire the best qualified person, and the predominant criterion should be accomplishment and capacity in teaching and research. You cannot determine excellence by race or creed any more than you can recruit a quality faculty by assembling a quota sampling or proportional representation of different groups in the population. The measure of ability for membership on the faculty should be the ability to pursue the truth and transmit knowledge. If certain groups—as Lionel Trilling has said, "for reasons obviously beyond their control"—have not yet produced a large number of persons trained for all of the academic professions then we should address ourselves to that problem and seek ways to remedy it.

COMPLIANCE VS. COMPROMISE

—Civil rights officials have a right to determine if contractors with the government, including universities, are in compliance with federal employment opportunity regulations.

But: We must not compromise the right of the university to make its own academic decisions regarding hiring, rank, tenure and promotion based on professional judgments about intellectual capacity, scholarship, and teaching ability. Each institution in a pluralistic society has its special characteristics, and those of a university should be recognized—and defended—by the government. A university is not an industrial plant. It is neither better nor worse, but it is different. The point is that all institutions in a democratic society should not be reduced to the kind of monolithic sameness that virtually insists they meet the same common requirements.

A basic error of HEW's Affirmative Action is in applying remedies perhaps suitable for conditions in the auto or construction industry, when in reality the situation in the academic world is significantly different. It may well be that a large pool of qualifiied or easily qualifiable minority manpower exists for business firms and labor unions and that, either through intentional or unintentional discrimination, minority members are not being hired. But this does ot describe the special features and problems of faculty recruitment in American universities. Such a pool does not presently exist, nor is rapid "on-the-job" training possible in the universities in the same way as it is in industry. (There is much talk—and I think considerable uncertainty and confusion based on a lack of knowledge—about what the pool of available talent for faculty recruitment really is. It would be helpful to know how many blacks, women, Chicanos, etc. with Ph.D.s presently not employed in the academic world would like to be employed.)

HEW must become more sensitive to other concerns and considerations of the academic world. In the debate over Affirmative Action there is need to distinguish between short-run psychological gratifications and long-run consequences. Many people cannot manage this long-range perspective. They cannot see that the appeal to defend academic quality and competence is not just a fusty privileged claim made by a special group but is also a claim to maintain the very institutions out of which rational policies and talented problem-solvers must come.

RIGHTS OF MAJORITIES

If a college or university gives preference in its faculty hiring to certain *groups* on racial grounds, it undermines one of its fundamental ideals and precepts, that of *individual* performance and merit. We construct public policies that provide social justice to a class, race or ethnic group, but we do not *hire* a class, race or ethnic group. We hire a *person*. It is important to remind ourselves that this principle about the status of an individual in a democracy is just as precious to the rights of majorities as it is to the rights of minorities.

We in higher education have an obligation to broaden the recruitment base for faculty hiring by conducting a serious and honest search for qualified women and minorities. I also believe that the federal government should help make available the necessary resources to provide expanded opportunities for graduate academic training for women and minorities who want to become doctors, lawyers, engineers, professors and the like. I support a concept of Affirmative Action that has as its goal the elimination of all kinds of discrimination, but I do not support a straight racial line for making faculty apppointments.

We live in a country of many minorities, and many of them have been severely discriminated against for a variety of indefensible reasons. This is why I have never believed that discriminating in *favor* of a minority can be easily distinguished from discriminating *against* a minority.

Governmental encouragement of preferential hiring based solely on racial classifications can only increase the importance of race in our already race-ridden society. My values lead me to believe that a person's race, sex or origins are irrelevant to his individual humanity. They certainly have nothing to do with his ability to teach physics, politics or anything else.

[From Freedom at Issue, November–December 1972]

THE QUOTA MENTALITY

A university president responds to questions on discrimination of academics and alternatives to the quota mentality

(By John H. Bunzel[1])

QUESTIONS THAT INSPIRED PRES. BUNZEL'S RESPONSE

To the Editor: Your journal has devoted much copy this past year to the question of quotas, but has neglected discussing the very real problem of discrimination against minorities and women at universities to which the establishment of quotas is—I hope—only one of many solutions.

I would like to see your contributors answer these questions:

1. Is it true that some blacks and women have been and still are denied opportunities to perform in academic positions for which they are fully able?
2. If not, how do we reconcile the statistics which show qualified Blacks and women to exist with the fact that these groups are not hired, promoted or paid at the levels one would expect in terms of their availability?
3. If we can agree that minorities and women have been treated discriminatorily by universities, what can and should be done to rectify this situation?

Universities are in serious trouble because of their apparently discriminatory record. They need *constructive* criticism and *positive* alternatives. Can your contributors help to define and resolve the problem of discrimination in higher education?

LINDA MACLACHLAN,
Southern Illinois University,
Carbondale, Ill.

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[1] Dr. Bunzel is president of California State University, San Jose. Three years ago we published his "Replies of a candidate for college president to probes of the California selection committee . . ."

I am grateful for the editor's invitation to allow me to use Ms. MacLachlan's letter as a catalyst for some remarks on the problems of discrimination—both real and alleged—in universities at the present time. Certainly her concerns (though not necessarily her formulation of the issues) are genuinely important and deserve serious consideration. I shall attempt to react to the issues she raises in what seems to me to be their most generic form. In this way I hope to deal more parsimoniously and productively with basic matters at a higher level of generality.

Stated in their broadest form, I take these issues to be three in all: 1) Can quotas solve, or at any rate help to solve, the existing underrepresentation of women and some minorities on the faculties and administration of many institutions of higher education? 2) Is statistical underrepresentation on the faculty and in the administration of numerous universities and colleges prima facie evidence of discrimination against women and some minorities? 3) Since virtually everyone would agree that the existing situation is less than perfect, what recommendations can be made that will improve the present state of affairs?

I. CAN QUOTAS SOLVE OR HELP TO SOLVE THE PROBLEM OF DISCRIMINATION?

Perhaps the most dramatic and far reaching proposal that is central to Ms. MacLachlan's position deals with her affirmation of the need to establish employment quotas as one of a number of ways of overcoming discrimination in university employment. I shall set aside for later consideration an analysis of the arguments she uses to show that discrimination actually exists. Suffice it to say here that I think her position rests on some shaky assumptions. I want to turn instead to the question of whether quotas are defensible in a good cause. I will assume, at least for the purposes of this statement, that all of us can take for granted the desirability of eliminating discrimination. What we need to examine is the claim that employment quotas are a good means—among others—to cope with forms of racial and sexual discrimination which are violations of the law and of the Constitution's guarantee of equal protection.

It is surely one of the mordant signs of the times that it has once again become fashionable in some quarters openly and even aggressively to advocate the use of quotas for one purpose or another. Not so long ago civil libertarians and equalitarians universally regarded quotas as expressive of racist, undemocratic, and authoritarian desires to preserve the sanctity of aristocratic privileges. Today there are not only an increasing number of calls (like Ms. MacLachlan's) for the explicit use of quotas, but in many quarters—even including, according to some interpretations, powerful arms of the federal government like HEW and EEOC—there is influential and determined advocacy in favor of a mandatory statement of employment goals and timetables which are almost invariably thinly disguised functional equivalents of quotas. It is rare that one sees a reasoned defense of such a position beyond the rather simple declaration that the statistical evidence of underrepresentation of certain minorities and women requires the setting of numerical goals or percentages to bring an end to past injustice.

I do not mean to suggest that there cannot be or that there have not been reasoned defenses of the need to eliminate discrimination or to assure greater equality. Such arguments exist in abundance and I am proud to count myself among those who over the years have tried to express them. Nor do we lack for defenders of the democratic faith who (out of a variety of motives) attack contemporary practice in the interest of making it conform more closely to our democratic theories. But at the moment we do seem to be rather short on those whose democratic convictions are sufficiently thoughtful to be able to escape sloganeering and counterproductive solutions to grave problems. Those who advocate quotas have the obligation to state the rationale for their position—and to state it as something more than the anguished expression of their desperate concern for the immediate righting of injustice. Those who shout the loudest or most self-righteously about their passionate belief in justice should not be allowed to bully the opposition. Even those who whisper can be advocates of justice. In short, the advocates of quotas should be expected to define them with reference to their internal consistency, their consequences and their morality and as a social policy consistent with democratic theory and practice.

I suspect that the antipathy of believers in democracy to quotas has always rested on the clear-cut apprehension that they could not be defended in these terms and that they were inherently inconsistent with the Constitution. In my judgment the recent attempts to transform or redeem the principle of quotas by declarative fiat—attempts engendered by our revolution of rising expectations and our relentless self-examination of our shortcomings—have thus far been a dismal failure. The following objections to the use of quotas, while in no sense a definitive answer, muster at least some of the basic reasons for rejecting the attempt to utilize quotas as a social policy designed to reduce or to overcome discrimination.

1. Quotas are self-contradictory when they are insituted as a means to end discrimination. The advocates of quotas who call themselves believers in equality seem to have forgotten the long struggle to resist and overcome quota systems which once kept people from advancement by virtue of their race or religion. Apparently we need to be reminded that quotas are by definition a form of discrimination. When they are invoked in a good cause—that is, when they are used allegedly to overcome discrimination—they require us to believe that we should overcome discrimination against some by discriminating against others. This means that "equality" for group Y must be assured by practicing inequality against group not-Y. In short, we are asked to accept a principle that can be asserted with equal force *in the form of its contrary.*

2. If we assume that quotas can be invoked in a good cause, we fail to see that bad means cannot assure us of good ends. The use of quotas or fixed ratios in university faculty hiring will result in harmful incremental additions to the life and values of our universities. The principle of equality and of reward according to our merits as individuals which presumably inspired the use of quotas—a principle which, properly defined, is central to the integrity of university life and to the democratic culture of which it is a part—will have been abandoned and the character of what remains is likely to be fundamentally transformed and compromised.

There are at least two complex and interactive principles at issue here: means and ends are inextricably intertwined; and bad means exercised in a good cause inevitably and continuously transform the character of institutions since they negatively alter the base line of acceptable practice. We should note that temporary arrangements have a way of persisting beyond their time. In the case of quotas, the projected time tables have been (and presumably must be) so vaguely drawn that it is not illogical to suppose they will become a fixed element of our recruiting process.

3. It is likely that quotas may reduce the incentive for genuine reform. The inequalities that quotas are presumed to diminish originate in widely dispersed aspects of our social and political life. Quotas may too readily provide a disincentive to transform these areas of our national life since they will encourage many to believe that discrimination can be and is being dealt with by relatively mechanical means. Some may argue that quotas are in fact not only the means by which discrimination may be abolished but that the ends of quotas, *i.e.*, the outputs, will in themselves constitute evidence that discrimination is being contained or defeated. After all, such an argument might run, if quotas are successfully enforced, won't the employment statistics reveal that discrimination has ceased to exist? In the presence of such arguments we are perilously close to the never-never land of the murderer who has just killed his parents and now asks for the compassion of the court because he is an orphan.

4. Quotas violate the merit principle *despite their dependence on it as a basis of support.* The injustice of discrimination is by definition an injustice suffered because someone has not been treated according to a universal standard. Some arbitrary or incidental aspect of their identity—their accent, their height, their color—has become the basis of judgments about them *rather than judging them by reference to a standard of merit that applies equally to all.* The most important aspect of this distinction is that it is only in terms of a universal standard of merit that one can conclude that discrimination or injustice has taken place. If such a merit standard had never been articulated, the entire attempt to discover the existence of injustice could never be made. That being the case, we are confronted by the advocates of quotas with the contradictory injunction that we should abandon the merit principle despite the fact that the very discovery of the existence of discrimination rests on the principle of merit.

5. Quotas may—indeed are likely to—make a selfish appeal to group or individual advantage that is fundamentally destructive of the common set of rules which alone binds us together as a people and as a nation. I said earlier that quotas are discriminatory by definition and constituted an authoritatively imposed assault on the right of persons to be treated as the equal of all other

citizens. That is a predictable view of quotas from the vantage point of someone who is *disadvantaged* by a quota.

But let us look at quotas for a moment from the standpoint of a person who presumably stands to gain an *advantage*. Let us suppose such a person is advantaged by a quota because the group to which he belongs is provided with some special priority in order to assure that group more adequate representation. Is it an exaggeration to say that a person so advantaged is being treated unequally? Isn't he or she being given an advantage by restricting someone else's access to equal opportunity? Such an advantage, especially when purposely imposed from above to prearrange certain outcomes, seems to me to constitute an injustice.

But I would like to go further. I would contend that from a higher contextual point of view not only the victim but also the perpetrator or the recipient of this kind of quota-advantage is harmed—without, I might add, needing to be a conscious advocate of discrimination. Indeed we may readily assume that such a person would be horrified by the notion that his or her conduct constitutes an injustice. Nonetheless, that momentary advantage rests on discrimination and has been bought at the expense of compromising the common-sense notion of justice which Aristotle and others have argued makes the very existence of the polis possible. To the extent that quotas encourage any of us, knowingly or not, to legitimate our personal advantage in the name of social justice, everyone is victimized. Justice is not served. In fact, justice is given such bewildering meaning (*e.g.* it becomes the basis for the justification of discrimination) that the cause of justice can only suffer once the consequences of such policies become clear and their principle is mistakenly applied to other aspects of our lives.

6. Quotas are counterproductive in that they are designed to end discrimination (though they require its perpetuation) and presumably are also regarded as a contribution to the establishment of a society where race and religion are not factors in our success or failure as social beings. But as numbers of groups and individuals begin to react to overly zealous interpretations of the meaning of "employment goals" it is increasingly clear that quotas are much more likely to make consciousness of racial and sexual differences more morbid and pathological. In short, quotas are counterproductive because they inflame rather than heal.

One can and should support affirmative action programs designed to increase the employment of minorities and women provided they do not give preferential treatment to a person or group over another on the basis of race or creed. In the words of Milton A. Senn, director of the Anti-Defamation League's Pacific Southwest Office, such behavior is "destructive of equal opportunity and violative of the Constitution and Federal and State laws and can only result in *exacerbating tensions and bias*." [my italics] How could it be otherwise? After all, quotas are a form of discrimination which, in the interest of setting things right, create new classes of victims. By virtue of this contradictory character, they make worse precisely the situation they hope to improve.

7. Quotas will help to make us into a society in which what matters profoundly to many people personally—their race, their religion, their ethnic origins and associations—is authoritatively made the business of everyone. There is, of course, a sense in which what matters to each of us *should* matter to all of us. I do not wish to deny that "no man is an island unto himself," or that it is essential for each of us to respect one another's views within the bounds of agreed upon definitions of the nature of freedom. But the authority of the state should not be used to force everyone to accept aspects of our being which are individually private but in some contexts ought to be socially neutral or at any rate marginal in their meaning and relevance. Why should it matter to a Department of English whether a Chaucer specialist is a Mexican-American or a Black-American? It matters very much to each of these people, and it should matter to all of us, that each should be safeguarded in the preservation of his or her right to be a Mexican-American or a Black-American. But from the point of view of a university's commitment to the pursuit of excellence and to the neutrality of scholarship, such aspects of our being are irrelevant. Is there a German-American form of physical education or a Russian-American form of biology? Haven't we been through enough in recent decades to know the answer to such questions? Should there be quotas set to assure that .05 percent of all elevator operators are American-Indians and that three percent of all university faculty are jewish because those are the proportions that exist in the general population? Who will be em-

powered to set these figures and for which occupations? Which groups are to be identified as deserving of quota benefits? Can employment quotas be monitored in such a way that we can still preserve our beliefs in the inviolability of the individual and in the free choice of our citizens?

It is not merely a rhetorical device to raise such questions without providing the answers. They bring into focus the far-ranging incursions on our freedom which quotas will inevitably encourage. We need to raise such questions in order to see that they cannot be answered—or, perhaps more exactly, that they cannot be answered in a way consistent with a belief in a free society committed to the preservation of individual rights.

These matters are so complex that they undoubtedly suffer from being treated in such brief compass. In the interest of avoiding confusion or being misunderstood, let me restate my belief that pride in one's color, ethnic origins, and religion are all aspects of a healthy pluralistic American democracy. My point has been that these ways of establishing and sustaining our personal identity and individual characteristics through our ties with groups ought not to be the basis of employment either in the university or elsewhere.

It is clear that for many Americans group affiliations are an important or sometime an indispensable part of their very being. But *if* these aspects of our personal identity are made legally relevant to the political arena or to the economic market place, we will have subverted freedom in the naive interest of pseudo-freedom. And we will have taken a step backwards away from community to reliance on primordial sentiments in the war of all against all. That, at any rate, is how I interpret a view which argues that some insignificant aspect of someone's right to be a Greek Orthodox-American must be granted at the expense of someone else's right to be a non-Greek Orthodox-American. After all, there is no obscuring the intransigent fact that establishing a minimum quota for the employment of Ukranian-Americans inexorably means that we have also established a maximum quota for the employment of all non-Ukranian Americans.

II. IS STATISTICAL UNDERREPRESENTATION ON THE FACULTY OF A UNIVERSITY PRIMA FACIE EVIDENCE OF DISCRIMINATION?

Ms. MacLachlan asks whether some women and black people (she is silent about the status of other minorities, perhaps because the case is more complicated than she is prepared to admit) are still denied employment opportunities or advancement in universities despite their impeccable qualifications. Let me be brief and to the point: the answer is that such discrimination exists and will continue to exist for a very long time, partly because we are dealing with the affairs of human beings and not of gods. But this manifest discrimination is not in every instance, or even in the main, synonymous with under-utilization or underrepresentation. When I say that discrimination exists, I have in mind those feelings of irrational prejudice and even hatred which are an omnipresent aspect of the darker side of man's nature, whether man is identified as the victim of racism or as one of its perpetrators.

But that is the brief answer to the wrong question. We must, to be sure, find out why sexual and racial discrimination exists—and doing so is a suitable subject of empirical inquiry for social psychologists, moralists, political theorists, and others. However, I am concerned with the question of what we are entitled to conclude from the evidence of statistical underrepresentation. Ms. MacLachlan's conclusions are in the main *non sequiturs*, in part because she seems automatically to equate discrimination with underrepresentation. This is clear when she proceeds to answer her first question with another question which, by implication, seems to assert that it is impossible to explain the underutilization of women and blacks unless we assume that this underutilization means they are the victims of discrimination. It is this conclusion that I want to examine by addressing myself to the most generic form of this issue: is statistical underrepresentation on the faculty of a university prima facie evidence of discrimination? This, it seems to me, is the *right* question.

Surely all of us have encountered the seemingly powerful argument that statistical underrepresentation provides the irrefutable evidence of discrimination and inequality. Such a view is complicated by the fact that there is rarely any general agreement, either by the advocates of such a view or by their opponents, about the appropriate base point against which to measure this alleged discrimination. Sometimes the base point is presumed to be the nation, the state, the region, the city, or some other official or unofficial geographical entity. Obviously, it it likely to make a considerable difference whether a state like North Dakota, where black people are a tiny percent of the population, is required to construct its public institutions so that black civil servants are proportionate to the number of black people in North Dakota or whether they should construct their institutions to reflect the fact that black people are fourteen percent of the population of the United States.

We could readily parallel this problem with an exemplary university analogue. Should a department of micro-biology at Yale University contain minorities proportionate to the number of minorities in New Haven, Connecticut, the Connecticut Valley, New England, or the United States in order to provide statistical evidence of non-discrimination? Should such a calculation include all the minorities in the country or should it include only those minorities that reside in New Haven or Connecticut? Or perhaps the proportion of minorities employed by the department of micro-biology should be proportionate only to the number of minorities with Ph.D's in micro-biology that presently reside within the limits of the continental United States? Or we might well consider the possibility that only those Ph.D.'s who are actively in the job market ought to be counted as part of the manpower pool since, for example, a black woman with a Ph.D. in micro-biology might have deliberately chosen to spend an indeterminate number of years rearing her children, writing novels or doing something else.

Still another version of this problem is evidenced in trying to determine what sort of statistical information is required of a university to demonstrate that it it is not engaged in discrimination or the willful perpetuation of inequality. (Such a formulation of the problem raises a very serious difficulty: are universities being required to demonstrate their innocence as if they are already guilty rather than being required to defend themselves against charges of guilt arrived at according to a known public standard of justice? Have they, in short, lost the right to be considered innocent until proven guilty because the gross evidence of statistical underrepresentation is presumed to provide prima facie evidence of their guilt?) Shall we require that each department or cluster of departments demonstrate statistical evidence of the employment of a proportionate number of minorities or shall we require that the employment figures for the entire university reveal the retention of a requisite number of women and minorities? And how are these numbers to be established?

These are all complications attendant to monitoring or assessing the existence of what is often called discrimination, disproportionality, or underutilization. Such complications are likely to have come into existence because we may already have concluded that statistical underrepresentation of minorities and women is, in fact, prima facie evidence of unequal treatment or discrimination.

But is that the case? In order to appreciate why it is not, we will have to unravel multiple confusions, some having to do with careless attempts to make words like "discrimination" and "unequal" synonymous with terms like "disproportionate" and underutilized." For example, do we really mean to argue that because Jews constitute three percent of the total population of the country that they should be represented in that proportion in the police force of Oshkosh or Chicago? If less than three percent of the oil-rig workers in the southwest are Jewish, does that provide us with unmistakable evidence that their underrepresentation demonstrates the existence of unequal treatment? (Note that I am not arguing that underrepresentation never provides evidence relevant to the discovery of discrimination. Of course it might. But does it constitute prima facie evidence of discrimination?) The absurdity of such a notion is self-evident and becomes additionally implausible if we continue to ask such questions about the proportions of Samoans who are insurance salesmen, Eskimos who are mechanics, and so on.

The most general difficulty with the argument that underutilization/disproportionality equals discrimination is that it conveniently overlooks the fact that there have always been—and, presumably, always will be, unless we submit to some sort of totalitarian homogenization of our pluralist culture—differences of values, orientation, taste, expectation and the like among the varied groups that compose this or any other nation. Many cruel perversions of our political life as a nation have exacerbated these differences, sometimes making them into heavy burdens or vicious stereotypes which have barred the way of some minorities to advancement. We need to continue and indeed to deepen our moral resistance and our legal opposition to such betrayals of the principle that all men are created equal. But to do this effectively we must have a clear mind about what is to be concluded from our observations of the real world. The fact is that many of the differences of group outlook to which I have referred—differences that have influenced a disproportionate number of Italians to become opera singers, a disproportionate number of Armenians to become truck farmers, and a disproportionate number of Jews to become doctors, college professors, and novelists (and, if C.P. Snow is correct, to constitute almost half of those ever awarded the Nobel prize for excellence in science)—these differences express prima facie evidence not of discrimination but rather of the vitality of democracy. These specialized choices are derived from deep allegiances to group loyalties, to religious ties, to sentimental attachments, to cherished traditions and ethnic identification. It is not necessary to believe that every aspect of these choices has been freed of constraint in every respect in order to defend them as expressions of democracy. Such a view would be perfectionistic and unrealistic. It is only important to understand that the alternative to such choices—quota arrangements that would assure proportionality—is an infinitely greater source of constraints on our freedom and provides absolutely no assurance—either with reference to logic or the record of social practice—of possible success. It is also important to understand that many of these choices that have resulted in disproportionality were made in an environment that offered alternative possibilities.

III. WHAT RECOMMENDATIONS CAN BE MADE THAT WILL IMPROVE THE PRESENT STATE OF AFFAIRS

In addition to a strict prohibition against job discrimination, higher education should support two basic propositions:

1. A serious search must be made for qualified women and minorities when faculty appointments are being made. At the departmental level, where academic recruitment is initiated, procedures should be established to include a current and realistic estimate of the pool of qualified individuals from which candidates will be drawn. Carefully balancing professional interests and priorities as it sets its own programmatic needs, the department must constantly strive to attract the best faculty possible. To this end it should also demonstrate that it has reached out in its search for women and minorities. All too often a departmental canvass is woefully incomplete, confined only to familiar channels which fail to inform women and minority persons of the existence of jobs. Departments should be put under the obligation—monitored by the administration—of conducting a determined search for women and minority group candidates.

2. Expanded opportunities must be provided for academic training at the graduate level for women and minority group members. The federal government, state legislatures, and private foundations, as well as business and industry, should make available the necessary resources as further confirmation that as a society we must be more than passive if increased employment opportunities for women and minorities in higher education are to be achieved in fact as well as in legal theory.

All of us need to be encouraged to think about a real Affirmative Action program. We also need to be clear about what it means to propose such a program. A quick numbers game will not solve the real problem of the minority imbalance that exists in virtually every field or discipline. It is an easy but deceptive and ultimately expensive solution. Nor is a straight racial line for making faculty appointments supportable. To move to the concept of race (or sex) as an exclusive or predominant criterion for faculty hiring is a major qualitative change which undermines the principle of academic competence so essential to an institution of higher learning.

I believe the most promising hope lies in a combination of longer-term efforts that range from introducing minority high school students at the earliest age possible to the opportunities available to them in medicine, law, teaching, etc., to motivating those with potential as college undegraduates to pursue careers at the professional level, so that the ranks of the truly qualified will be legitimately expanded.

The kind of Affirmative Action program I have in mind would be substantial and significant. With the help of the federal government there would be fellowship programs for people *before* they become incapacitated students. We need to rescue good minds at the high school level before they become dulled and ill-equipped to go on to college. This country would be willing to pay for an educational program that would benefit the handicapped, by which I mean giving people, on a non-discriminatory basis, a chance to overcome poverty, a bad family situation, and the like.

I believe that to attack our colleges and universities today is really to attack the wrong stage of the development. As I have suggested, we need to mass our remedial efforts in the form of state and national search programs at the high school level where talented young people—blacks, Chicanos, poor whites, which is to say all of the disadvantaged who otherwise get locked into a lifetime of inequality—can be found and helped. It seems to me that much of the current emphasis being put into enforcement could wisely and profitably be put into discovery and assistance.

[From Change, October 1972]

THE POLITICS OF QUOTAS

(By John H. Bunzel)[1]

For the past several years the Civil Rights Office of the Department of Health, Education and Welfare has been investigating colleges and universities. That office has taken on the responsibility of reviewing programs of Affirmative Action that are required to establish specific recruitment goals and timetables to assure an immediate increase in the percentage of minority and women faculty members and staff employees. Apparently convinced that enforcement action against our colleges and universities is necessary because they do not "think right" about the problem of alleged discrimination and what should be done to correct it, HEW has made Affirmative Action one of the most divisive issues in American higher education, and possibly one of the most anti-intellectual.

Along with most of my academic colleagues, I strongly believe we should recruit more women and minorities as faculty members on an equal opportunity and non-discriminatory basis. Women in particular have not been accorded fair and equal treatment by the academic world, and it is time we admitted it. But I am opposed to the use of any form of quota system that would distinguish race or sex as an exclusive or predominant criterion for hiring.

The distinction is important because the debate over Affirmative Action increasingly echoes Stokeley Carmichael's: if you are not actively with us, you are actively against us. When applied to the academic world, this simplistic moral absolute denies legitimacy to complicated and inevitably vexing questions.

J. Stanley Pottinger, the director of HEW's Office for Civil Rights, said recently that he "never understood academic freedom to deny a qualified person an opportunity for appointment or advancement because of race or sex, or the right to pay one person less than a person of another race or sex performing the same job." He is absolutely right, just as he is right in pointing out that the "real objective of the law against discrimination is to ensure equal opportunity to all persons regardless of their race, sex, religion, color or national origin." There can be no quarrel with Mr. Pottinger on these points, or with his belief that university administrators and faculties must examine "their own practices and profiles to determine whether discrimination exists and how it may best be remedied." It is also reassuring to learn from him that an individual's professional qualifications are still "the primary standard for hiring and are at the heart of the Executive Order that HEW enforces."

But are they? Or are universities being encouraged to introduce into the appointment process nonacademic criteria such as sex and race? Are traditional academic or intellectual qualifications to be temporarily suspended (how long is temporary?) until the proportion of women and certain minority groups becomes "acceptable"? I state the problem this bluntly to sharpen the issue, and because the intent and meaning of Affirmative Action are considerably obscure. HEW must become more sensitive to the problem of conflicting principles: that in the name of undoing past discrimination, methods may be encouraged that risk perpetuating the very racial barriers the government is charged with eliminating. As a society we need urgently to remove the many injustices the disadvantaged and minorities have suffered. But colleges and universities must not adopt unjust or undemocratic means to achieve laudable goals. If we set aside a white candidate who is more qualified than a black or brown competitor *because* he is white, we will be discriminating according to race. And once that process gets legitimated, there is no stopping it.

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If we are to examine the real or potential effects of Affirmative Action, we need to move from generalities and rhetoric to specific concerns about implementation. For example, blacks, Mexican-Americans, and other groups are not heavily represented on college faculties. Some say that our colleges and universities should therefore move at once to bring about a statistically acceptable representation of women and minorities on their faculties. Others go so far as to say there should be a formula for proportional representation of races and sexes. But a university does not and should not make faculty appointments the way the Democratic Party chooses convention delegates. The proper goal is to hire the best qualified person, and the paramount criteria should be accomplishment and capacity in teaching and research. We often hear the argument that academic hiring frequently violates merit criteria—hence why get upset about Affirmative Action hiring? The most honest response is to acknowledge that the charge is sometimes true, but to insist that failure to act always according to principle does not discredit the principle. Rather than abandoning it, we should concentrate our efforts on making it more consistently honored.

HEW's strategy of Affirmative Action seeks to apply remedies that are not suitable to the specialized conditions in the academic world. Each institution in a pluralistic society has unique characteristics, and those of a university should be recognized—and defended—by the government. It may well be that many qualified or easily qualifiable minority people exist for business firms and labor unions and that, either through intentional or unintentional discrimination, they are not being hired. But this does not describe the special features and problems of faculty recruitment.

Consider another troublesome issue. Does Affirmative Action mean that a university is expected to freeze or set aside faculty positions until women and members of certain minority groups are added to departments where they are now underrepresented even if this results in rejecting a better qualified applicant? The question is not hypothetical. Last spring a man received the following letter from a state university:

"I am sorry to report that although our Department saw you as our top candidate we will not be able to make you an offer for our new position.

"Our university is an Affirmative Action Employer and the Department must attempt to fill the new position with an individual from a recognized oppressed minority group. Although the Department initially viewed your ancestry as satisfying the requirements of Affirmative Action, consultation with our institutional advisors on the Affirmative Action Program indicated to us that your ancestry does not qualify you as an oppressed minority.

"I wish you the best of luck in your future, and I am deeply sorry we were not able to extend an offer to you."

There is a certain schizophrenia running through the whole posture of Affirmative Action. Presidential Executive Orders 11246 (1965) and 11375 (1967) are responsible for its birth and reflect the unobjectionable policy of the Civil Rights Act of 1964 that all contractors with the government "will take affirmative action to ensure that employees are treated during employment without regard to their race, color, religion, sex or national origin." But the Department of Labor's Order No. 4 charted a different course which, in the hands of HEW's advocates of an aggressive Affirmative Action program, has introduced the concept of race into academic deliberations, reopened the door to the idea of quotas as a way for colleges to meet their "goals" and "timetables," and affirmed the principle that preference in hiring should be given to women and certain minority groups when faculty appointments are to be made. Thus Affirmative Action is governed by two sets of criteria with quite different genealogies. One draws on the tradition rooted in Justice Harlan's observation that the Constitution is "color-blind" and thus does not allow discriminatory preference for any group, minority or majority, while the other asserts that the Constitution's equal protection clause allows race to become a factor in employment when identification by race is intended to help those for whose protection the Fourteenth Amendment was enacted. The former accords equal rights to all persons regardless of race and does not command that members of any groups be given preference in hiring because they were formerly the subject of discrimination or because they are members of a minority group. The latter claims that racial identification in hiring is necessary, given the compelling interest of the state in overcoming past discrimination. Further, it is a strategy that seems to assume that preferential treatment based on race is a rational means of implementing that interest.

There are many in the academic community who believe that what is indicated now by Affirmative Action is a set of strategies and goals that would encourage preference for women and certain minority groups in the filling of faculty positions even when it is necessary to discriminate against those whose qualifications are found to be superior. HEW officials maintain that "goals" are not quotas, but simply a way of evaluating whether a university is meeting its Affirmative Action obligations within a specified time period. When is a quota not a quota? When it is a "numerical goal?" As one college official admitted privately, "Academics don't like the smell of quotas, and 'goals' is an inoffensive and much milder term. It doesn't suggest anything unpleasant to the faculty." Is there really a significant difference between a university setting a *quota* of 10 percent bearded Republicans for the faculty within five years, and announcing as its *goal* the hiring of 10 percent bearded Republicans for the faculty within five years? Are not the two virtually synonymous? Perhaps, the difference is a matter of perception: For HEW, which seeks to impose them they are called "goals;" for an academic department, which must apply them in the hiring process, they become "quotas."

Further, by what standards will HEW evaluate the Affirmative Action goals it requires colleges and universities to establish? HEW says it will decide whether or not the goals are reasonable. But what is reasonable? We are entitled to know the criteria, particulary what numerical goals really represent and how they will be calculated and determined.

The language of Revised Order No. 4 indicates that numerical goals were intended primarily for industrial employment and not for university faculty appointments. It states: "An Affirmative Action program is a set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith effort. . . . An acceptable Affirmative Action program must include . . . goals and timetables to which the contractor's good faith efforts must be directed to correct deficiencies and thus to increase materially the utilization of minorities and women, at all levels and in all segments of his work force where deficiencies exist." But why must a university compute numerical goals and timetables by academic department if specified and result oriented procedures (e.g. broadening the base for faculty recruitment) are strictly enforced with respect to appointments?

There are other difficulties with the statements about goals in Revised Order No. 4. As Richard A. Lester, dean of the faculty of Princeton University, points out, goals are to be specific numbers, to be measurable, and to have timetables attached to them, but are not to "be rigid and inflexible." One cannot help but wonder, he says, what a measurable and specific yet flexible goal with a timetable in an affirmative action program will look like. Goals are supposed to be "targets that are reasonably attainable, but *reasonable* means "applying every good faith effort to make all aspects of the entire Affirmative Action program work." Dean Lester remarks that that is like saying it is a reasonable human expectation to assume that everyone will work at his peak capacity.

HEW has said that a university's attainment of specific numerical goals according to the timetables in its affirmative action program will not be the single test of compliance or non-compliance. But are goals and timetables intended as a commitment? They will certainly be perceived as such by various groups on campus, which will then hold the university accountable. If goals and timetables are to be an important test of compliance, "goals" must involve some conception of quotas. HEW assures us that it is not advocating rigid and inflexible quotas that must be met. But are there some sort of non-rigid, flexible quotas that could be applied in a flexible manner to determine if the university is or is not in compliance? The problem with applying of numerical goals in a flexible manner is that there is no way of predicting how it will work in practice.

But many will doubtless wonder why HEW shouldn't insist on "good faith efforts" to achieve numerical goals within a given time? There are at least two more reasons. First, by stating the university's primary obligation in numerical terms, by failing to specify what "good faith efforts" will be acceptable, and by placing upon the university that has not achieved its "goal" the burden of proving that it did all that was legally permissible to meet it—by doing these things, HEW so weights the procedural scales against the nonachieving university as to oblige it in fact, if not in law, to discriminate in favor of certain groups.

Second, colleges and universities will be encouraged to make faculty appointments and promotions not on the basis of a person's individual worth, but as a member of a minority group. If a college or university gives preference in its faculty hiring to certain groups on racial grounds, it undermines one of the fundamental ideals and precepts, that of individual performance and merit. We construct public policies that provide social justice to a class, race or ethnic group, but we do not *hire* a class, race or ethnic group. We hire a *person*.

A black scholar, for example, was being considered last year for a faculty position at a large northern university. He was highly recommended and was clearly among the best candidates the department had interviewed. "I hope I am not being considered because I am black," he said later. "I like to think I have enough self-respect to be judged solely on my qualifications. I have no need or desire to be a token."

If HEW were to confront the reality of the academic marketplace, it would have to envision drastic, but as yet unspecified, changes in hiring—and firing—in our colleges and universities. The institution's Affirmative Action goals cannot be divorced from the reality of the academic job market. In addition to the availability of new faculty, there is also the question of what happens to present faculty.

For the sake of simple arithmetic, assume that a college faculty in 1972 numbers 1000, ten percent of whom are minority-group members. Assume also that the announced goal at the end of five years is to raise the 10 percent to 30 percent. If the faculty in 1977 remains the same size, it would be necessary to hire 200 minority-group members to meet the goals set for 1977. In other words, minority-group hiring would virtually monopolize all faculty hiring until the goal was met. Aside from the problem of finding and recruiting that number of qualified minority people, will there be 200 openings over a five-year period in a 1000-member faculty? One school in a large university plotted the number of full-time faculty members (78) against their years of birth and discovered that only eight people will retire through 1981. Short of firing full-time faculty to make room for minorities, or expanding programs and increasing faculty allocations, these figures suggest an upper limit on expectations for change in the near future.

An atmosphere of condescension, contradiction, and reverse discrimination must inevitably surround any attempt to "legalize" preferential hiring in favor of certain individuals or groups solely on racial grounds. The clear implication is that minorities will be granted an enormous favor if they enter the competitive arena under some preferential auspices. Is there any compelling evidence that they would wholeheartedly appreciate or welcome such a decision? It is one thing to enable those who have been unfairly disadvantaged to compete—and this we must do; it is something else again to do away with competition altogether or to provide the real or alleged victims of discrimination with redress by discriminating against others. Earl Raab has made the important observation that one of the characteristics of a free society is the ascendance of performance over ancestry, or what he calls "the ascendance of achieved status over ascribed status."

Nor can all minority groups be preferred equally: some will inevitably be considered more "preferred" than others. Once the principle of preferential hiring has been adopted, say, for blacks, it will only be a matter of time before other minority groups will demand similar preferential advantages. (As of December 23, 1971, the Department of Labor proposes to include in its guidelines intended to remedy unfair treatment "Jews and Catholics, and members of certain ethnic groups, primarily of Eastern, Middle, and Southern European ancestry, such as Italians, Greeks, and Slavic groups." Apparently they were overlooked in earlier interpretations.) Once institutionalized, the principle of preferential hiring is not likely to decrease the potential for discontent and divisiveness. Indeed, it is likely to set minority against minority, since it encourages basically irrational schemes of compensatory redress.

In short, we may, paradoxically, be deepening and exacerbating precisely the situation we have set ourselves to avoid by increasing the already pronounced tendency to politicize and racialize more and more aspects of modern life. In the *Atlantic* (August 1968), Daniel P. Moynihan warned us we have so far been unable to assemble the political majority that would enable the nation to provide a free and equal place for the Negro in the larger society. We have used what are essentially market strategies, like full employment, income supplementation, and housing construction; but the failure of such methods will drive us to institutional strategies involving government-dictated outcomes against those institutions—colleges and universities, for example—most sympathetic to social change and most vulnerable to government pressure. Events are on the way to proving him right and endangering precisely those institutions that "must provide the moral and technical leadership for rational, peaceful and democratic change."

One of the most critical issues is the extent to which the commitment to increase the percentage of minorities in college faculties can co-exist with the maintenance of professional standards in hiring and retention. It is entirely possible that present professional standards will inadvertently keep the number of minority faculty appointments disproportionately low. The outcome of that unhappy situation may then be to discredit the professional standards. Perhaps we should maintain standards and then deliberately and openly depart from them in the name of social justice by adopting a system of quota hiring of underqualified applicants. But after that process has been operating for a time we will still have to ask if it has been successful, and the horns of that dilemma are sharp indeed. Who would feel able to state publicly that the underqualified faculty have performed poorly? Who would be willing to count the high social costs that might ultimately far outweigh the immediate benefits gained by making an exception to professional criteria? I am not saying that underqualified appointees can never become qualified, and there may be times when mere formal qualification is meaningless. But when apprehension about social injustice toward a group prevents our making a clear-headed judgment about an individual, when one feels compelled to assert in all cases that the underqualified did as well as the qualified, then what happens to our long-cherished professional criteria?

Other thorny problems follow. For example, how far, and for how long, must we live with what may prove to be a double standard of evaluation? In colleges and universities where scholarly research and publication are a basic norm, are Affirmative Action appointments to be exempted from meeting such standards? (The same question applies to teaching ability and competence in the discipline.) If the percentage of articles submitted to and accepted by the professional journals from minority-group faculty is well under the percentage of minority faculty in the particular discipline, would a doctrine of "preferential compensation" lead publishers to accept otherwise unqualified articles? If so, how can we justify a hiring policy that neglects the imperative to encourage high standards?

Other questions have to do with the consequences of establishing dual sets of criteria for faculty appointment and retention. What happens if a minority person who has been given a faculty appointment that can lead to tenure proves inadequate—but his ethnic group on campus demands that he be retained? One of the serious implications of having undefined, irrelevant, or nonacademic criteria initially is that it sets the stage for the special claims of ethnic groups that only *they* are able to understand and pass judgment on the merits of members of their groups. If academic criteria are ruled out from the beginning, it is virtually impossible to legitimate their use later on.

Giving faculty appointments immediately to large numbers of relatively unqualified persons will do a serious disservice to all graduate students presently pursuing their degrees, and, indeed, to all students. These students began their careers not so many years ago on the assumption that their training would be needed in higher education. Are they now to be told that the available faculty positions—already considerably diminished because of the financial crisis in higher education—are to be given on some basis *other* than academic preparation and qualifications? Will committing ourselves to the goals of Affirmative Action reduce or even abandon our responsibility to these students? And what of our superior undergraduates of all races and ethnic groups who want to get the PhD degree and become college professors? Against the tangled and discouraging backdrop of goals, quotas, and preferential hiring, will they perceive any future in academic life?

We are, therefore, caught in a complicated dilemma—the need to choose between two positions, both of which are morally defensible:

Position Number One: Preferential treatment must be given to disadvantaged minorities in this country if they are to be freed from the grip of poverty and despair that locks them into a lifetime of inequality. We must break the vicious circle of unequal employment opportunity that leads to unequal housing opportunity, unequal education opportunity and back to continued unequal employment opportunity. Equal treatment will not break the circle fast enough and by itself will not assure real equality of opportunity. Thus the drive for preferential treatment.

Position Number Two: A self-respecting college or university will want to choose the best qualified person available for a faculty appointment. Race or sex or color are inappropriate tests of an individual's competence to do research, to explore ideas and to transmit knowledge. The best way to end competitive inequality among groups is to step up the percentage of disadvantaged students who go to college and provide them with the highest possible quality instruction.

How do we mediate between these two positions? First, we must recognize that Affirmative Action is not simply a program that yields gains and benefits. It also entails demonstrable costs and consequences. To believe otherwise is to fail to understand that what one person gains under Affirmative Action may well be taken away from someone else. To an educator the balancing notion is mischievous because it is likely to mean giving up the principle of merit and accomplishment that is central to the integrity of higher education. I prefer giving those who have been unfairly disadvantaged the opportunity to compete fully and fairly on genuinely equal terms, rather than imposing or forcing an equality of outcomes that is artificially rigged.

Amidst the divergence of assertions and assumptions, Affirmative Action must ultimately be viewed in relation to other competing and legitimate values and in light of many practical problems. When there is such a collision of rights and conflict of principles, the important question is how one balances one's obligations.

A simple prohibition against job discrimination is not enough. Higher education must embark upon these two goals:

An unprecedented search must be made for qualfied women and minorities. At the departmental level, procedures should be established to include a current and realistic estimate of the pool of qualified people from which candidates will be drawn. Carefully balancing professional interests and priorities as it determines its own needs, a department must constantly strive to attract the best faculty possible. All too often a departmental search is woefully incomplete, confined only to familiar channels that fail to inform women and minority persons of the existence of jobs. To this end, the administration should obligate departments to demonstrate that they have reached out in their search for women and minorities.

Increased opportunities must be provided for academic training at the graduate level for women and minorities who want to become doctors, lawyers, professors and the like. The federal government should help make available the necessary resources to confirm that our society is seriously committed to increasing academic employment opportunities for women and minorities that are to be achieved. The most promising hope for a solution lies in combining longer-term efforts. We can introduce minority high school students at the earliest age possible to the opportunities available to them in medicine, law, teaching, and the like. We can motivate and encourage those with potential as undergraduates to pursue careers at the professional level, so that the ranks of the truly qualified will be legitimately expanded.

These goals are neither definitive nor exhaustive. They deserve support because they are intended to eradicate attitudes that discourage women and minorities from trying to enter the academic world. What is *not* supportable is a straight racial line for making faculty appointments.

My own values lead me to support a program of Affirmative Action that has as its major goal the elimination of all kinds of discrimination and that accepts the principle that in a democratic society an individual's worth has a higher moral claim than his color, his sex, or his origins.

[From Change, October 1972]

COMPUTING MINORITIES

(By Robert Perrin)[1]

To establish compliance with recent laws, executive orders and affirmative action plans—as other articles in this issue indicate—colleges and universities increasingly must play the "numbers game," a game involving the collection of vast amounts of statistical data concerning the identities of employees and students of a school.

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[1] Robert Perrin is the Vice President for University Relations at Michigan State University.

They must total the numbers of women and minorities in the tenure stream, determine whether they have temporary or part-time appointments, and classify them by rank, service and salary. Non-academic employment by salary and distribution, records of applicant flow and promotions, and other hard, non-subjective statistics must be collected—all purporting to indicate whether the institutions are heading toward the utopia of true equality.

The need for such data is part of the new, more sophisticated approach to civil rights. It is no longer sufficient to show that the lunch counter is now open to all comers or that the want ads no longer specify "male help wanted." Those were the tin lizzie days of equality; today's computer age demands more complex grist designed specifically to be compatible with electronic circuitry. Today, progress must be shown on the computer print-out.

Once computer programs satisfy those who feel that numbers are the ultimate answer, quarterly or semi-annual regurgitation of the latest statistics becomes relatively simple. Not wholly so, however, since the Federal government has been slow in realizing that employment descriptions and practices in an institution of higher education are not as easily quantifiable as, say, those of an automobile plant. There is always someone who wants just a little different cut from the data than what was fed into the machine.

Nevertheless, most institutions are struggling to provide the demanded information. At best, their motivation is to equip themselves with a genuine measure of progress in correcting inequities and assuring equality; at worst, it may help forestall the Federal government from cutting off contract funds.

The collection of statistical data on employees, however, is only one part of the numbers game. In some ways, it is the simplest part because permanent personnel records are an essential ingredient of any business operation. However, under Title VI of the Civil Rights Act of 1964, the Department of Health, Education and Welfare also demands a minority census of the student body. This can be a very complex undertaking, especially at an institution such as Michigan State University, with more than 41,000 students on its campus.

The requirement to produce data on racial and ethnic identities is, of course, a 180-degree turn from the practice of the 1950s and early 1960s when such inquiries into an individual's background were considered a gross violation of his or her civil rights. The attitude then was a natural counter-reaction to the historic misuse of minority information to prevent an individual from obtaining employment or entrance into a college. However, the civil rights activism which led to the trail-blazing Federal legislation in 1964 put things in a different focus: affirmative action for minorities. Thus the headcount census turned into an important means for an institution to prove progress and compliance.

Unfortunately, this reversal has not always been accompanied by either full understanding or cooperation among the persons being counted. Nor has the government provided easy-to-follow guidelines and definitions for compiling statistics. HEW tells us, for example, that:

"a student may be included in the minority group to which he appears to belong, is regarded in the community as belonging, or categorizes himself as belonging."

This rather loose standard can produce rather bizarre results—as when 150 of MSU's students "categorized" themselves as American Indians, more than triple the actual number. To top things off, responses by the students are voluntary. And students from minority groups may view such requests with suspicion and apprehension. It is all very well to tell students that such information is requested only after they have been admitted to the university, that Federal support depends on compliance, that the university needs the data to determine its own progress and that the information is confidential, but such arguments have not been altogether successful. The university thus often must choose between a once-over estimate to satisfy minimum Federal requirements, and an honest count that can serve the institution internally and publicly.

Michigan State University has been conducting its minority student census in a formal, systematic manner only since 1970. Prior to that time, its counting was based mainly on eyeball observation. (Indeed, counting was not much of a problem. As recently as 1967, it was estimated that there were 690 blacks among the student body; in the fall of 1971, the census showed 2509.)

The 1970–71 count was conducted at September registration for everyone except freshmen, who took part in the census during their summer orientation sessions. Registration always is a hectic time—often describe as organized chaos. 30,000 to 40,000 must juggle course schedules, pay fees, arrange financial aid, secure identification cards and move into their residences, all within three days. Accomplishing these tasks with a minimum of confusion is always enough of a challenge without inquiring into students' ancestry or color of skin. Yet registration also is the only time in the academic year when the university administration is assured of a captive audience: the receipt from that final fee-payment checkpoint must be secured before enrollment is valid.

Thus, the registration paraphernalia with which each student was equipped in September 1970 included a computer card upon which he or she was to mark ethnic data. The card listed the usual categories: American Indian, black, Oriental, Spanish American and "all other students." Foreign students were to be excluded. In an effort to overcome philosophical or visceral opposition to the census, "EQUAL OPPORTUNITY" was printed on the card and it carried the statement:

"Michigan State University is dedicated to equal opportunity. In order that the university be able to assess its progress in enrolling minority students, and to meet Federal requirements for funding of special support and educational programs, it isnecessary to obtain an ethnic classification of students. Please cooperate; it is to your benefit."

And although participation in the census was voluntary, the card had this final admonition in small type: "Falsification of a university record is cause for cancellation of registration."

The first census in 1970 was not an unalloyed success. Out of 40,000 students who moved through the registration process, more than 4,000 bypassed the census checkpoint and failed to deposit their cards. An untold number of others mismarked their cards or otherwise furnished erroneous information. Nevertheless, by actual count and interpolation, the university had something nearing a minority count of its students for the first time.

In a post-census review, a number of problems were raised. While HEW's ill-defined needs might be met by the results of the count, especially in view of its voluntary nature, the failure of more than 4,000 students to respond properly was clearly unacceptable if the information was to be truly useful. Methods had to be found to secure greater participation and to ensure accurate responses.

An additional area of concern which surfaced was the description of ethnic classification. While the term "black" has almost uniformly become an acceptable substitute for "Negro," ethnic sensitivities were being aroused by the imprecise "Spanish-surname" or "Spanish-American." Those of Mexican-American descent preferred "Chicano" and did not want to be confused with South Americans, Puerto Ricans or others of Spanish derivation. Thus, the 1970 census which showed 370 "Spanish-Americans" at MSU was greeted with justifiable skepticism by the vocal Chicano element as a true measure of their numbers on campus. (The count also was erroneous in that it inadvertently included some foreign students.)

Before a decision could be made on the designation issue it was necessary to start the next census, and basically the same census card was used for the 1971–72 school year. New freshmen were counted as usual during their summer 1971 orientation sessions, while the bulk of that year's 41,649 students again were requested to deposit their cards during the registration process in September. The results from the second census were more accurate: instead of the more than 10 percent deficiency of 1970, those who failed to properly complete or return a card in 1971 amounted to 1685, or about four percent.

While this marked improvement led some to believe that the margin of error was now statistically acceptable, and that we should formalize the minority count as it then stood, there still was reason for dissatisfaction. One glaring anomaly still remaining was the appearance of the 150 cards marked "American Indian." Although we dearly wished that this was an accurate count, it was quite obvious that an increase of 1500 percent in the number of Indian students had not occurred. (10 were counted in 1970.) According to Federal and most Tribal Council rules, a person may claim Indian status only if he or she has one-quarter Indian blood. Faced with this question in a follow-up telephone survey, those who continued to claim this category quickly dropped to 41.

Meanwhile, the 1685 students were analyzed further, their names matched against those cards filed by minority students in 1970. This picked up 38 additional minority students and weeded out a number of foreign students. At this point there were 1079 students of unknown status.

With an "unknown" factor of less than three percent, we now felt that we might have reached a statistically justifiable stopping place, if not actually a point of diminishing returns. Nevertheless, it was determined to make one last effort to achieve maximum possible accuracy. Like the last few feet up Everest, we had come too far not to try to reach the summit.

The final step was carried out by mailing a new computer card to the 1079 students whose ethnic identity was unknown, together with a low-key letter from the university's Office of Equal Opportunity Programs requesting their cooperation. This mailing produced 49 additional minority students, 318 "others" and weeded out a number of aliens or students who had withdrawn from school. Some 19 students made a special point of their refusal to answer, while 450 did not return the card.

Those who refused with emphasis returned cards marked with such additional categories as "Super Jew," "Texan," "50 Generation Hun!" or "female." One determined iconoclast not only mutilated and spindled his computer card; he stapled it as well.

Thus, when it was all over (nearly four months after registration), fewer than 500 persons had declined, for one reason or another, to participate in the census. This represented a "missing" element of less than 1.5 percent, a margin any professional poll taken would consider as close to Nirvana as possible. (The final minority count for those who have followed this chronicle thus far was 3024, of whom 41 described themselves as American Indians, 2509 black, 237 Oriental and 237 "Spanish American.")

In the spring of 1972, a small committee consisting of the MSU Office of Institutional Research and administrators representing various minority groups was formed to discuss plans for the 1972–73 census. After reviewing the improvised procedures which had gone into the 1971 count, the committee agreed on several changes which, hopefully, would lead to more orderly results the next time around.

Several alterations were made in the categories listed on the card. Caucasian students, who previously were lumped under "all other students" would now have their own category of "white." Those checking "American Indian" would be asked also to indicate their tribe. And in addition to "Spanish American," a new category of "Chicano" was provided which presumably would separate this group from Puerto Ricans and others of Spanish descent.

Furthermore, members of each racial or ethnic group represented in the census volunteered to staff the desks at registration where the census cards are deposited. It was believed their presence would help ease some students' apprehensions.

Finally, specific procedures were established for processing the returns. Now, if the "no response" element is under 500, the minority count is accepted unless there is some obvious irregularity. Should the number not responding be greater than 500, however, additional steps will be taken, including a follow-up mailing and the checking cards against the previous year's returns.

In retrospect, it is legitimate for one to harbor some doubts about the entire exercise. It is still distasteful to inquire into another person's racial or ethnic background—or religion, politics or any other essentially personal information—regardless of the worthiness of purpose. And was all the statistical effort worthwhile? While the validation shifted scores of students between categories, the net increase in the non-Indian minorities amounted to only 18 from the original, unevaluated report (a gain of 30 blacks, and a decrease of seven Orientals and five "Spanish Americans"). And what are the characteristics of the 450 "unknowns"? Are they mainly whites with a super sense of civil libertarianism, minorities with forebodings about the process, or just the slothful?

The need for basic statistical data in the equal opportunity area is likely to increase rather than recede during the next few years. And institutions of higher education must search for the best possible means of supplying accurate information for their own and external needs. Michigan State University intends to follow that course. At the moment, however, all we really know is that MSU had 3024 minority students last year—give or take a few hundred.

[Freedom at Issue, May–June 1974, No. 25]

THE GOVERNMENT'S SPUR TO GROUP RIGHTS

Comprehensive recommendations for countering the ethnic chauvinism of "affirmative action" and similar programs, by stressing fairness and merit as basic to the preservation of individual rights.

PUBLIC POLICIES AND THE RISE OF ETHNICITY: BASIC CONSIDERATIONS AND PRACTICAL SUGGESTIONS

(By Richard Gambino)

For as long as the life of humanity has been recorded, people have identified themselves by their membership in groups. Among the most frequent criteria for group definition have been common languages and religions, common cultural backgrounds and histories, and common physical and racial distinctions. In a phrase, ethnic characteristics. Probably no society in history has included more contrasts in its people than that of the United States. The forebears of citizens of this country migrated here from every direction, from almost every continent on the globe. The well known ideal of the melting pot, whatever its social significance, represented an effort to come to terms with, to encompass and cope with this cultural pluralism.

Although Americans have indeed achieved a common culture, it is one that is composed of ever continuing contributions from its diverse peoples. Just as Walt Whitman celebrated the United States one hundred years ago as a "teeming nation of nations," it remains today a giddy culture of cultures. Whether ethnic characteristics remained vital but submerged or unnoticed during the onslaught of the melting pot ideal, or whether they lapsed and are becoming revitalized, is a moot question. What is significant is that ethnicity is a powerful force on the American scene and is likely to remain forceful.

If the melting pot myth[1] is on the wane, two older beliefs are still very powerful. One is the myth of social and economic mobility based on individual merit. Second is a powerful ethic of "fairness." Any attempt to form policies for American society today must probe the probabilities and possibilities in three complex myths—ethnicity, merit and fairness. Not only should we investigate the future of each myth, but also the interrelations between the three.

ETHNICITY INTENSIFIES

Accustomed in the 1950's and before to thinking of our society as culturally homogeneous, or at least moving toward cultural homogeneity, we were startled at the intensity with which ethnicity began to be asserted in the middle 1960's. And in the 1970's, we are taking note of expressions of ethnic diversity in other societies which we had hitherto thought of as "monolithic." Thus, on July 31, 1972, the *New York Times* reported new affirmations of ethnic identities among the one hundred ethnic groups in the Soviet Union. More significantly, a major shift of official policy was reported. The Soviet government has for the past 50 years vigorously pressed a campaign to achieve a melted pot of Soviet culture, a cultural homogeneity rooted in "international" socialist ideology. In short, it tried to obliterate popular ethnic myths and to impose in their place an exclusive myth, using all of the formidable means of a totalitarian state in the effort.

Now, in evident recognition that the effort failed, the official policy of the Soviet government has turned to try to compromise with the forces of ethnicity rather than attempting to eradicate them. Speaking of the new policy, it was reported:

"Within the limits of its republic region or other autonomous area, each ethnic group was given the right to foster an education and culture in its own language, but under the over-all umbrella of a Communist ideology. In terms of a widespread slogan, ethnic cultural development became 'national in form and socialist in content.'"[2]

On the same day, a separate article reported a similar effort on the part of the government of China regarding the 54 major ethnic groups that constitute most of the nation's 750 million people. The Central Institute for Nationalities in Peking is attempting to cultivate, among carefully selected young leaders, *both* Maoist ideology and different ethnic identities.[3]

See footnotes at end of article.

We, too, need to balance divisive ethnic forces with the cohesive strength of a common culture. The myth of the melting pot was never a complete basis of our common culture. It was more a psychological superstructure than a cultural foundation, more a poorly defined goal than a reality.

On the other hand, the myths of fairness and meritocracy are fundamental to our culture and are clearly perceived. Their destruction would signal an acute social pathology. The very roots of the authority around which the majority of the American people center their lives, plans, and hopes would disintegrate. Without this strong center, centrifugal forces of ethnicity could cause American society to fly into fragments. Restoration of a common culture of any sort would be made very difficult. In the chaos, possibilities would inevitably become polarized between anarchy and totalitarianism.

Today, gigantic forces of social life create mass feelings of rootlessness, anonymity, impotence, and hence meaninglessness among people. Among the many paths to identity available to people to resolve their crises of meaning—for example, religion, political ideology, personal achievement—ethnicity is outstanding in several ways. First, it is immediately available. A person is already a member of one or more ethnic groups by birth and/or upbringing. Personal achievement, to cite another criterion of identity, is an uncertain and long-term affair. Second, events of recent history have demonstrated the effectiveness of ethnicity in providing identity at a time when other criteria, such as religion and political ideology, have proven to be of dubious reliability. Given the overwhelming need for identity, ethnicity has a powerful psychological appeal today, perhaps unmatched by any other criterion for defining meaningful life.

THE FORMS OF ETHNICITY

And yet "ethnicity" remains a vague, confusing, and sometimes controversial term. Each of its different meanings carries with it different possibilities for American society. For purposes of clearer understanding, let's distinguish between two types of ethnicity. It is useful and important to separate "tribalistic," "parochial," and "chauvinistic" ethnicity on the one hand from "creative" ethnicity on the other.[4]

Chauvinistic ethnicity involves the tendency to distinguish between "us" and "them." Grounds for distinguishing between members of "the tribe" or group and outsiders have been innumerable. They have included virtually every real or fictional criterion one could imagine, including religion, age, sex, class, interests, and cut of one's clothes or hair, etc. Throughout human existence, various ethnic attributes have often been used as defining characteristics of tribalism. Jonathan Swift satirized this tendency in his fictional description of the cleavage between "Big Enders" and their enemies, the "Small Enders," at war with each other because of an irreconcilable difference about which end of a soft-boiled egg should be opened at breakfast!

From initial division of humanity according to the criteria of ethnicity, *all other meanings follow* in the minds of ethnic tribalists. The very framework for all their thoughts, feelings and actions follows. We may say of them what George Orwell said, merely reading "ethnic group" where Orwell used "nation or other unit":

"I mean first of all the habit of assuming that human beings can be classified like insects and that whole blocks of millions or tens of millions of people can be confidently labelled "good" or "bad." But secondly—and this is much more important—I mean the habit of identifying oneself with a single nation or other unit, placing it beyond good and evil and recognizing no other duty than that of advancing its interest."[5]

Ethnic chauvinism provides a strong sense of identity and security. Moreover, seemingly it provides answers, or at least the directions for the solutions of problems. And it purports to provide a clear guide for all relations with those outside the ethnic group. But it is a sham identity, a false security and potentially disastrous guide for human relations. For ethnic chauvinism stifles the very growthful psychological characteristics needed for genuine identity, well grounded security and constructive relations. These include free and active intelligence, sensitivity to the tragic dimension of life (all is not clear cut), and positive appreciation and utilization of differences between people and groups.

Instead, ethic tribalists can be clannish, conformist, obstreperous, uncritical of themselves or their group, overwrought, pugnacious, prejudicially critical of those outside the group, paranoid and enormously energetic and determined. In short, they are potentially very destructive.

More creative, but still rooted, people on the other hand, use their ethnic backgrounds as points of departure for growth rather than as proof of their worth. By inquiry and reflection, each individual shapes his identity by building upon ethnic characteristics he judges to be valuable. In so doing, he gains insight by analogy into how the identities of other people are formed, and in the process learns how to appreciate their different inheritances. Educated ethnic awareness provides a substantial part of identity, energy and direction for many creative people. It cultivates in them respect for others, with possibilities of genuine communication and interchange of what may become valuable to all from each ethnic group. Thus, it is "creative" ethnicity, for one learns to live not only as a rooted person, but also to live beyond one's roots and to help shape the emerging synthesis of contributions coming from various ethnic groups.

What our future will be is considerably dependent on which way Americans turn, toward chauvinistic ethnicity or creative ethnicity. As a corollary, the direction of the turn will be influenced by the policies and actions of government and other institutions. However, we do not begin with a blank slate. The influences of the past are already operating, setting directions taken. Unfortunately, some events of the recent past have moved us in an undesirable direction. As the "revolution of rising expectations" of the 1960's became increasingly one of rising "non-negotiable" *demands by chauvinistic groups*, America entered a severe social crisis at the close of the decade.

One of the key causes of the reassertions of ethnicity was the civil rights movement. At first impelled by the 1954 school desegregation decision of the Supreme Court, the movement was a demand for equal rights for individuals. It sought to tear down the walls of racial segregation that impeded the enjoyment of equal rights. At this stage, the movement raised the ethnic consciousness of blacks, and raised both corresponding and responding awareness of their own ethnicities among various white groups. In the middle 1960's, however, a concurrent of forces moved the ethnic awareness toward chauvinistic ethnicities among many blacks and whites.

DAMAGING CLAIMS OF ETHNIC CHAUVINISTS

Although it did not cause the shift in direction, the slogan of "black power" stands as the clearest symbol of the movement from awareness of ethnicity to ethnocentric chauvinism. Since the middle 60's, the switch from concern with individual rights to alleged rights of ethnic groups has become pronounced. Large segments of various ethnic groups now think exclusively in terms of identity each with its own ethnic group, in Orwell's phrase, "placing it beyond good and evil and recognizing no other duty than that of advancing its interest." When challenged on the socially divisive results of this, chauvinists of various ethnic groups answer with one or more of the following responses:

1. "America was always divided. It has always been each group for itself." This response ignores the fact that the common culture myths of fairness and merit have until now had considerable vitality. Although less than complete, and denied to some groups of Americans, the myths have been operative. Responding to the limitations of the myths by wanting to scrap them altogether is an understandable result of the rage of "have nots." Understandable, yet ill considered. There is far more compelling logic to the response that seeks to increase *in fact* the effectiveness of the myths, and to extend them to cover all Americans.

2. Citing the constructive aspects of ethnicity. Those who do this are either confused themselves regarding the differences between chauvinistic and creative ethnicity, or are consciously manipulating and exploiting the confusion in the minds of others.

3. Asserting that chauvinistic ethnicity is a necessary, temporary step toward creative ethnicity. The dynamics of how one would lead to the other are explained, if at all, in terms of a dangerously inadequate understanding of the self-perpetuating natures of chauvinistic minds and groups.

These apologies are used to legitimize the violations of the moral myth of fairness so strong in the American mind. Double standards abound. Great sympathetic attention is given to the objective conditions determining social ills among favored ethnic groups. But social ills among other groups are dismissed without either sympathy or understanding, by use of epithets and hostile stances. Segregation practiced by non-favored groups is assailed. Segregation by favored groups is accepted. The use of legal sanctions against behavior abusive of basic individual rights is demanded only against others, but never regarded as legitimate against favored groups. These philosophically crude positions are now finding sophisticated, if not sophistical, arguments to support them. Attempts have begun to replace the myth of fairness by imposing other myths upon the American people. These vary in subtlety.

One of the least subtle attempts is found in Peter Schrag's *The Decline of the Wasp*. Ignoring that the melting pot myth was touted by people from all ethnic groups (and that the phrase "melting pot" was probably first used by a Jewish writer in 1907), Schrag portrays it as the product of an evil conspiracy by WASPs to rob other Americans of their souls. Gross stereotypes of WASPs (unfeeling robots) flow from Schrag's writing, perhaps intended as instruments in a deliberate effort to build a political force. At some points, his worst slurs seem to be the product of an intelligence totally distorted by rage. In the end, his book turns out to be merely another diatribe for tearing down the utterly evil "establishment." It is a scream familiar from the rhetoric of those who believe America is synonymous with an evil which is doomed to the trash heap of history. But Schrag's efforts culminate in an attempt to make the familiar polemics of the New Left and Counter-Culture synonymous with *ethnic* sensibilities of non-WASPs, and the evils of "bourgeois," "capitalist" America synonymous with another set of ethnic characteristics—those of WASPs. Political cant is disguised as ethnic chauvinism. The total distortion created in the effort represents a "big lie" technique of propaganda that would stagger even superior analysts like Orwell. A typical example of Schrag's reasoning involves an explanation of why at the trial of the Chicago Seven, Judge Hoffman punished Abbie Hoffman:

"(Judge) Hoffman's insecure establishmentarianism skirted overt anti-Semitism. He appeared deliberately to be trying to deny not only identification with the kids but his own Jewishness. They seemed, at times, to represent similar (or even identical) crimes. The link was hardly precise, yet it had symbolic validity in a society that had always made it difficult to be totally American and totally Jewish at the same time. Abbie Hoffman understood, "Your idea of justice is the only obscenity in this room," he shouted at the judge. "You schtunk. Vo den. Shanda fur de goyim." For insulting the judge in Yiddish (accusing him of shameful behavior on behalf—and in the eyes—of WASP's), six days."[6]

Using this tortured logic, one can hang any rap on WASPs or on any other group. But American sensibilities no longer tolerate such obvious ethnic hatred in print. Except when directed against the new scapegoat, the WASP. Not only is it open season on him, but if Schrag's book is an indication, there is a bounty on his head. Schrag would tribalize and politicize ethnic groups and have them at each other's throats.

More subtle, abstract attempts to destroy the common culture myths are offered in terms of theories of social philosophy. Thus, two favorable reviews have appeared by professors of philosophy of a recent tome on justice, one in the *New York Times*, the other in the *New York Review of Books*.[7] Both are very sympathetic to *A Theory of Justice*, by John Rawls. Rawls' theory of justice, which presumably is to replace the operating American myths of fairness and meritocracy, is composed of two essential elements. One is that justice is to be pursued by institutions on behalf of *groups* as well as individuals. Second, and more important, justice demands that institutions cultivate inequalities of wealth, authority and power when such inequalities work in favor of some group that is socially or otherwise disadvantaged. In short, institutional *unfairness* to individuals and/or groups is justified if it produces benefit to a favored group.

Rawls' thesis is being used to complement the position explained by Harold Cruse in his *Crisis of the Negro Intellectual*. Meritocracy, which has been the operating framework for other ethnic groups, it was explained, will not work for blacks. From this, the next step was to favor quotas or "positive discrimination" to permit blacks to break through racism and move upward more quickly than possible under meritocracy and fairness which demand that blacks learn the skills that enable them to compete with whites. It is a reversal of the traditional American system as explained, for example, in Richard M. Huber's *The American Idea of Success*. Until now, all ethnic groups have operated under the myth that status is gained, as Huber puts it, by "achievement rather than ascription." Now ascription rather than achievement is being pressed. Of course, the basis of ascription is not the old European class and caste system Huber writes about. The new basis for ascription is membership in a favored ethnic group.

ENTER THE "MOSAIC SOCIETY"

The pluralistic society that results from a coupling of ethnic chauvinisms and the abandonment of the ethic of fairness is a "mosaic society." This is an apt metaphor, for it connotes the static quality of such a society, each piece in the mosaic unmoving and isolated from the others. The mosaic aspect of our society has become increasingly evident. For example, on American campuses. Blacks and whites segregate themselves from each other in dormitories, cafeterias, extracurricular events, and college newspapers. Even the sitting together of blacks and whites in classes is mosaic, for there is little interchange between members of different races. In the words of a student, "Dianne Howell, a graduate student of psychology at the University of California at Berkeley, likened her white classmates to 'the wallpaper.' They're there. They are just there,' she said." [8]

At P.S. 108 in Manhattan the children (the majority of Puerto Rican background, the minority black) responded in singular fashion to the showing on television of the movie "West Side Story." The behavior of the children, as reported in a newspaper story, was conspicuously more ethnically chauvinistic, agitated and violent in the days following the film. The children identified with both ethnic gangs of the film (Italian and Puerto Rican), and were highly excited by the intergang violence. They imitated it both in play and in serious "acting out." According to the staff of the school, there was no evidence that the children either understood or were moved by the clear moral of the movie, a plea for inter-group tolerance and the renunciation of violence in intergroup behavior.

In my opinion, "this is where we are at." We are a society heavily into a static mosaic of isolated, even mutually hostile, ethnic and ideological blocs. It remains to enquire what, in light of this, should be the role of institutions, including governmental agencies, in the next decade.

The mosaic aspect of our society overlays all of the institutions that constitute what Peter Drucker, in an influential book, called the "new pluralism" of our society.[9] This pluralism is of types of large institutions. Each type is specialized in its basic functions and ultimate goals. Each exercises considerable influence on the whole society.

Accepting this part of Drucker's analysis as essentially correct, I offer two responses. One is that the very nature of the society described by him adds to the severity of people's feelings of social alienation, their yearning for personal wholeness and for meaningful identity. Therefore, insofar as American society is accurately depicted by Drucker, its character will make the psychological appeals of ethnicity even more attractive to large numbers of people in the next years.

Second, I must take issue with some of Drucker's conclusions that have been widely accepted in government, especially by career bureaucrats in federal, state and local agencies. These apply directly to the question of what should be the role of governmental agencies and other public and private institutions. Although they have remained unscrutinized, there is evidence that Drucker's ideas have been applied in a wide scale since the publication of his book in 1968. Moreover, the actual behavior of governmental agencies reflects Drucker's opinions at some key points. Government, according to Drucker, should "coordinate" the operations of society's institutions. It, and it alone, should make the key decisions about society as a whole, and move society's institutions in directions it has charted. Drucker is vague about how these basic decisions are to be made. To continue his metaphor that government should be a special institution among institutions, as he puts it the "conductor" that conducts an "orchestra" of society's institutions, one may ask, who writes the music? On this Drucker is both vague and ambiguous. At times he sounds like a latter day Rousseauean, raising anew the notoriously vague notion of the "common will":

"We need government as the central institution in the society of organizations. We need an organ that expresses the common will and the common vision and enables each organization to make its best contribution to society and citizen and yet to express common belief and common values." [10]

In other places, Drucker seems to suggest a theory of decisions by "consensus":

"The purpose of government is to make fundamental decisions, and make them effectively. The purpose of government is to focus the political energies of society.

It is to dramatize issues. It is to present fundamental choices. The purpose of government, in other words, is to govern."[11]

What *is* clear in Drucker's view is:

1. Government should make all key decisions.
2. Other institutions of society should be merely what he calls "doer" institutions, i.e., they should carry out the roles and policies set for them by government.

Drucker's views raise serious questions of political ethics and democratic theory that can be only cited here:

1. "General will" and consensus theories lead to *de facto* rule by the whimsies of whomever controls the instruments of power.
2. Government's exclusive prerogative to make decisions and "orchestrate" society is totalitarian. The obvious danger is one of a corporate society ruled by an all powerful state. Until now, the term applied to such a society has been "fascism."

In addition to these fundamental questions, other questions more operational in nature come to mind. There is no pluralism of decision-making in Drucker's scheme. This in a society where each institution is specialized. The people who best know an institution would be excluded from making decisions concerning its basic aims and functions! For example, the university, a "doer" institution, is merely to obey the commands of government agencies, even if academicians perceive those commands as destructive of the university's unique mission, the pursuit and dissemination of knowledge and ideas. In other words, the effective specialized functions of the doer institutions are ill served by Drucker's design.

One may also ask whether Drucker has too sanguine a view of social engineering. Indeed, in the two-page concluding chapter of his book, he admits that his thesis is flawed in that he has ignored all but "the social dimension of man." One may go further and charge that even within this dimension Drucker has ignored too much. He simply does not deal with many determinants of social life, for example, popular myths. In short, his model of society is *both* too mechanistic and too simplistic in its view of the dynamics of the social "machine."

GOVERNMENT VS. INDIVIDUAL RIGHTS?

We come to the question of what should be the role of governmental agencies, e.g., H.E.W. *What policies by these agencies and by other of society's institutions foster creative ethnicity, individual rights, a fluid pluralism of interrelations among groups, democratic decision making, and social and economic justice? What policies move society toward ethnic chauvinism, violation of individual rights, a static mosaic society of insulated groups, and internecine fighting in American society?* Human psychology being what it is, any actions which are not clearly and unequivocally perceived as moving toward the first scenario *ipso facto* help to create the second type of scenario. The issue is nowhere more critical than in the "affirmative action" policies of H.E.W. and other institutions. At present, the widespread public confusion surrounding these policies is fraught with dangers.

In the popular American myths of fairness and individual merit, institutions, and especially governmental institutions, are viewed as "referees" which see to it that the respective ethics of the two myths are not violated. When a governmental institution is perceived as itself violating the ethics, the effect on society is extremely disruptive and destructive. Several characteristics of affirmative action, *as they are perceived* by millions of Americans, are precisely so damaging. Again, as perceived by large groups of people, they are:

1. The assertion of "group rights," specifically rights of certain ethnic groups, over individual rights and the "rights" of other groups.
2. The assertion of ethnic membership over individual merit as a criterion of reward.
3. The assertion of "compensatory justice" on behalf of members of some groups over the rights and merits of individuals not of the groups.
4. Institutions, including H.E.W., becoming *partisans* of certain ethnic groups, thus violating fairness.
5. The capturing of the powers of institutions by groups using them for partisan purposes.
6. Provoking the determination to "strike back," to assert oneself and one's group against other groups and the institutions favoring them.

The realization that America is composed of a pluralism of ethnic groups is an old one. In this scheme, basic to the American mentality for a long time, government is viewed as the guarantor of the legal rights of individuals and as neutral regarding the relations between ethnic groups and their various expressions. The twentieth century has seen the rise of collectives, including ethnic groups. As collectives per se compete and clash with each other, the internal relations of our "nation of nations" have become increasingly like those of international rivalry. American society increasingly resembles international "society," a society composed of sovereign units where the lack of effective, fair international laws is sorely felt. Thus woes of fragmentation have beset the United States for some time. That these are felt by millions of Americans is reflected in a Synoptic View of American Public Opinion reprinted in a H.E.W. paper.[12] Of five "hopes" and "fears" surveyed over twelve years, the sharpest increase was seen in the fear of "national disunity" on the part of the American people, jumping 18 percentage points from 1964 to 1971, and 23 percentage points from 1959 to 1971.

As the nation is increasingly perceived as a collection of collectives competing with each other, it would seem essential that the traditional role of government be reaffirmed. Individual rights urgently need protection on a a field of collective movements, and the myth of fairness dictates that government and other institutions remain non-partisan in the competition between ethnic groups. The great civil rights emphases since 1954 attest to the interest to protect individual rights. Ironically, however, some of the more ill considered of these thrusts have weakened public confidence in government as nonpartisan, and at the very time when the more chauvinistic assertions of ethnic groups are becoming both multiplied and intensified.

The problem can be put simply. As the government is viewed, accurately or not, using its power-implementing ideas of "collective justice" on behalf of some *groups*, it is seen as unjust to those individuals not of the favored groups. And government is also viewed as a partisan group itself. Belief in the fairness of American society is undermined. In the cynicism that results, there is fertile ground for the growth of a new myth, a myth of a disjointed nation of chauvinistic groups, each following a "dog eat dog" ethic. The confusion surrounding the affirmative action programs of H.E.W. and other institutions has also fueled the drive toward ethnic chauvinisms itself. As people become convinced that membership in a favored ethnic group is given preference over individual merit, many respond by turning their efforts not on improving their qualifications and performance, but strengthening the power of their group so that it (and hence they) can survive and flourish in the war of tribes.

In addition, the trend has another socially destructive result. Although it is now unfashionable to say it, social and economic progress in the United States has been realized in large measure because of the efforts of its middle class, greatly outnumbering both the poor and rich combined. This is so because the energies of the poor are wasted, are not channelled into socially productive areas. Indeed, this is one of the outrages against the poor. And although much of the money of the rich is used in ways that contribute to socio-economic growth, their personal energies have been largely deflected into pleasure seeking and other individual pursuits which produce comparatively little or no social gain. It is the desire for upward mobility on the part of the large middle class that is the yeast of America's social and economic growth, without which the resources or "dough" of society (no pun intended) would not rise. This desire for upward mobility depends upon faith in the myths of reward for individual merit and fairness exercised by social institutions, especially public ones.

Actions by government that subvert belief in these myths in favor of reward according to ethnic membership vitiate the socially productive energies both of those not in favored groups, and of those who are condescendingly favored. For some time now, it has been widely believed by members of all ethnic groups in all strata of our society that the term "an equal opportunity employer" is a code phrase meaning that members of favored minority groups and women will be given preference over qualified individuals not of these groups. It is widely accepted that this is the result largely of pressure from governmental agencies like H.E.W. which have devoted their power not only on behalf of individual rights, but also given in to pressure to support chauvinistic ethnic aggressiveness. Hence, H.E.W. and other institutions are seen as unjust partisans threatening the rights of individuals and the effectiveness of pressured organizations.

Two examples. In the academic world, where the job market is now very tight and competition for positions intense, it is widely believed that the affirmative action policies of H.E.W. place qualified members of nonfavored groups at a disadvantage and thus lead to the hiring and promotion of the less qualified, subverting the quality of the universities' unique roles of education and research. Regardless of the extent to which "reverse discrimination" is in fact operative, a moot issue, the *belief* that it prevails has the same corrosive effect as the fact. Only a few recruitment letters from university departments expressing partial or absolute preference for women and members of specific ethnic groups are sufficiently destructive. And more than a few such letters have surfaced, some directly attributing the preference to pressure from H.E.W.

For example, a recruitment letter from a department at Claremont Men's College (California) states, "We desire to appoint a Black or Chicano, preferably female." (Incidentally, the device of hiring female members of minority groups satisfied pressures from two directions. One person now "represents" both categories of people. The ultimate conclusion of this trend merely demeans people. Individuals are quite plainly reduced to tokens.) From Northwestern University (Illinois): "We are looking for female economists and members of minority groups." From Sacramento State College (California): "Sacramento State College is currently engaged in an Affirmative Action Program, the goal of which is to recruit, lure and promote ethnic and women candidates until they comprise the same proportion of our faculty as they do of the general population." From Indiana University: "Preference will be given to women and minority group candidates in filling this position if candidates of equal quality are identified." From Connecticut College to a male applicant:

"It is quite true that we have an opening here and that I have examined your dossier. It is very impressive indeed, and I wish I could invite you to come for an interview. At present, however, the department is interested in the appointment of a woman so we are concentrating on interviews of this kind."

From New Mexico State University:

"Your prompt response to my letter with four candidates all of whom seem qualified for our vacancy, is greatly appreciated. Since this is no indication that any of them belongs to one of the minority groups listed, I will be unable to contact them at present."

From Washington State University: "women or members of minority groups." From Stanford University (California): "The Provost of Stanford has asked our Department to make a special effort to assemble a roster of Chicanos . . ." From the University of California at Berkeley: "outstanding candidates of minority background (Chicanos, Blacks, Women (sic))."

In the area of trade unionism, affirmative action is felt as an unjust threat by members of those ethnic groups nearest to the lowest rung of the socio-economic ladder. It is they who must compete with the favored minorities and who suffer reverse discrimination. We should remember that many trade unions became ethnically homogeneous for two reasons. One was the necessity of foreign language speaking immigrant workmen to survive at a time when labor unions were underdogs in a hard and often vicious struggle. Because of the ready usefulness of ethnicity, in this case involving common language as well as other cultural characteristics, many unions or union locals were organized as ethnic organizations. To cite but one of many examples, Local 89 of the Garment Workers Union was organized by Italian workers. Workingmen needed unions, and ethnicity served as one of the most useful criteria of organization. Thus, in New York City's public employment, the sanitation workers union was organized as an Italian union, teachers organized a Jewish union, and the police association was Irish. In private employment, Italian populated construction unions, the Irish were synonymous with transportation workers, and the garment industry was unionized by the Jews and Italians who worked in it. Similar ethnic identities marked the organization of the labor movement in the rest of the United States. For example, the steelworkers' unions of the mid-West were organized by Poles, Slovaks, Croats and Magyars.

Since their origins, ethnic unions have frequently sought to exclude members of different ethnic groups. This has been so for three reasons. First, the natural desire to work and associate with those of similar background and culture. As has been emphasized, ethnicity has always been in the warp and woof of identity among all people. Second, ethnic tribalism has sometimes operated. In these situations, outsiders were excluded not only because they were different but also because they were regarded as inferior. Third, outsiders were excluded in response to an anti-labor tactic once widely used by employers. The tactic was to divide and conquer the workers on the basic of ethnicity. Employers set ethnic group against ethnic group. The fears and hatreds between ethnic groups were cynically inflamed. In *Toil and Trouble*, a history of the labor movement, Thomas R. Brooks marks the effectiveness of this divisive tactic against the fledgling labor movement, turning ethnicity toward panicky, threatened ethnic tribalism:

"Needless to say, each group protected its own as it organized its trade. The process—and resutls—were markedly different in industry where employers followed a deliberate policy of pitting one immigrant group against another as a means of forestalling unionization.

"In a report made by John R. Commons following a visit to a large Chicago packing company in 1904, he notes that he "saw seated around the benches of the company's employment office a sturdy group of Nordics. I asked the employment agent, 'how comes it you are employing only Swedes?' He answered, 'Well you see, it is only for this week. Last week we employed Slovaks. We change about the different nationalities and languages. It prevents them from getting together. We have the thing systematized. We have a luncheon each week of the employment managers of the large firms of the Chicago district. There we discuss our problems and exchange information. We have a number of men in the field who keep us informed. . . . If agitators are coming or expected and there is considerable unrest among the labor population, we raise the wages all around . . . It is wonderful to watch the effect. The unrest stops and the agitators leave. Then when things quiet down we reduce the wages to where they were.' " His deliberate policy is one reason that unions failed to secure an early foothold in industrial plants. Among the skilled trades, ethnic lines reinforced craft solidarity. But among the unskilled in factories, worker solidarity was defeated by the babel of tongues." [13]

Thus the paradox. Ethnic homogeneity was reinforced in the labor movement *both* because of its success as a tactic of skilled labor, and its impact as a union busting tactic by employers. In short, ethnicity and much of the early labor movement were inseparable. Today, the historic ethnic parochialism of trade unionism is exaggerated as members of large white ethnic minorities (Irish, Italian, Poles, etc.) fear that they are, or may be, discriminated against in favor of non-whites. The violation of the myths of fairness and merit is perceived by ethnic white workers as a continuity, running from the practices of the old employers to the new affirmative action practices. In the academic world, a parallel is found. Jews, WASPs, and white males fear getting the short end of ethnic and sex discrimination exercised by universities under pressure from H.E.W. Unfortunately, neither H.E.W. nor other affirmative action proponents have demonstrated appreciation of these complexities and nuances in intergroup relationships. Like the news media, they have been sensitive only to one facet of the complicated history of ethnic relationships—racism. Their single-minded myopia has convinced white ethnics that their legitimate needs, problems and rights are not understood or respected. As a matter of fact, little hard data about these individual groups has even been collected. In government studies, they are usually lumped together as "whites" or "others"—and ignored. The attempts of members of these groups to protect or even explain their rights and needs are immediately countered with loud, glib cries of "racism" and "sexism." Instead of producing confusion and guilt among white ethnics, the dominant pattern until recently, this simplistic shrillness now is meeting a counter-response of white ethnic assertiveness and even tribalism. The miasma surrounding affirmative action is dense. Within the brief limits of this article, major points can only be illuminated. As they emerge in the context of the discussion so far, recommendations become possible.

SOME RECOMMENDATIONS—THE APPROACH

1. The confusion over whether "affirmative action" means the imposition of quotas is widespread. Quotas, by any name, for example "goals" or "timetables" are unjust and destructive.

2. The selection of favored groups, called "protected classes" by H.E.W., raises complicated questions. Who decides which groups are to be favored and by what criteria? Choices inevitably will involve injustices. For example, is the son of a rich and influential black family to be favored? Are black men to be favored

over Italian-American men in admissions to graduate school in light of the finding of Glazer and Moynihan that in the New York area the percentage of black men working as professionals is actually higher than the percentage of Italian-American male professionals?[14] In short, any selection of favored ethnic groups is bound to violate fairness and merit. In addition, the policy of favoring groups is an open invitation to groups to struggle to gain the levers of power and declare themselves or their allies "favored." In this struggle, the most energetic, chauvinistic, and/or politically savvy groups are best equipped to win to their side the adversary efforts of government and other institutions. These groups are not necessarily those suffering discrimination, nor are those who lose in the struggle necessarily free from discrimination.

3. The use of statistical data *alone* does not prove or disprove discrimination. Present affirmative action policies rely too heavily on simplistic use of such data.

4. Compensatory justice is valid only as applied to individuals, not to groups. If a qualified individual has been discriminated against in the past, and thereby refused a job, he or she is entitled to compensation, entitled to be first hired by the offending employer. Compensatory justice applied to groups, however, leads to absurdities of infinite regression. As the selection from Brooks' book on the history of the labor movement indicates, it would be hard to find someone not a member of a group whose members have not been discriminated against at some time somewhere in the United States. Second, its application operates as an injustice against individuals discriminated against in favor of a member of a favored group.

5. The establishment of favored ethnic groups distorts the processes by which society chooses which cultural contributions by which groups are to be accepted by the whole, thus operating against the chances that those that are genuinely valuable or useful will prevail.

6. The argument that discriminatory affirmative action is a temporary, necessary cure is spurious. For in addition to establishing precedents and entrenching practices, it also has the other undesirable effects cited in this article and these also are long-lasting.

7. The policy of applying the sanction of "pre-awarded compliance review" of financial aid and contracts against institutions is in effect a demand to prove innocence. This demand is not only morally unjust, but is also logically absurd. Powerful governmental agencies like H.E.W. should take the lead in reversing the drift of American society since the middle 1960's toward ethnic chauvinisms and move it in the direction of creative ethnicity while preserving the essential values of fairness and merit. *This can be done by a clear and unequivocal announcement that "affirmative action" means programs designed to equip disadvantaged individuals to compete on the basis of competence in a social arena where fairness will be guaranteed by government vigilance for the protection of individual rights. Emphasis of energies and resources should be shifted toward the creation of imaginative and effective programs of this type,* coupled with clear renunciation of all practices which are signs of discriminatory affirmative action. Recommendations can be listed under three headings. First, those relating to all social policies—general guides. Second, recommendations which will also meet the special circumstances of the academic world. And third, recommendations covering the particular conditions of trade unionism.

GENERAL RECOMMENDATIONS

1. Special programs to recruit and qualify members of all ethnic groups. The goals here are widened opportunity to access to jobs for individuals who are qualified, and special training and educational efforts to increase the pool of those who are qualified. There should be a switch in affirmative action from the categories of ethnicity to that of opportunity for all who are in need. No ethnic group has a monopoly on poverty, need or ambition. Widened opportunity to compete on the basis of merit is the goal where job or professional qualifications are relevant. Widened opportunity *to be selected by lot* (by the neutral laws of chance) when there is a surplus among the qualified, or a surplus when no special qualifications are germane. Chance should be permitted to determine the result instead of the guideline of the Office of Civil Rights of H.E.W. covering colleges and universities that women and minority applicants "must be recruited, hired and promoted over all competitors where their qualifications are the same."

2. Vigorous enforcement of the 1964 Civil Rights Act and all prior and subse-

quent legislation against racial, ethnic, religious and sex discrimination. Here, specific cases of discrimination would be pursued. The effect of vigorous enforcement would not only punish offenders but also deter others from practicing discrimination. Thus, the cause of equality is twice served.

3. **Statistical data should be used according to mathematically correct rules for meaningful interpretation.** One of these rules is that statistics alone are no conclusive proof of anything. At best, data can give a *prima facie* picture. Conclusive proof of discrimination requires that evidence independent of mere statistical data be presented. The other rules of statistcial use are complicated, but easily available through the many statisticians employed by government agencies and other large institutions. Among them are the stipulation that all significant characteristics be included in a study and assigned appropriate statistical weight; that the statistical samples used be large enough to have mathematical significance; and that there be homogeneity among the statistical examples in terms of significant characteristics. Each of these major rules has been repeatedly ignored in the use of data purportedly establishing discriminatory practices. The logical and moral burdens of proof are on those making an accusation, and not on the accused as the Guidelines would have it with its statement, "the premise of the affirmative action concept of the Executive Order is that systemic and institutional forms of exclusion, inattention and purposeful discrimination in employment have existed." Such a premise says nothing about any *specific employer*. To use it as a blanket *a priori* condemnation requiring a proof of innocence on the part o fan employer is a logical non-sequitor and a moral injustice.

4. A cessation of classification of favored groups by institutional fiat. Which individuals belonging to what groups and under what circumstances are discriminated against should be objectively determined according to the rules listed under #2 and #3.

5. The complete, unequivocal renunciation of all attempts to impose ethnic or sex quotas, however they be euphemistically labelled.

6. Government neutrality regarding the efforts of organized ethnic groups. These should be purely private and voluntary associations, and government should not use its power on their behalf. This involves a clear and unambiguous commitment on the part of government institutions to enforce not "group rights" but only the legal rights of individuals of all groups. Indeed, preferential hiring is quite clearly *illegal* under Section 703 of Title VII of the Civil Rights Act of 1964 which states:

"Nothing contained in this title shall be entitled to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race, color, religion, sex or national origin employed by any employer . . . in comparison with the total number of percentage of persons of such race, color, religion, sex or national origin in any community, State, section or other area or in the available work force of any community, State, section or other area."

FOR COLLEGES AND UNIVERSITIES

In addition to these recommendations, others should also be followed specifically in regard to colleges and universities.

1. Colleges should be persuaded to give maximum publicity to all job openings, tenure and promotion opportunities, and full disclosure of all information involving all decisions made regarding these questions, including full disclosure of the qualifications of those accepted. Any aggrieved individuals would thus have the information necessary to initiate corrective action. Neither the confidentiality nor privileges of departmental personnel committees or of deans and presidents should be permitted to hide cases either of discrimination or reverse discrimination. Colleges should be compelled to honor the merit system by vigorous scrutinization of their practices and punishment for any lapses. The long-established "old boy" discriminatory system and the newly established "preferential treatment" discrimination should *both* be combatted on behalf of the merit system.

2. The recognition that colleges recruit from a nationwide pool, and careful interpretation of statistical data. For example, the great majority of college personnel decisions are made by individual departments. Most of these are too small (less than 50) to draw conclusive statistical results without considerable

statistically independent evidence. In enforcement of anti-discrimination policies, the stress should be upon good faith efforts by the employing departments *to hire the best qualified without ethnic or sex discrimination.*

3. Enlargement of programs recruiting college and graduate students and meeting their special needs (educational, social, financial) so that they have a fair opportunity to become qualified for college teaching (and for other professions and occupations).

REGARDING LABOR UNIONS

I wish to make four recommendations regarding labor unions.

1. *Opening apprenticeship programs.* For many years, craft unions have required that admission be based on successful completion of apprenticeship training programs. These have varied in length from a few months to as long as six years. These programs are designed to meet two needs. First, to assure a supply of fully trained labor. Second, to control the numbers of trained workers entering a particular field. This second purpose is firmly grounded in bitter memories of past unemployment which wrecked many a union, with disastrous results for all workers in the trade. Affirmative action efforts at first were aimed at winning admission to apprenticeship programs for selected minorities. Openings for these programs should be widely publicized. Then applicants should be selected by lot in a supervised process. Each person desiring entry would then have a chance mathematically equal to that of every other applicant. This guarantees complete fairness for all individuals, avoiding discrimination and reverse discrimination. The recent attempts to by-pass apprenticeship programs, exercised on behalf of favored groups, should cease. In addition to all of the objections raised in this essay, such efforts create hazardous conditions for workers and passersby that result from having incompetents on the job.

2. *Opening de facto closed unions.* Some craft unions use techniques favoring the admission only of relatives of members. Obviously, this tends to preserve the ethnic status quo within these unions. This closed union device is illegal under the Taft-Hartley Act, but like the illegal closed shop it persists in actual practice because of sub rosa agreements between union and employers. The closed unions should be opened by vigorous enforcement of the Taft-Hartley Act. This can be done through close government observation of practices in the field and swift prosecutions of cases of vilations.

3. *Opening union leadership.* Union leaders tend to perpetuate themselves in office. This is so even when the ethnic composition of membership has changed dramatically. For example, in New York City, garment workers have shifted from a Jewish and Italian membership toward a black and Puerto Rican membership. But the leadership does not reflect this change. Similarly, in the Fire and Police Departments, and in transportation, the once solidly Irish memberships now have large proportions of Italians and a growing number of blacks and Puerto Ricans. But the leadership of the unions remain Irish. Of course the assertion that the ethnic composition of a union *must* be reflected in a corresponding ethnic leadership violates meritocracy. I do not advocate this position, but address the question of entrenched union leaders *per se*. The remedy here calls for close government scrutiny of union elections under existing laws, a remedy government have been loath to employ for fear of "labor troubles."

4. *Opening a fifty percent alternative to seniority.* Seniority is the most troublesome issue in the labor union area. Seniority systems require laying off the latest arrivals first. They also require all rehiring on the basis of length of service. Thus, newcomers are last hired, first fired. In addition, in those industries where seniority affects promotion, those who lack seniority because hired late as a result of past discrimination are not promoted. This perpetuates the *original* discrimination against these individuals. A remedy would require bypassing seniority requirements for fifty percent of all firings, hiring and promotions. Thus, those who have seniority (and who are individually innocent of past discrination) continue to have some protection. And those who are newcomers have a chance "to get where they should have been." Because none of the newcomers are guilty of any past discrimination, the 50% rule would apply to *all* of them. Those to benefit from it should be chosen by lot, as should those whose accumulation of seniority is to be waived. This compromise is necessary because questions of individual rights are mixed regarding seniority as they are not in other questions.

Government policies, and those of large private institutions, tend to concentrate on short term results at the expense of long term considerations. This is so not only because these institutions are highly vulnerable to political pressures, but also because most of the social scientists they employ are trained to work only with quantitave models of analysis. These are blind to different value priorities of data. Such values can only be assigned by informed, sensitive social thinkers. It is time to restore public policy planning to a high level of vision and a more sophisticated field of perspective. Such perspective should keep the critical myths of fairness and merit in the forefront. Large-scale educational efforts should be initiated regarding the differences between chauvinistic ehnocentricism and creative ethnicity. Finally, imaginative programs advancnig the latter need formulation and support by public and private institutions across our society. America needs not merely to change, but correctly to mature.

FOOTNOTES

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[1] Among the most significant determinants of behavior are myths held and acted upon. A rich myth is rooted in reality, but transcends it in an outreach toward an idea or ideal. The energies expended by people in the outreach define the values they esteem. To the consternation of "social engineers" pressing for ever more effective social management, myths are born, grow, die and replace each other in a complex process that is highly nonrational, and hence not amenable to predictions or control. In short, it is very difficult deliberately to invent a myth and get people to believe in it. And it is equally hard to stamp out a myth which enjoys credence among large numbers of people.

[2] "Soviet Is Pressing the Blending of Its 100 Nationalities," Theodore Shabad, The New York *Times*, July 31, 1972, p. 2.

[3] "China Strives to Integrate Her Minorities," John Burns, the New York *Times*, July 31, 1972, p. 2.

[4] For a fuller exposition of my thoughts on the tension between tribalism and creativity, see "The Militant Mentality," Richard Gambino, *Freedom at Issue*, July–August 1972.

[5] *The Collected Essays, Journalism and Letters of George Orwell.* Vol. 3. Harcourt, Brace and World, New York, 1968, p. 362.

[6] *The Decline of the Wasp*, Peter Schrag, Simon and Schuster, New York, 1971, p. 104.

[7] The review by Marshall Cohen in the New York *Times Book Review*, July 16, 1972, p. 1. And the review by Stuart Hampshire as a special supplement to the *New York Review of Books*, Feb. 24, 1972.

[8] "Campus Racial Tensions Rise as Black Enrollment Increases," Thomas A. Johnson, the New York *Times*, April 4, 1972, p. 57.

[9] *The Age of Discontinuity*, Peter F. Drucker, Harper and Row, New York, 1968.

[10] Drucker, p. 225.

[11] Drucker, p. 233.

[12] Reprinted in "H.E.W. and the Future, a paper of H.E.W. dated Nov. 26, 1971, p. 30.

[13] *Toil and Trouble*, Thomas R. Brooks, Dell Publishing Company, 1964, pp. 76–77.

[14] *Beyond the Melting Pot,* Nathan Glazer and Daniel Moynihan, M.I.T. Press, Cambridge, Mass., 1970, p. lvi.

[From Race and Politics in School/Community Organizations, Pacific Palisades, Calif., Goodyear, 1974]

THE RETURN OF RACIAL QUOTAS

Competition for jobs on the basis of ability is being eliminated not only in the schools but also in most of the job markets. This sweeping change is being brought about mainly by Executive Orders No. 4 and 11246, which were signed by President Johnson to eliminate discrimination in hiring, but which were revised and issued by the Department of Labor, and which now force institutions to give preferential treatment to minorities in hiring and promotion practices and require that goals and timetables be filed annually by each employer. The Orders cover public schools, universities, civil service (policemen, firemen, post office workers, etc.), the armed forces, construction and trade industries, unions, private corporations and businesses employing more than 50 people; and *all* organizations that have contracts with government or are regulated by one of the governmental agencies—in total, affecting about 95 percent of the employment market.

According to the U.S. Commission on Civil Rights (1970) report, the federal government is the largest employer in the country and another third of the nation's labor force is employed by companies that are government contractors. These two powers, the power to employ directly and the power to force federal contractors to abide by the rules of the government, alone affect more than 75 percent of the job force. Title VII of the Civil Rights Act of 1964 reaches almost all the rest of the employers; the title asserts that no person may be discriminated against on the grounds of race, color, or national origin. The meaning of nondiscrimination, however, has been transformed into affirmative-action compliance and reverse discrimination. Almost every school district, hospital, local government agency, bank—almost every institution we can think of—receives some federal assistance and/or is covered by this regulation. The list of organizations covered by Title VII is endless, and these employers also must follow federal guidelines. Furthermore, quite independent of any executive order that stresses preferential treatment of minorities, and quite independent of Title VII of the Civil Rights Act, the federal government has enormous powers vested in insured and guaranteed loan programs, such as home mortgages, student scholarships and stipends, institutional contributions to social security, and those of the Veterans Administration. And finally, the government has tremendous power in such agencies as the ICC, EPC, FCC, CAB, SEC, and FTC, which regulate railroads, ship building and operating, securities, marketing, communications, and many other industries. All of the businesses in these regulated industries, according to Glazer (1971), feel obligated to give preferential treatment to minorities. Preferential treatment is also required by all businesses with more than 50 employees, enforced by governmental agencies in Washington and on a regional basis. The obligation to give preference to minorities is felt more intensely by all businesses and institutions with more than 100 employees, because they must file annual reports with the Equal Employment Opportunity Commission (EEOC), detailing the number of minorities in all job categories, from laborers to administrators.

According to the federal guidelines, the goal of equal opportunity is no longer equality for all groups but is, as the report by the U.S. Commission on Civil Rights (1970) states, that the number of members of minority groups found in employment, at every level, be equal to their proportion in the population. In other words, *equal opportunity* has become transformed into *actual employment* of minorities. These minorities include blacks, persons with Spanish surnames, Indians, Orientals, and women—but not Greeks, Poles, Italians, Irish and other ethnics, not Catholics or Jews. Thus the only eligibles for preferential treatment are racial minorities and women, supposedly because they have suffered the most discrimination and disadvantage because of sex and heredity. Needless to say, they are not the only ones who have been discriminated against in some way. Other groups, and certainly individuals in those other groups, have suffered disadvantages in school and society. To be sure, no one asks how we know that some black person did not come from a home more advantaged than that of some white person seeking the same job or trying to get into college. Remember, about 70 percent of the poor in this country are white. Thus Seabury (1972*a*) cites the frustrations of one poor white student.

"The ability to think in the abstract is hard for a person with my cultural background and economic background. My parents' . . . income barely exceeded the poverty level. My father is a Southern Baptist with a third-grade education. . . . I believe I am a victim. As a non-member of a minority group I feel that I . . . [am] discriminated against constantly. The same admissions standards are not applied because a certain percentage of minority students must be admitted in each class regardless of their qualifications. My test score, undergraduate record, and my family (poor white) deny me admittance to Harvard because I am white."

The federal guidelines, according to Abrams (1972) and Seligman (1973), appear to be designed to scare employers away from any objective standards or test requirements which have a differential impact on minority groups. Moreover, the U.S. Supreme Court has ruled in *Griggs* v. *Duke Power* (1971) that tests can no longer be considered a reasonable job requirement; all arbitrary barriers to employment which demand certain skills, education levels, or test score results and have the effect of employing minorities in less than their proportion to the population are now considered illegal. The employer must now demonstrate conclusively that the skills are in fact needed for the job. If test scores are involved, he must now demonstrate that the tests are reliable and a valid predictor of job success. The fact that the employer has no discriminatory intention is irrelevant; it is only the effect that matters now.

The claim is that the tests are unfair and culturally biased because all groups do not obtain the same mean scores or pass the tests in the proportion that they represent of the general population. Ironically, the critics claim that blacks and other racial minorities are not getting an education as good as that of whites. When they apply to a college or go out into the job market, the blame for failure to qualify is no longer to be put on their schools and teachers but is now to be put on the tests. Suddenly, the words "unfair" and "biased" are used to alibi the inability of some groups to compete with others, ignoring educational abilities and differences in reading, mathematical, and aptitude scores even when educational levels are held constant. The claim is that standardized tests cannot be used, that we must either apply different standards to nonwhites who cannot compete with whites or eliminate standards altogether. (Some critics, according to Kurtz [1972], even contend that all testing should be eliminated and we should use lotteries to choose plumbers, teachers, lawyers, and physicians.)

Here it is important to note that females are considered as minorities in affirmative-action policies, but they have always been able to compete with males on standardized tests. The *Griggs* decision is not aimed at helping white women but is directed toward helping those racial minorities (except Orientals, who are high-achievers) who seem unable to compete on cognitive tests. All federal agencies involved in affirmative-action programs, such as the Office of Civil Rights (OCR), Equal Employment Opportunity Commission (EEOC), and Office of Federal Contract Compliance (OFCC), are rigorously enforcing this legal decision. This of course puts the employer on the defensive, and the easiest thing to do is just hire enough minorities to fill a quota.

According to Doppelt and Bennett (1967) of the Psychological Corporation, the cry that testing for job applicants is biased is a smoke screen to mask the political nuances. Granted, there are some technical limitations to tests, but there are many well-devised (reliable and valid) tests that measure "the individual's present capability of demonstrating his skills or knowledge for predicting job success." It is senseless to eliminate verbal and simple mathematical items on tests, or to exclude the tests altogether, when verbal communication and the ability to perform simple mathematical activities are important for a given job. The tests may be culturally oriented, but the job is embedded in a cultural milieu. The ability to "understand oral and perhaps written instructions" are not racially biased items; they are "culturally laden" items which are likely to be criterion or job-related. The purpose of the test is to select people who will succeed on the job; outlawing such tests makes the selection process more subjective and political than without the tests. The politics of the charge, that tests are racially biased, is evidenced by the fact that it does not consider a large subgroup of the white majority who are educationally disadvantaged and do not perform well on many of these job tests. The authors conclude:

"Whenever the number of applicants exceeds the number of job openings, some applicants will be rejected. This is one of the hard facts of life. It is not surprising that those who are rejected sometimes attack the selection procedures on the grounds that these are invalid or unfair. Although testing is not free from defect or beyond criticism, appropriately chosen and properly administered ability tests are superior to most available alternatives.

"Some of the problems which stem from the testing of disadvantaged groups are of a technical nature and are not related to the issue of discrimination. Reduced reliability is often due to the fact that score distributions obtained from disadvantaged groups are compressed. The same compression (and reduced reliability) is also found when only highly capable individuals are being tested. These problems require technical study and, in some instances, may call for the use of different measures or the development of new and more appropriate tests. The basic issue is not necessarily one of discrimination against a particular subgroup."

Society has the responsibility for providing jobs for people with limited skills, but not at the expense of replacing qualified personnel with unqualified personnel. Society has the responsibility of providing remedial job instruction for disadvantaged populations, but this also should include white disadvantaged populations. The rejection of such measurements that register the consequences of educational deprivation is merely a political move to kill off the messenger who brings the bad news, to deemphasize the harsh fact that quotas will lead to a downhill trend in quality and abilities of people employed in many jobs. New and artificial standards that mock excellence and replace it with mediocrity have little to do with equal opportunity. The moral and ethical arguments are secondary; rather the political decision to pay off militant blacks to curtail violent tactics seems to be the major factor. Indeed, the silent majority must now pay the consequences for being silent.

The fact that a company or institution does not want to hire a member of a minority group because of his character or even because of previous arrests cannot be deemed as an excuse for not hiring him. (Such an excuse often is illegally used for not hiring a white person). In *Gregory* v. *Litton Systems* (1971) the federal district court in California ruled that an applicant with a record of 14 arrests and no convictions could not be denied a job on that basis alone. The plaintiff was black, and the plea of racial discrimination was successfully used against the company. The court ruled that arrests alone prove nothing about individual character and that, since a greater proportion of blacks are arrested, it is discriminatory to use this excuse for not hiring them. Abrams (1972) points out that in the new interpretation of Title VII, the federal government has gone a step further and has declared it is now "unlawful to discharge or refuse to employ a minority group person [notice that only minorities are mentioned and minorities in this case does not include white women] because of a conviction record unless the particular circumstances of each case indicate that employment of that particular person for a particular job is manifestly inconsistent with the safe and efficient operation of that job." Although members of the EEOC admit that a bank robber should be barred from employment in a bank, they argue that a person who is convicted of rape or murder "may be hired, since the act is not job-related".

Seligram (1973) points out that, although government officials continue to profess that "you never have to hire an unqualified person," the real point is that in all job sectors the pressure to file timetables and goals, even though actual quotas may not be intended by the federal government, turns the whole procedure of preferential treatment toward one of racial quotas and reverse discrimination.

The advocates of preferential treatment of minorities refuse to admit that they have created hysteria in all job sectors, with the result that, rather than risk legal or financial problems with the government, almost all employers have overreacted and instituted quotas and reverse-discriminatory practices. Thus, Seligman (1973) also points out that major companies like IBM and Xerox have informed their executives that their futures depend on results in meeting affirmative-action goals. This type of hysteria is increasing as more and more large businesses are probed for alleged biases in recruitment and promotions (*Chicago Daily News*, September 18, 1973; *New York Times*, September 23, 1973). The threat of court action, compounded by possible loss of federal contracts, is sufficient to cause overreaction on the part of these industries and to negotiate a settlement with EEOC. According to the *Chicago Tribune* (September 20, 1973) and the *New York Times* (September 23, 1973), a growing segment of the black civil rights groups openly use the term "quota system" and demand that it be implemented "to correspond with the size of the black population." Failure to adopt a quota system will lead to black boycott of goods, black demonstrations and picketing of the businesses, as well as lawsuits.

Similarly, Seabury (1972*a*) finds that quotas are widespread in colleges and universities, which he lists by name, and that such quotas represent "a stark remodeling of their criteria of professionalism and their standard of excellence." And, the president of Columbia University, William J. McGill, states that "the determination of superior ability and special excellence [is now viewed by] some officials as a mask for continuing discrimination" (*New York Times*, May 7, 1972, p. 12).

Preferential treatment is so common that many chairmen, deans, presidents, and professors who head search committees blatantly indicate (even in writing) to candidates and placement bureaus that they are interested in hiring only minorities, and females, and especially minority females. Among the schools that have expressed such preferences in accordance with current affirmative-action policies are: City University of New York, Columbia University, Connecticut College, Indiana University, Lehigh University, New Mexico State University, Northwestern University, Sacramento State College, San Francisco State College, Stanford University, State University of New York at Albany, and the University of California, Berkeley.[1] These are but a few of the colleges and universities that give such preferential treatment. Many clearly state that their new hiring "goals" are based on recruiting minorities in proportion to the surrounding population. The prestigious institutions, where hiring and promotion standards tend to have been rigorous in the past, and the state and city-supported institutions and those receiving federal funds, are under the most pressure.

For example, the department head of a southwestern university responded to the inquiry of the placement officer at another university on May 27, 1971, by stating that although "four candidates seem qualified for [a] vacancy they cannot be considered" because he had been instructed to make every effort to recruit "a qualified person from a minority group." He pointed out that his recruiting policies had changed and he could no longer "seek the best-qualified person available, regardless of race, color, or creed, as [the university had] in the past."

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[1] Almost every, if not all, college and university has an affirmative-action plan. These institutions are mentioned only because I managed to obtain xeroxed copies of such letters.

In other words, this department head is forced to seek a "qualifiable" minority person, not the most qualified person. Another chairman at a west coast state school wrote to placement bureaus across the country on April 24, 1972 stating that the new goal of his school is "to recruit and promote minority and women candidates until [their] proportion of [the] faculty is [the same as that of] the general population." A department chairman of an Eastern college compliments a person's "impressive" research and states "I wish I could invite you to come for an interview," but informs the candidate that affirmative action makes it impossible to do so. He reassures the person that with his "excellent qualifications [he] will find a position of [his] choice." [3]

In the same vein, the *Congressional Record* (May 22, 1973) points out that letters are now even posted on bulletin boards and read:

"The Department of Philosophy at the University of ——— is seeking qualified women and minority candidates for all faculty positions at all levels . . .

"We desire to appoint a black or Chicano, preferably female . . .

"State College is also an affirmative-action institution with respect to both American minority groups and women. Our doctoral requirements for faculty will be waived for candidates who qualify under the affirmative-action criteria."

Letters between departments now read: "College has a vacancy in its . . . Department. . . . We desire to appoint a black or Chicano, preferably female.

"I should very much appreciate it if you could indicate which of your 1972 candidates are either Negro or Mexican American."

The list of these kinds of letters can comprise a textbook. While women are often included in the affirmative-action categories, the above letters keenly illustrate a distinction between minority and majority group women. Preference is given to minority women, and the waiving of formal qualifications is not geared to help white women, for these candidates usually possess the necessary qualifications.

Now listing statements by highly influential people who determine policy, Oscar E. Shabat, the chancellor of the City Colleges of Chicago (comprising seven units), has instructed the presidents of the various colleges that race is to be the prime factor in hiring new faculty members as administrators. *Chicago Today* (March 8, 1972) further reports that at Kennedy-King College, whose faculty is already 37 percent black, Shabat has "told the president to hire 10 additional black teachers." The reader should note that the racial proportion of the staff at Kennedy-King already exceeds the general black population of the country, as well as that of the city of Chicago. (Here black demands are approaching community control.) Dr. Shabat also added that "when 52 systemwide contracts expire in July for teachers, many qualified whites will not be rehired and blacks will be sought to fill their jobs". In other words, whites, no matter how well qualified they are, will be replaced by blacks whose major qualification is the color of their skin.

At Columbia University, a memorandum written on January 20, 1972, by William T. deBary, executive vice-president for academic affairs and provost, to the deans, directors, and department heads, begins with a statement of the need (a) to demonstrate that hiring policies are in accord with the affirmative-action program of the Department of Health, Education, and Welfare, (b) to "make every effort to locate and consider women and minority groups" for openings, and (c) consequently, to state this need in all letters and communications sent to candidates and university placement bureaus. Each department is to keep a file for 18 months to provide a statistical base to serve as a record of what was done for hiring on the basis of race and sex, as mandated by HEW. Candidates are to be subdivided into five categories: black, Spanish-surnamed, Oriental, Caucasian, and other. The first two categories, it seems, are to receive preferential treatment. Further, although the memorandum urges that qualified people be sought for openings, they will not necessarily be the most qualified candidates, since race and sex are to be major considerations for hiring. Thus, even at Columbia University scholarship and excellence are being subverted under the guise of equality for all groups.

Although the practices instituted at Columbia are now common at other institutions of higher learning to meet HEW's requirements for body counts and quotas, ethnic categorization is carried to absurd and confusing extremes. For example, Seabury (1972*a*) points out that San Francisco State College now defines six racial groups to implement the affirmative-action program: (1) blacks, (2) Orientals, (3) other nonwhites, (4) persons of Mexican, Central, or South American ancestry (except those who have physical traits that resemble those of blacks, Orientals, and nonwhite races), (5) Indians, and (6) all other Caucasians or whites. As Seabury states, "All but the last category are eligible for discriminatory preference". Another of the institution's hiring policies is to make the college's nonacademic personnel ethnically mirror the population of the Bay Area.

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[3] The truth is, this person was unable to find a job at a university. In the meantime, the *Chicago Sun-Times* (September 4, 1973) points out that a black male who has not yet completed his dissertation for sociology has already received job offers from ten different universities with salaries ranging up to $20,000. This is comparable to what the average full professor (after 15 years of university experience) makes at the average institution of higher learning.

According to a letter to the editor of the *New York Times* (January 6, 1972) by four professors at Cornell, the president of the university wrote to the deans, directors, and department heads setting forth a "new and innovative program to help achieve affirmative action"; this included the hiring of "unqualified or marginally qualified people." (In other words, under the guise of innovation, Cornell was to hire unqualified people.) One week after the letter appeared in the *Times*, the directive was clarified or changed—depending on one's interpretation—that the new hiring program applied only to nonacademic personnel. But it is hard to believe that the original directive was not related to the hiring of professors and administrators, since those who received it hire for such positions.

At the State University of New York (SUNY) at Albany, one of the 72 institutions of the system, six affirmative-action memorandums were issued between August 10 and December 3, 1971, by various vice-presidents. Department heads were asked to consider anticipated vacancies through termination of contracts over a five-year period and to determine "how many of these vacancies could feasibly be allocated to minority groups." The memorandums recommended the hiring of "qualifiable" people on the basis of race and sex and "temporary preferences . . . to members of minority groups." This hiring was to be on a three-to-one ratio for professors and a "one-to-one hiring of minorities affecting all of the administrative staff." In short, these six memorandums represented clear requests for quotas, violation of the Fourteenth Amendment, and disregard of individual merit. Furthermore, they virtually forced administrators to hire on the basis of race or let essential jobs go unfilled and advocated the debasement of academic standards by the hiring of "qualifiable" people.

The SUNY story was told by the *New York Times* (March 3, 1972) and subsequently by several upstate New York papers including the Albany papers. The director of SUNY's Office of Equal Employment Opportunity tried to ameliorate matters by explaining that "none of the memos or statements were issued as policy . . . they were suggested guidelines." With twisted logic, he argued that as policy the guidelines were illegal, but as suggestions there was nothing wrong with them. He failed to point out, however, that such guidelines, written by persons in higher echelons of the university, are usually followed—at least by people who wish to maintain their jobs. Sherman (1972) points out that on April 24, 1972, SUNY issued a new statement on affirmative action which showed some improvement. It supported "the selection of the best-qualified people," but in view of HEW's pressure it maintained that "a department with a black or female candidates still has a better chance of gaining a new position or retaining a vacant one." The new statement did not call for consideration of the nonretention of qualified whites, solely to support HEW's programs, as did the first memorandum. The new statement represented a welcome concession but no guarantee that it would be followed. Sherman adds that it was a small triumph when one of the liberal assistant professors admitted that it would be unjust to terminate his contract "for the purpose of replacing him with a black person." Indeed, a liberal educator had been educated to the realities of today's perverse "equality."

For the six-month period between January and June 1972, the *Chronicle of Higher Education* (a bimonthly newspaper on higher education which also lists jobs openings at colleges and universities) indicated that for more than 25 different positions a preference for minorities was expressed. There was a greater number of ads that included the term *affimative-action employers*, often a euphemism for quota hiring; moreover, the June 5, 1972, issue advertised an "active file of 111 minority candidates available for September 1972 employment" (p. 7). And, the *American Association of University Professors Bulletin* (March 1972) cites the "Harvard University Report on Academic Tenure" about the competition to find qualified blacks and that "Havard and comparable institutions have been warned against 'raiding' black colleges in the South".

There are several court orders in the North and in the South, even in Alabama and Mississippi, which require that police, fire, and sanitation departments, as well as electrical, plumbing, construction, steel, iron, asbestos, and other labor unions, hire one black for every white or even a greater percentage of blacks than of whites until the ratio of blacks corresponds with their proportion of the population. The fact that blacks are not proportionately represented on the police force of a city may reflect the fact that, because of hostility to the police, many blacks, even if they are qualified, are reluctant to enter a career in the police department. As for blacks' inferior education and low test scores, these factors—although obvious and perhaps part of the explanation—cannot be mentioned or used as reasons for blacks' having had and continuing to have trouble passing civil service examinations.

The New York City plan gives a new twist to affirmative action. Former Mayor Lindsay initiated his own arbitrary executive order, requiring all contractors for the city to submit goals and timetables through 1977 along with their contract bids. At the same time, the city passed legislation that will give minority workers an average of 26 percent of the jobs in the construction industry by 1978. Contractors who violate the percentages or, more accurately, quotas are subject to loss of their contracts with the city. Similar executive orders are being implemented for all city jobs such as in the fire, police, and sanitation departments. What is questionable here is whether a city has the legal privilege to enact its own affirmative-action program that goes beyond the state and federal guidelines.

Revised Order No. 4, issued in April 1972, also rules that it is discriminatory to require of a new applicant qualifications any higher than those required of "the lowest-qualified incumbent." Rather than being permitted to upgrade the work force, educational, business, and other institutions are compelled by this regulation to lower the standards of performance. It opens the door to the hiring of someone who cannot meet current standards or qualifications because some incumbent was hired long ago either by some mistake or when standards were lower because of the scarcity of college-educated people, when there was a scarcity of people with advanced degrees, or when the institution was struggling for recognition. In effect, the government has applied Gresham's Law to the job sector; the result is bound to be a downgrading of quality in the professions and in the work force. Furthermore, HEW now insists that an institution "may hold certain vacancies open until such time as qualified minorities are found and considered," although such positions may not be set aside to the exclusion of nonminorities. The question is, how long can an institution keep a position vacant? Is it not easier to hire someone who is unqualified, one who will meet the guidelines of the federal government, than to explain why someone could not be found? Does this posture not lead to the exclusion of nonminorities, and especially white males? In effect, the government requires that "qualifiable" minorities, not the most qualified persons, be hired and promoted to meet suggested goals and timetables. Revised Executive Order No. 11246, issued in October 1972, now mandates this to all federal contractors and employers. [b]

The absurdity of the quotas is evidenced by the orders issued to the National Guard in North Dakota. Federal government officials told the guard it had to recruit 20 blacks to balance its membership racially, although there are only 20 eligible blacks in the entire state. The general in command of the guard in North Dakota provided the following census breakdown. There are 2,496 blacks living in the state, and 2,346 are members of the armed forces. Active military personnel would seem unlikely candidates for the guard. This leaves 150 blacks: 60 are women, 40 are under 18 or over 45 years of age, and 30 are college students from other states with little interest in enlisting in the National Guard in North Dakota for six years. This leaves 20 eligible blacks, some of whom are physically unfit. Officials in Washington had studied the 1970 census to determine what proportion of blacks the state guard should have. They had come up with the figure of 20, although the general calculated the figure to be less than one person, as shown above. Said the *New York Times* (March 4, 1973), "this is further proof that Washington bureaucrats . . . know little if anything about life beyond the Potomac River."

As Rabb (1972) points out, the government has forced institutions to substitute quotas for achievement and competition. To argue that the minorities will be "qualified" is to evade the issue and fail to admit that "qualifiable" connotes something quite different from qualified. The inescapable assumption of this ascriptive approach, of what turns out to be a quota, is that minorities and especially blacks cannot compete, even with a competitive margin. "The proposers of such a quota system are calling, then, for a social welfare program, pure and simple, which indeed should not be considered performance-connected." And Seligman (1973) quotes a number of blacks who are growing uneasy about the idea of hiring less-qualified minority-group members. "It puts the 'less qualified' stamp on the minorities you do hire," many of whom are qualified. There is the growing feeling among employees of those institutions and businesses that hire or promote blacks that capabilities did not enter into the hiring decisions. Questions concerning the qualifications of the person who was hired will occur to the white applicants who did not get the job, to the customers who deal with the black employee, to the student who is taught by the black professor, and, of course to the black person himself. In effect, one aspect of reverse discrimination is that it makes both the white and the black persons involved feel that members of minority groups do not have the same abilities as whites and are not able to make it on their own.

Concerning quotas, Seabury (1972*b*) points out that, once they are established as an institutional practice, quotas are quite likely to be perpetuated for obvious reasons, that is, custom and pressure by the groups who benefit. For a complex society like our own, which depends on the skills of individuals composing it, the end result is mediocrity and a downward trend in our standard of living. We want tests that predict learning and show achievement levels and aptitude to perform jobs, yet such tests are being abandoned by schools, colleges, civil service, and private industry because of pressure from the black community and affirmative-action programs.

We want qualified students to go to college and universities, who can read, write, and calculate with a reasonable degree of proficiency; otherwise, there is a simple downward regression to the mean in standards and grading and the college diploma becomes meaningless for most graduates and highly suspect for minorities, including those who are able students. Yet most institutions of higher learning have adopted informal quotas for minorities, including many prestigious institutions such as Harvard, Princeton, Yale, and Michigan State. In Scholastic Aptitude Test (undergraduate) scores and Graduate Record Examination (graduate) scores for entering minorities, the great majority who are black are now often in the lowest 25 percentile on a national level, thus taking away a seat from an individual that would normally require a 90 or higher percentile range. Kilson (1973), the black economist, summarizes the whole situation at Harvard and other prestigious colleges as "irresponsible."

In line with this new policy, most colleges and universities are asking student applicants to voluntarily respond to a supplementary "civil rights questionnaire," where the applicant checks if he belongs to a minority group or is a Caucasian American. Here we can assume that a minority applicant gladly fills in the questionnaire—almost guaranteeing himself admission into a college or university. It is usually taken for granted that the individual who does not volunteer the information is white. Other admission forms now require the applicant to check an appropriate racial category, and many even require a photograph—a return to the pre-1954 Brown decision, only almost in reverse—to limit whites.

Admission into college and universities is seemingly guaranteed to minorities, despite academic qualifications. The U.S. Office of Education has established separate test norms for blacks, Spanish-speaking, and other designated minorities and another norm for the rest of the student population. Instead of outlawing tests for schools, which the Supreme Court did with tests for jobs, the USOE has devised a dual system whereby a black student who reads as well as other minority students of his age group is considered to be a "normal" or "average" reader. To put it in a different way, the black student who reads 3½ years behind his white counterpart at the twelfth grade (as purported by the Coleman report) is considered to be a "normal" or "average" reader. Although the USOE aims their action at the public schools and justifies their action on the basis of tests being unfair to minorities (notice they do not consider disadvantaged white populations or first generation students from Europe who have langauge problems), this approach now implies that universities will have no excuse not to admit minority students who have trouble reading, writing, or doing basic mathematics problems. Both the *New York Times* (September 9, 1973) and Shanker (1973*a*) point out that public schools across the country are acquiescing to this dual testing program, a program which will justify two racial learning standards because of fear of losing federal funds. At the present, one exception is District 19 in New York City, which refused to go along with the USOE and has been punished by the federal office and has had withheld its $964,000 in annual federal funds. The handwriting is on the wall for colleges and universities who refuse to honor these dual standards; they too can be threatened by loss of federal monies. [c]

We do want a qualified surgeon when we need an operation, yet there are now hard quotas in medical schools—seats reserved not for the most qualified applicants but for the most qualified minorities.[3] We want a skilled lawyer when we are in trouble, yet there are hard quotas for candidates applying to law school.[4] We want a plane serviced by skilled mechanics and flown by a skilled pilot when we travel by air, yet the airlines are under pressure and are hiring their share of minorities in all jobs at all levels and are upgrading minorities on the job. In universities we want high standards of scholarship and excellence, yet there quotas are pervasive and professorial positions are filled not with the most-qualified people but rather with "qualifiable" persons and some whose qualifications may be equal only to those of the lowest-qualified incumbent.

Despite all our legal, moral, and ethical talk about the need for affirmative action, it takes many years to educate and create qualified doctors, lawyers, professors, industrial executives, etc., of any color, and no increased federal pressure and no increased demand are going to increase the supply immediately unless we wish to lower standards. In effect, in the eyes and minds of many people, we are making "black" synonymous with "substandard." Within a few years people will really ask themselves and others, "How did the person get the job? Besides belonging to minority status, does he have any legitimate qualifications?" According to Seabury (1972*b*), "Our existence places us at the mercy of persons often invisible to us, who are certified for their qualifications." Although we may argue about how skills are elicited and measured, "we can hardly argue that certain people are more skilled and equal in given jobs than other people." But there are those among us who argue for equal results rather than equal opportunity for minorities and do injustice to the criterion of excellence. Those who accept this argument and its "spreading influence may well constitute the single greatest threat to the quality of our lives today".

Mayer (1973) contends that when students are admitted to colleges, medical schools, law schools, and engineering schools by open admissions or quotas, immense differences will soon begin to appear in a large number of difficult jobs. [d] And Ravitch (1973) maintains that social science has not found a way "to make those who are dumb, lazy, and unambitious win equal rewards in a fair competition with people who are smart, ambitious, and talented" (p. 88). But it seems that the government has found a way to do so, by abolishing fair competition and standardized tests for employment and by establishing separate test norms for minority and nonminority students. The government is ensuring equal employment and equal "success" for all groups and an egalitarian society through affirmative-action programs. But the goal is not the desire to promote equal opportunity but a political philosophy of equal results which, according to Ravitch, "requires not only efforts to upgrade those who are unequal below the median, but also active steps to level-down those who are unequal above the median."

In a society built in correspondence with this philosophy, almost anyone who displays talent or brilliance and is white (white females are still discriminated against in favor of nonwhite females) is frozen in his position or sent to the end of the line to make room for a minority person. In effect, the white person is penalized for his abilities because of his color. In contrast to equal opportunity, which encourages competition and excellence, equal results discourages competition and ability and leads to reverse discrimination. Indeed, this is perhaps the only time in the history of a democratic society anywhere in the world when the majority has been discriminated against for the sake of the minority. It is perhaps the only time in history that a society has been told that reverse discrimination is an acceptable method of employment.

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[3] Shephard (1972) indicates that in 1971, 79 out of 101 medical schools reported that admission requirements were being lowered to admit additional racial minorities; more women also were admitted into medical schools. Yet I would conjecture that the requirements for white women were similar to those for white males.

[4] The Committee on Academic Nondiscrimination and Integrity (1972) cites a recent study by the Association of American Law Schools, reporting that all but 2 of 50 law schools surveyed indicate preferential treatment toward racial minorities.

As an example of a medical school's effort to reach this new "goal," the *Village Voice* (August 31, 1972) indicates that the University of Illinois Medical School has reserved 60 out of 300 places in its incoming class for minorities. A similar example, of a law school, is Stanford University, which virtually guaranteed admission in 1972 to any minority student whose grade-point average was not below that of the lowest-scoring Anglo in the 1971 class and whose Law School Admission Test score was within 50 points of that of the weakest student in the previous entering class

By the time this book is published, these statistics will be outdated, and we can expect quotas on a nationwide basis to have snowballed and to be apparent even to many college students attempting to gain admission to professional schools even though they may not be aware of the term *affirmative action* and what it affirms.

According to the Committee on Academic Nondiscrimination and Integrity (1972), these targets and goals—in effect, what has boiled down to quotas and reverse racism—are "defended as compensating for past injustices," yet we fail to recognize that "they only perpetuate injustice." Goodman (1972) points out that in a recent court case in Minnesota dealing with firemen, a dissenting judge argued that the plaintiffs seeking employment could not show how they were ever denied employment in favor of less-qualified whites. Furthermore, past racial discrimination against blacks did "not justify racial discrimination against white applicants."

The right to be free from discrimination is an individual right, as the Supreme Court has continually stated; it is not a right delegated to a broad mass or group, and it should not be abridged on the basis of a person's race. Justice for one group is utterly meaningless if it requires injustice toward another group. It is essential to outlaw all forms of discrimination, but not by promoting discrimination against other persons. The whole principle of reverse discrimination denies the basic American principle that an individual's advancement depends on his qualifications and not on his heredity.

"If quotas are justified for one group, why are they not justified for other groups?" ask white ethnics who have been discriminated against in the job sector. We can stretch our imagination and claim that quotas should be justified for registered Republicans at universities, since so few of them teach in institutions of higher learning, or for Poles, Greeks, and various Slavic groups as well as Catholics, since they also are underrepresented in universities. Since Jews are underrepresented in trade unions, banking, and insurance, why can't we have quotas for Jews in these fields? Since homosexuals are underrepresented in almost all phases of the economy, why shouldn't we have quotas for them, too? Since in proportion to the national population the number of blacks far exceeds that of whites in basketball, baseball, boxing, and parts of the entertainment industry, why shouldn't we use the principle of quotas now being applied against whites in other fields and thereby limit the number of blacks in sports and entertainment until whites catch up? If we can hire marginally qualified university professors because they are black, why can't we hire marginally qualified basketball players because they are white?

If illegal quotas are camouflaged and continued as goals and timetables in affirmative-action programs, what is to prevent any well-organized group from demanding its full share of quotas? Indeed, we already hear rumblings of "Irish Power," "Italian Power," "Polish Power," and the like. What is to prevent the majority from availing itself of precedents established by affirmative-action programs? Rather than continuing to polarize this country, rather than continuing to create bitterness and hostility among the majority groups who now feel discriminated against and argue that the government has overlooked their needs and concerns and favors only blacks, we need to implement a viable program of equal opportunity.

Such a program would consist of enforcing laws against discriminatory practices but would clearly safeguard against reverse discrimination. Quantitative measures must be used to establish some kind of criteria for standards, and there must be some tolerance for the fact that some groups achieve better in one area or do better in cognitive areas while others do better in psychomotor areas. The fact is, different people and different groups have different strengths, and it should not be taboo to admit that no two persons or groups are totally equal. Our policies should promote equal opportunity, with the person with the best qualifications receiving the appropriate job, not equal results, which fosters mediocrity and penalizes individuals for being talented if they belong to the wrong group.

If members of one group predominate in an area of employment, that fact is not adequate evidence of "discrimination" or "racism." Rather than proportional representation, we must consider the eligible manpower and qualifiable talent within the job market of a geographical area. For example, in 1972 there there were only 1,500 black Ph.D.s in the country, not all of them in higher education. It is impossible for institutions of higher learning to have an adequate representation of blacks on their staff's without lowering scholastic requirements. The fact is that only 2 percent of the engineers are black. How can an engineering firm employ a proportional representation of blacks in the city of Chicago, which is nearly 35 percent black, or in Detroit, which is nearly 50 percent black? And yet, this is what the present affirmative action suggests.

In communities and states where the black population is less than the general population, the black community and affirmative-action officials are arguing that representation should correspond with the general population, whereas in places where it exceeds the general percentage they are arguing for job representation that corresponds with the local population. This tactic must be corrected, because this overall pattern of hiring and promotion is even more unfair to whites. Furthermore, overall the black population is younger than the white population. The U.S. Riot Commission Report (1968) indicates that 45 percent of the black population are under age 18, as compared with 35 percent of the white population. About one out of every six children under age five is black and one out of every six new babies is black. This menas it is still more unfair to claim jobs in proportion to the local or general black population, since a greater percentage of blacks than of whites are young and are not looking for full-time employment.

It must also be pointed out that job applicants are at no time required to identify themselves by race, color, or nationality. No such records should be maintained by an employer or institution, yet a few bureaucrats in the federal government are breaking the government's own laws to implement affirmative action.[e] The government may have the right to enforce affirmative action, but it also must prevent abuses in such programs. Federal officials, although they seem overzealous in pressuring institutions of comply with their *illegal* quotas, do not appear to be as interested in stopping and correcting the abuses that stem from these quotas. In *Hughes* v. *Superior* (1950) it was stated that racial quotas and discrimination against an individual are unconstitutional, and this has been repeatedly upheld by the Supreme Court. Individuals who claim discrimniation as well as reverse discrimination should be permitted speedy grievance machinery. Seemingly, only claims of the former type are acted upon with any haste, especially since the Office of Civil Rights, the Equal Employment Opportunity Commission, the Office of Federal Contract Compliance, and the Department of Health, Education, and Welfare are administered mainly by the liberal-black community. In addition, affirmative-action officers at the federal government level and within individual institutions are usually members of minorities. Affirmative-action officials should be interested not only in seeing that employers comply with government regulations but also in stopping abuses brought about by government pressure and in acting upon complaints by individuals who feel injustice has been done by the policy of reverse discrimination.

In the final analysis, reverse discrimination is unconstitutional, just as any form of discrimination is unconstitutional. We can expect the legal skirmishes concerning quotas at the lower courts to eventually reach the U.S. Supreme Court. What is objectionable is not so much preferential hiring within reasonable discretion, but rigid quotas that leave little room for maneuver, and in the end are bound to be a denial of equal opportunity. Furthermore, a group of invisible bureaucrats who were never voted into office by the people and who are not accountable to the voters, should not have the right to make regulations that have the effect of laws.

It is essential that the reader understand that the Revised Executive Orders No. 4 and 11246, which have brought about affirmative action, have been decreed and interpreted by a few middle-ranking bureaucrats in the Department of Labor and its derivative organization HEW, and HEW's offshoot organizations such as the Office of Civil Rights and the Equal Employment Opportunity Commission. In particular, three bureaucrats are instrumental in devising affirmative action policies: William J. Kilberg, principal negotiator of the Labor Department's Office of Federal Contract Compliance; J. Stanley Pottinger, former director of the Office of Civil Rights; and William H. Brown III, chairman of the Equal Employment Opportunities Commission. While the original Executive Orders have constitutional precedence, pursuant to the Civil Rights Act of 1964, it is questionable if the revisions are constitutional; moreover, it is doubtful if the Act was ever intended to authorize a few middle-ranking bureaucrats and their field representatives to exercise power of life and death over say General Motors, Columbia University, the International Brotherhood of Electrical Workers, or the entire civil service: city, state, and federal.

Both OCR and EEOC officials are using guidelines set forth in a document dealing with construction companies in Philadelphia—where there were specific problems of hiring minorities—and have transferred the guidelines from one specific situation to just about all industries and institutions across the country. This is incredible. They have taken a plan which was devised for a relatively uneducated pool of people and have proclaimed that the same percentage of minorities must be available in other fields such as the university, medical and legal professions, industry, skilled unions, civil service, etc.—and if they are not available, standards must be lowered to meet appropriate body counts, and tests for jobs and admission into professional schools cannot be applied because they tend to be used to maintain standards.

Advocates of affirmative action try to tell the critics that "affirmative-action goals are usually arrived at through collaboration between government and private parties, while quotas are imposed arbitrarily upon the employer." If what is going on between government and the various institutions is "collaboration," then what will happen when duress is used? The fact is, schools, universities, businesses, unions, etc., are being bullied into compliance under the threat of court suits and loss of federal contracts and federal funds.

The most fascinating aspect of affirmative action is that the concept of what are reasonable goals and timetables continuously changes, thus putting the investigated institution always on the defensive and at the mercy of the whims of the overzealous bureaucrats who search for evidence. According to Senator James Buckley (1973) of New York and Seabury (1972*a*), these field bureaucrats may reject goals and time tables at any time, giving the institution 30-day notice for swift rectification, even though no charges of discrimination have been filed. Innocence must be quickly proven, or acceptable means of rectification devised. The findings are not based on qualitative available manpower figures, but rather on quantitative figures with the assumption that if the number of minorities does not correspond with population figures, the specific institution has practiced past discrimination (*New York Times*, September 23, 1973). That there are a limited number of minorities in certain jobs does not necessarily reflect the institution's past discrimination, but more accurately reflects the pool of available qualified minorities. (Again, if in 1972 there were only 1,500 black Ph.D.s in the country, how can we reasonably expect all the universities to employ their share of blacks?)

The bureaucrats claim the right to search for evidence and investigate personnel files. In the past, institutions have denied the FBI and other governmental agencies access to these files. Liberals have always argued that this form of investigation approaches totalitarianism, but with millions of dollars at stake either in lawsuits or in the loss of federal monies, administrators are now literally afraid to say no. Employees, workers, and faculty members remain silent, and the fear of being denounced as a "racist" pervades. While the country remains in an uproar over the ransacking of Watergate, the people are silent about the ransacking of personnel files where job classifications are grouped according to racial and sexual counts. Under the guise of justice, we have permitted an illegal policy—a reverse South African policy—to suddenly erupt where individuals are either visually identified by race or voluntarily fill out policy forms of racial designation.

In no way do affirmative-action officials use the terms quotas or reverse discrimination; rather they rely on timetables and goals. Therefore, they argue that the critics are wrong in charging that affirmative action is a quota system or a form of racism. HEW bureaucrats know that they will lose their case if they use a quota system or the notion that we can rectify past injustices toward innocent victims by present injustices toward innocent victims (Seaburry 1972*a*). Nevertheless, the thrust of affirmative action and the fears of administrators in schools, universities, private industry, the unions, and civil service are real (and in part illustrated by the above letters and policy statements). The thrust of goals and timetables have the effect, if not the purpose, of strict quotas and reverse discrimination (Buckley 1973).

The absurdity of this policy is self-evident: it is worse than absurd, it is designed to accomplish a vicious, inherently discrminatory policy toward the majority populace. It mocks everything that the civil rights movement has sought to accomplish in the past; it applies one set of rules for one group and another set of rules for another group, it is based on a standard of advancement based on heredity and color, and it discriminates against many people who have had no part in discriminating in the past. The whole policy penalizes individual excellence and is based on rewarding and producing mediocrity.[f]

When we reflect on this trend, we realize that justice is not found by some mathematical formula, but rather on some more humble process in which people correct their prejudices and consider the rights of others. As Frankel (1973) asserts, some of us may think this new policy is just, but "we can be fairly sure that what we have found will only have a temporary validity" (p. 61). In the meantime, the silent majority should seriously consider becoming a little more active and vocal in voicing their complaints to their congressmen. If the people were given a chance to vote on affirmative action, it is highly probable that what it affirms would be overwhelmingly defeated. And, if people had the guts to throw body count compliance questionnaires in the waste paper basket and file counter lawsuits and injunctions against interpretations of the Revised Executive Orders, the laws that were originally designed to protect individual rights and due process might be reapplied. If people claimed they were of minority status, and let the institution make their own interpretations, just think of what might happen to affirmative action.[g]

Surely there is a need to deal with a greater sense of reality. Who is supposed to share the blame for past injustices, or for that matter can we accurately determine who should be penalized? What is the minority pool of skills and talents? How can it be increased? What is the present trade-off between increasing minority employment and decreasing efficiency? Are all women included in affirmative action, or does it mainly apply to minority women? Where do the benefits of civil rights enforcement begin to fall off and lead to abuses toward the majority population? When do the arbitrary interpretations of a few unelected bureaucrats become a matter for the people to check?

COMMUNITY ACTION AND FEDERAL SPENDING: WHO BENEFITS?

The War on Poverty and its various social and community action programs, was launched in 1964 under an umbrella agency called the Office of Economic Opportunity (OEO). The OEO started with a $1.5 billion (1963 fiscal year) budget and dispensed funds rapidly without any real knowledge or evidence that what it was doing made sense or would work to improve the conditions of the target population, the poor. As Glazer (1972*a*) and Green (1972*a*) point out, the object was to spend the money for purposes for which the Congress had appropriated it, regardless of whether the programs were plausible or viable. Officials felt obligated to spend all the money appropriated down to the last penny. It was the expense-account syndrome: "You know your boss won't increase your expense allotment unless you spend every bit of this year's budget."

It was only later that people in Washington began to question the results of these programs. Evenutally, there was a realization that no one Nixon pointed out these programs had not worked, and in his budget message he claimed that these programs were "poorly conceived and hastily put together." At another level, however, the budget with its cuts in social welfare programs was proclaimed by liberals and blacks to be directed against the nation's poor.

It did not matter that these programs did not work; various interest groups (and a few other naive individuals who are seemingly influenced by catchy slogans) were shocked and angered. They ignored the fact that Nixon had increased spending for Head Start, food stamps, civil rights legislation, loans to minority businessmen, implementation of new laws against discrimination, social security benefits, welfare payments, and unemployment insurance. They also ignored the fact that revenue sharing was actually geared to making up indirectly many of the cuts in direct federal spending for community action programs.

The new efforts to shift responsibility to local government might be perhaps considered "counterrevolutionary" if the cities were supposed to finance the programs. According to Banfield (1973), the 1974 budget proposes to give states and cities more federal aid than they received in previous years. The new revenue sharing may represent "a facing of the fact, obvious in the Johnson administration but not faced by it, that federal programs have become too many and too complex to be administered from Washington" (p. 34). Granted, it might take city governments one or two years to make appropriate adjustments, but in the meantime many of the community action programs can still be financed under specific grants. Some community action programs are threatened, true, but this is probably for the good, claims Glazer (1973), since they did not solve the problems of poverty and often encouraged antisocial behavior.

The fact is, it is difficult to determine exactly how the residents of poor communities benefited from most of the old programs. This does not really seem to be the major concern of most of the liberal-black community, especially the militants. They have managed to mobilize public opinion against program cutbacks by creating false impressions and demanding "reform." And as the rhetoric for "reform" continues, it is often those with the loudest voices, rather than those with the most compelling needs, who are heard. Despite the loudness and the shouting of demands, perhaps with revenue sharing some of the silent poor groups (which local governments are often more aware of than is the federal government) may finally get some money for community plans.

CONCLUSION

In the early 1960s, the liberals successfully advanced the War on Poverty and various social programs. Subsequently, local antipoverty and community groups entered into the political arena to advance their own special interests. Most of these groups were connected with the civil rights movement; but as the white liberals faded from the picture, the groups became more militant, more assured, and less willing to compromise and to work within the democratic process. In the mid-1960s, community control exploded in the New York City schools and the theoretical idea spread across the nation with full impact in Detroit. Again liberals espoused this new "wisdom"; and as black militants entered this movement, white teachers and administrators became the new casualties.

Both community action and community control are linked to the black power movement. Traditional democratic methods envisioned by early liberals in the War on Poverty and in the school arena were rejected by black militants because, they claimed, such methods had failed in the past. They argued that blacks had to organize themselves and exert their own power. Rather than work within the system, black militants regarded it as illegitimate so long as whites were involved in educating or providing services to blacks. One black caucus after another asserted that integration was no longer viable to the black community and that whites were no longer wanted in black schools and communities. Conflict and confrontation—boycotting, demonstrations, picketing, physical assault, and violence—became the main weapons of those advocating community control and community action programs. These programs survived with Nixon, but barely, and some people are finally beginning to admit that many social programs did not do what was promised, just as we are discovering that "participatory democracy" in the schools is neither participatory nor democracy.

POSTSCRIPT

a. Despite the surplus of available candidates, the 1973 issues of the *Chronicle* bulge with more than 200 "position available" notices per issue. The norm is now to include the words "equal opportunity employer" and/or "affirmative-action employer." Minorities are specified to apply. Prior to 1970 this would connote a color-blind, nondiscriminatory practice; today, it means a color-consciousness, discriminatory practice in reverse. In one issue after another (e.g., June 4, October 1, October 15, November 5, November 12, 1973), the *Chronicle* reports that university professors across the country are unionizing to protect their jobs, and authors link this trend with affirmative-action policies and the overall employment trends. Qualified individuals without tenure find their jobs in jeopardy, and themselves unable to find employment elsewhere in their fields, in order to make room for individuals defined by the government as minority-group members.

Perhaps one of the most enlightening issues of the *Chronicle* is the October 23, 1973 issue, where it is reported that black professors accuse middle-class white women as being aggressive and deflecting attention away from correcting racism. There are countercharges by white women that so few blacks have the formal credentials for faculty appointments, and those that are qualified (and even qualifiable) are immediately hired and able to command higher salaries than their white male or female counterparts because of supply and demand. In this connection (although not mentioned in the above controversy), some racial minorities are considered more "minority" than others; that is, preference is given to some minority groups in comparison to others also defined by the government for special consideration. The difference usually coincides with local political power and the minority background of local compliance officers.

b. In its Sunday Midwest employment section, the *Chicago Tribune* (December 2, 1972) reports a similar dispute taking place between blacks and white women in the business and industrial job sector. Racial minorities blame the women's movement for taking away their jobs, and white women are claiming that they lose out in the job market "because the hiring of minorities make companies look good." Both sides contend that the other group will profit more from affirmative action.

In the meantime, the 1973 winter issue of *Business and Society Review* indicates that minorities and women are being advanced to desirable jobs in corporations on a quota system, not on merit. Corporation executives sense backlash and low morale and warn against declining production. Jules Cohn, author of the *Review* article, maintains that unrealistic affirmative-action plans will add to employee frustration. The plans must be based on realistic manpower needs and available labor markets. Those who are not members of protected groups should have access to grievance procedures and promotions should be based on merit.

c. There is now new evidence of imposed racism attached to federal funding. School districts across the country which are in the process of applying for the Emergency School Assistance Act (ESAA) are required for the granting of funds to create an advisory committee composed of teachers, community or civic representatives, and parents. The creation of such a committee is not unusual, as Albert Shankerf points out in the *New York Times* (November 25, 1973), but they are different in that they call for racial quotas with respect to committee membership and specifically to teacher representation. "Minority" representation is defined in accordance with HEW's own definition.

Rather than work at racial harmony, the U.S. Office of Education (an agency within HEW) is surveying 30,000 fourth and fifth grade students in 183 schools in 95 school districts receiving ESAA funds. The first question of the new "Elementary School Questionnaire" asks if the respondent is "Black" . . . "White" . . . or "Brown." Among the questions that follow are "How do you think your parents feel about Black and White students going to the school together?" "How do you think your teacher feels about Black and White students going to the same school together?" "Do you think Black students in this school cause more trouble than other kinds of students?" "Do you think White teachers in this school are unfair to students who are not White?" (Each of these questions are repated with black-white, brown-white, and black-brown combinations.)

The USOE defends this questionnaire and also claims that if parents object, their children may be excused from answering the questions. This is a dishonest reply, since the students were surveyed in late 1973 with the accompanying directive that they answer them immediately. Moreover, HEW's action in stripping District 19 in New York of almost 1 million dollars for refusal to cooperate in its testing program, combined with the federal government's mandates on affirmative action which are tied to federal monies, makes the schools afraid to resist because of the possibility of losing much-needed funds.

d. In November 1973, the U.S. Supreme Court agreed to consider the *De Funis* case; this should have far reaching implictaions for college admission quotas. With a near "A" average and a *magna cum laude* graduate of the University of Washington, De Funis applied to the School of Law in September 1971. He was rejected, but he discovered that 38 other applicants, all racial minorities with worse grades and lower Law School Admission Test (LSAT) scores were accepted. The University's rationale was that preferential treatment was being given to minority groups. The Washington Superior Court ruled in favor of De Funis, and he was admitted into law school. The University appealed to the State Supreme Court which reversed the decision, ruling that the law school had the right to consider race as a special factor in admitting minority students and acknowledging that more qualified white applicants would be displaced. In an angry dissent, James B. Wilson asserted: "Racial bigotry, prejudice, and intolerance will never be ended by exalting the political rights of one group or class over another . . . . The circle of inequality cannot be broken by shifting the inequities from one man to his neighbor." And if this author may add, the kind of reverse discrimination being urged by social reformers unjustly penalizes innocent individuals who bear no responsibility for historical wrongdoing.

Furthermore, while most minorities are "disadvantaged," many are not, nor are all whites "advantaged." Power politics prevents us from making this distinction. If white women can claim victimization, why can't they claim it on standardized tests and college admissions? Why can't other groups who have suffered from discrimination claim the right of preferential treatment? Why can't white ethnics who speak in a foreign language at home claim that tests are biased against them? The perils of contagion are manifest. *The Chicago Daily News* (November 26, 1973) reports that the Polish American Committee claim discrimination in educational and employment opportunities and are filing charges with the EEOC.

By lowering our college admission standards, we are bound to have a regression of standards downward to the mean. And as Martin Kilson asserts in the November 1973 issue of *Change* magazine and Thomas Sowell points out in *Black Education*, there is a double standard in grading blacks and whites in institutions of higher learning. This double standard predominates in *all* levels and areas of higher education, just as it predominates in nearly all sectors of the job market. Students quickly perceive the benefits of this new grading system, and it is bound to affect their self-esteem, not to mention the impact it has on students who graduate without favoritism. Thus, graduation does not guarantee equality of academic outcomes and professional competence. Those who benefit from the less vigorous testing scale often must compete on professional licensing examinations with those who were not favored. The NAACP, combined with black militant pressure and the politics of the courts, have either eliminated or watered down licensing standards and objective tests in city schools across the country. The *Griggs* court decision abolished job related examinations for blacks in all sectors of the economy.

At the present, a law suit has been filed by black law-school graduates which challenges the Michigan bar examination. In 1971, 71 percent of the white candidates and 17 percent of the black candidates passed the examination. The plaintiffs claim that the test is "culturally biased" against blacks. Similarly, the National Bar Association, composed of black lawyers, has called for the abolition of the bar examination in all states for the same reason.

The claim of cultural bias has become a successful ploy to eliminate standardized and competitive examinations in school and work. It is difficult to understand what is culturally biased about solving mathematical problems, reasoning in the abstract, writing a simple sentence in formal English, or being tested on subject matter that is related to one's professional specialty. In lieu of test scores for some racial minorities, college admission officers and job personnel officers now rely on a vague and more subjective criteria: personal qualities, such as "motivation," "maturity," and "potential."

e. A new federal regulation now requires that all federal, state, and city employees be coded by ethnic and racial origin for purposes of "research" and for "affecting decisions concerning personnel with respect to . . . recruitment, assignment, and promotion." The EEOC admits that its definition of "White," "Black," "Spanish surnamed," "Asian American," American Indian, and Other are inconsistent with anthropological data, but it contends that the definitions and coded classifications are "now . . . necessary and appropriate." The Third Reich (and more recently South Africa) also claimed that it was compelled to implement governmental classifications of people according to its own definition of ethnic and racial origin.

f. A balance must be struck between groups who claim preferential treatment and the entitlements of individuals who belong to groups in our society who are not favored, nor permitted special privileges, nor provided with legal counsel and support of civil rights organizations and federal compliance agencies; these individuals are entitled to their rights and opportunities, too. While group interests today supersede individual rights, the concept of group rights is antithetical to the Constitution. If the nation is to prosper, individual merit, measured as objectively as possible, must be reimplemented. The past clearly shows that discrimination does not work, nor does it result in social harmony. A double standard in society, especially where the majority must suffer, cannot work for long and can lead to political upheaval.

g. There are no easy solutions to this problem. While efforts should be made to recruit and promote *qualified* people from diversified backgrounds, we must recognize that it is impossible to bestow instant competency on anybody. While special efforts should be made to identify qualified individuals of minority status, and other programs are needed to assist potentially qualifiable minorities to become qualified, essential prerequisits and criteria for diplomas and jobs cannot be dropped for an extended time without social repercussions and a decline in economic growth. Being unable to test for competency and ability because of the ploy of "cultural bias" is at best well meaningful and illogical, but in reality, highly political. Indeed, the present use of numerical goals vs. body counts is not the main issue; neither policy should be permitted to make the growing danger of a *de facto* system of quotas or incompetency. Individuals need to write to their Congressmen in Washington stating their position in their own words; they need to place ads in newspapers to mobilize grass roots action campaigns; and organized groups need to bring the issue to the attention of the voting public, to seek a referendum, and to find out where candidates for office stand on the issue of reverse discrimination. While expanding educational and economic opportunities for individuals of *all* groups is a long-range goal, thus diminishing the intense competition for scarce existing opportunities, a short range goal includes a workable coalitional strategy that is multi-ethnic and bi-sexual.

In 1960, John Gardner, in his classic book on Excellence, raised the question whether a society can strive for equality and excellence. No society yet had solved it. The book, although widely read, did not have a major impact: Gardner had raised the question ten years too early. Today, it has become a crucial issue, with equality transforming into equal results imposed by goals or quotas (call it what you want, depending on your own politics). Indeed, there is tension between the ideal of equality and that of maintaining excellence. Slacken standards, and we are bound to get poorer quality. Limit one's definition of excellence to intellectual areas, and we limit the ideal of equality. But the more we eliminate or even diminish the importance of intellect, the greater the danger of decline and of stretching the tension wire that snaps society altogether.

THE UNIVERSITY OF IOWA,
Iowa City, Iowa, August 15, 1974.

Hon. JAMES G. O'HARA,
Chairman, House Special Subcommittee on Education, Rayburn Office Building, Washington, D.C.

DEAR REPRESENTATIVE O'HARA: The August 9, 1974 newsletter of the American Council on Education indicates that your Committee is conducting hearings on the implementation of affirmative action programs in colleges and universities. I am very glad to learn that your Committee is conducting these hearings. They are needed.

As one who has protested to HEW about the implementation of the affirmative action program, I should like to convey to you my concerns about HEW's insistence on numerical goals for the employment of members of minority groups and females. Despite everything which may be said to the contrary, these numerical goals are very easily translated into quotas. I am convinced that at a goodly number of institutions numerical goals have become quotas for all practical purposes.

The basic problem is that HEW does not seem to understand the unique nature of the problem involved in the hiring of college and university faculty members. Our goal is, and has been, to employ the best available person, regardless of race, color, religion, or national origin. Furthermore, we operate in a market where the supply of highly qualified persons is limited. A university such as the University of Iowa can fill almost any position on very short notice—if only minimum qualifications are required. The problem is to find the person who has the rare creative and scholarly qualities to function as a truly effective faculty member. To have numerical goals or quotas imposed by an agency such as HEW means that in the long run quality will be sacrificed for the sake of making one's statistics "look good" to HEW.

I would have no objection to a program which would call for "best estimates" of what an institution can accomplish over a period of years. These estimates can take into account the availability of properly qualified individuals in the various teaching fields. (There are very few highly qualified women and minority group persons in certain fields.) Furthermore, if evidence can be gathered to show that an institution is not really appointing the best available person to a vacancy, then I would agree that the appropriate agency should call that institution to task. But to threaten institutions with loss of federal funds unless certain quotas are established is, in my judgment, an outrageous example of unnecessary interference on the part of a federal bureaucracy in the life of a college or university. Some of this has already happened and threats have been made of more of this sort of thing in the future.

I wish to make my position perfectly clear. I support the goals of affirmative action and feel that I have always done so. But when an agency steps in to insist that certain numbers of people who are members of certain groups must be hired, or else, then I believe it is time to protest as I have done in the past and shall continue to do in the future.

I sincerely hope that as a result of your hearings, HEW will be instructed to substitute "best estimates" (of what can be accomplished) for numerical goals and that there be reaffirmation of the principle that colleges and universities must be free to appoint the best available person to each faculty position regardless of the "group" to which the individual may happen to belong.

Thank you for your attention to this letter.

Sincerely yours,

DEWEY B. STUIT, *Dean.*

THE UNIVERSITY OF ROCHESTER,
Rochester, N.Y., August 19, 1974.

Hon. JAMES G. O'HARA,
Chairman, House Special Subcommittee on Education, Congress of the United States, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN O'HARA: The August 9, 1974, issue of the American Council on Education's "Higher Education and National Affairs" reported the testimony of John H. Powell, Chairman of the Equal Employment Opportunity Commission, in part as follows: "in the area of education, there is still a lot of resistance" [to ending job discrimination]. The concept that institutions of higher education are above or at least not in the same relationship to the rest of society is shared by a large segment of the population, and by most institutions of higher education as well. This view is frequently held, notwithstanding glaring realities to the contrary."

If Mr. Powell has been quoted accurately by the publication, the impression I draw from his statement is that he believes that institutions of higher education consider themselves above the laws and regulations prohibiting discrimination in the services provided students and in the employment of faculty and staff. If that is the correct interpretation of Mr. Powell's testimony, I believe he has misjudged institutions of higher education in this country.

My responsibility at the University of Rochester includes both serving as the institution's affirmative action officer for academic employment and supervising our office of Admissions. With regard to making educational opportunities available to minorities and women, the University of Rochester had undertaken substantial special efforts before the existence of Title IX. Using its own resources, the University established an educational opportunity program which not only sought to encourage applications from minorities to the University but also provided special remedial programs for students who came from disadvantaged educational backgrounds but who showed the basic abilities and motivation to benefit from the high equality education available at the University of Rochester.

In the area of affirmative action, the University of Rochester promptly met its obligations to develop an affirmative action program and to carry out that program vigorously. Our difficulty with the government agencies responsible for administering that program resulted not from any lack of enthusiastic support on our part for its objectives, but rather from our inability to convey to governmental agencies the special aspects of recruiting faculty in a research university. The scarcity of minorities who have qualifications for appointments in research universities, the high degree of specialization in appointments to faculties, and the great amount of decentralization in recruitment and appointment decisions are factors which differentiate the recruitment of faculties in research universities from recruitment of employees in a typical industrial firm. The governmental agency with which we had experience in reviewing affirmative action programs has had difficulty in adapting its administration of the program to these differences. It has also been difficult to convince the agency of the importance of a salary policy based on merit rather than a fixed rate structure.

I want to assure your Subcommittee that the University of Rochester heartily subscribes to the goal of equal opportunity both in education and employment. The excellence of a university depends centrally upon the excellence of its faculty and supporting staff. That excellence cannot be achieved if we deny ourselves access to outstanding people because of race, religion, or sex. Moreover, the central goal of a university is the greatest possible development of the individual. An institution which so concentrates on individual achievement can hardly subscribe to discrimination based on group stereotypes.

Sincerely yours,

ROBERT R. FRANCE.

STATE UNIVERSITY OF NEW YORK AT ALBANY,
Albany, N.Y., August, 14, 1974.

Hon. MARIO BIAGGI,
House Office Building,
Washington, D.C.

DEAR CONGRESSMAN BIAGGI: I was pleased to learn of your concern about the manner in which anti-discrimination laws are being enforced by Federal agencies in dealing with colleges and universities. Despite claims to the contrary by HEW, the Department of Labor and the Equal Employment Opportunity Commission, the haste with which a zealous group of people acted in this area is deplorable.

Having been associated with civil rights and equal opportunity efforts for many years, I regret the creation of a needless backlash by well intentioned Federal efforts. The lack of professionalism, and elementary common sense we have encountered is amazing. Contradictory rulings, barely veiled threats and the like have given ammunition to those opposed to affirmative action, and turned off some of its most ardent supporters.

All of this could have been avoided had the zealots been controlled and top administrators taken the trouble to inform themselves about the somewhat special problems of universities and colleges. As a group, we did not seek special treatment but did ask for recognition of special problems. The unions had special problems, so did industries, so our need was not unique. Instead we got harassment with predictable results.

Mr. John Powell of EEOC testified recently about the large number of charges of discrimination filed against universities. Considering the kinds of evidence Federal agencies accept as supporting such charges, I would expect everyone with any kind of real or imagined grievance to take advantage of a priceless opportunity to create trouble. We stand guilty before a hearing and often are forced to compromise to avoid the threat of worse harm.

I hope that you will continue your efforts to bring some sense into this field. Some universities probably are guilty of discrimination, more may have failed to recognize bias in some of their procedures. Those situations should be remedied following due process in an atmosphere free of intimidation. As citizens, certainly we who happen to have jobs in universities are entitled to no less.

Sincerely,

CHARLES T. O'REILLY.

UNIVERSITY OF CALIFORNIA, DAVIS,
August 26, 1974.

Representative JAMES G. O'HARA,
House of Representatives,
U.S. Congress,
Washington, D.C.

REPRESENTATIVE O'HARA: I am writing to you in response to an article on page 8 of the August 19 issue of the Chronicle of Higher Education. I was particularly concerned about your statement that reverse discrimination is no more defensible than "old-fashioned, straight-forward discrimination."

The whole theory of affirmative action is to give preference to women and minorities to overcome the detrimental effects of past discrimination. That is, affirmative action is the practice of reverse discrimination. It is very different from "old-fashioned" discrimination, particularly in the following respects. First, it is temporary, to be applied only until the effects of past discrimination are overcome. Second, it is deliberate, following well constructed guidelines to achieve specific and clearly stated goals. And third, it is accomplished with reason, with care to avoid lowering of standards or diminution of quality.

In fact, "old-fashioned" discrimination and the type that is necessary to achieve affirmative action have very little in common. Reverse discrimination is not built on predjudice, is not emotionally rooted, is not going to adversely effect a whole segment of a population.

As chairman of the House Special Subcommittee on Education it is terribly important that you understand these distinctions. I hope that the quote which appeared in the Chronicle was indeed misleading.

I applaud your efforts to define the affirmative action guidelines more precisely, and dearly hope that you will succeed in fending off the watering-down pressures which no doubt confront you. The sooner we accomplish the goals of affirmative action, the sooner we can dispense with the plans.

If I can be of any assistance, please do not hesitate to call on me. I will be in Washington on September 3. Should further discussion seem fruitful, please contact my secretary, Lee Saucerman, at 916-752-6050 to make arrangements.

Yours truly,

KATHLEEN M. FISHER,
Director, Teaching Resources Center.

SEPTEMBER 10, 1974.

KATHLEEN M. FISHER,
Director, Teaching Resources Center,
University of California, Davis, Calif.

DEAR MS. FISHER: Thank you for your thoughtful letter of August 26. You have taken the time to set down your views in some detail, and I hope you won't mind if I do the same.

The quotation from the Chronicle which you repeat in your letter was quite accurate. My hearings, as you note in your letter, are intended to define affirmative action and other obligations of institutions of postsecondary education, and I am willing to wait until all the testimony is in, and all the arguments have been set forth before I come to the conclusion that affirmative action as it is practiced in higher education either is or is not correctly described as "reverse discrimination".

But if it is, and your letter starts from the proposition that it is, then I don't see how it can be distinguished, morally or legally from the kind of discrimination that has kept women and members of minority groups out of university employment.

I won't take issue with your assertions that reverse discrimination is temporary, deliberate, or undertaken for a purpose. If a thing is wrong, none of those qualities seems to me to exculpate it. I think the real root of our disagreement appears when you defend reverse discrimination on the grounds that it will not "adversely affect a whole segment of a population."

The reason I have supported civil rights legislation throughout my public life—and earlier is because I have always believed, and I believe to this day, that there are no such things as group rights. You have no rights stemming from the fact that you are a woman. I have none stemming from the fact that I am a man. Neither of us has any rights arising out of our race or religion. You and I have individual rights, because we are human beings. We have a right to be considered, as individuals, on our individual merits, for a job or for admission to a school or for whatever. It is only as individuals that we have rights, only as individuals that our rights can be violated, and only as individuals that they can be protected. The fact that a practice does or doesn't adversely affect a whole segment of the population seems to me to be a monumental irrelevancy. Does it affect Kathleen Fisher? Does it affect Jim O'Hara? That is the whole question, in my mind.

Maybe I am hopelessly out of date. Maybe we are in an era when people are first of all members of a group, first of all men or women, first of all whites or blacks or chicanos, or whatever, and that it is from that identity that their rights and responsibilities will stem. If that is where we are headed, then I am afraid that the cause I have fought for—the cause of human equality, without regard to race, sex, ethnic origin or religion, has lost a major battle.

Very truly yours,

JAMES G. O'HARA, *Chairman.*

UNIVERSITY OF CALIFORNIA, DAVIS,
September 18, 1974.

Representative JAMES G. O'HARA,
House of Representatives,
U.S. Congress, Washington, D.C.

HON. REPRESENTATIVE O'HARA: I appreciate your thoughtful reply of September 10th. I am reassured that we are in one hundred percent agreement that the basic struggle is for human rights and human equality. I think that we are also in agreement that the basic problem is *how* to achieve equal opportunity for all persons.

The philosophy that underlies affirmative action is the following. Even if we could eliminate all prejudice and discrimination immediately, there would be a strong tendency for the status quo to be maintained by lack of inertia for change. The present racial and sex imbalances in employment and in our schools would for the most part persist. Realistically, of course, we can not eliminate all discrimination and all prejudice immediately, but through a process of deliberate preferential treatment of women and ethnic minorities, we can increase the proportion of such people in many areas of human endeavor. By such positive pressures, we will gradually achieve a state of equal opportunities for all persons, a reduction in prejudice, and we will provide necessary and important role models for younger people.

Perhaps you, Congressman O'Hara, can think of a better means to achieve these goals which we both desire? But so far I have not succeeded in thinking of a better method than affirmative action, nor have I seen one proposed by others. The footdragging and empty rhetoric that characterizes current HEW efforts is appalling. Hopefully, your committee will find some means to improve the situation.

Yours truly,

KATHLEEN M. FISHER,
Director, Teaching Resources Center.

[From Change, June 1974]

THE FUTURE OF ANTIDISCRIMINATION ENFORCEMENT

(BY *George R. LaNoue*)

In higher education and elsewhere, the federal government has become the major enforcer of a wide range of antidiscrimination legislation, the scope and extent of which are only now beginning to be widely recognized. Federal agencies are spending over $100 million to make these laws stick and to create new antidiscrimination programs. But the effectiveness of these programs in higher education must be questioned.

The magnitude of the problem has led to the creation of so many enforcement mechanisms that public policy and procedures have become badly tangled. Aggrieved individuals find their cases delayed or lost in the bureaucratic maze and the accused employers often wait months for a chance to have the issue resolved. The problem exists in all sectors of society, but it is particularly acute in higher education with its complex personnel decisions.

There are now seven major avenues for someone wishing to press a charge against a college or university: (1) the Wage and Hour Division of the Department of Labor, (2) the Office of Civil Rights of the Department of Health, Education and Welfare, (3) the U.S. Equal Employment Opportunity Commission, (4) state and local fair employment commissions, (5) the federal courts, (6) the American Association of University Professors, and (7) local campus grievance procedures. Each of these avenues has certain advantages as wel as liabilities as a mechanism for resolving discrimination complaints. In my judgment, action by federal agencies will have substantially eliminated most types of systemic discrimination in higher education within the next three years. Antinepotism rules, restrictive maternity policies, exclusive old boy recruiting networks, and wage discrimination will largely disappear from all major academic institutions.

INDIVIDUAL CASES

Less institutionalized forms of discrimination, however, will be harder to root out. The academic professional employment process is so decentralized that it is quite possible to have some discriminatory and some nondiscriminatory departments within the same institution. Appropriate evaluations of academic performance are often quite difficult to make even where sex and race are not involved. Honest disagreements are commonplace, particularly if individual merit is taken seriously in the institutional reward system.

Within a few years, the preponderance of cases will concern individuals who allege discrimination in their failure to be promoted or granted tenure, and colleagues or administrators who argue that they are incompetent or lack professional distinction. These charges wil increase dramatically. Job alternatives in today's academic market, after all, are poor, and there is very little lose by not bringing a charge.

Which agencies are the most appropriate to hear such cases? If the issue is salary discrimination against women, currently the most endemic problem in higher education, it seems likely that the issue can be resolved with some dispatch by the Wage and Hour Division of the Department of Labor. Although some complex policy questions remain (i.e., to what extent may an institution reflect differences in market supply and demand in its salary structure if that has an adverse effect on women—for example, paying scientists more than language teachers), previous interpretations of the Equal Pay Act will cover most abuses. Wage and Hour can go to court if necessary to enforce its findings, but compliance usually precedes that step. The Equal Pay Act, however, applies only to salary and fringe benefit issues and only to sex discrimination. In the long run most collegiate problems wil range beyond the coverage of the Equal Pay Act.

Most attention in higher education has focused on the Office of Civil Rights (OCR)—HEW, under the authority of Executive Order 11246. That document gives HEW the power to require any university with a federal contract to employ on a nondiscriminatory basis and to institute an affirmative action plan. The sanction for failure is delay and eventual loss of federal contracts. There has been in its administration considerable confusion of policy and some serious difficulties. In fact, no contracts have been finally terminated though several have been delayed. Where an institution has engaged in systematic discrimination, contract penalties may be an appropriate sanction. But where the issue involves a single individual's tenure or promotion, the contract sanction is probably improper and unworkable. Using a cutoff of federal contract funds to a whole institution because of a disagreement about an individual grievance is like arming a police force with nuclear weapons. In punishing the guilty so many innocents would be harmed that the weapon cannot in fact be used.

That is one of the reasons why OCR agreed in the fall of 1972 to turn all individual complaints over to the Equal Employment Opportunity Commission (EEOC). EEOC enjoys a number of advantages in handling this kind of complaint. Its staff is larger. As an independent commission it is not so subject to political considerations and, unlike HEW, it has no educational programs of its own. Furthermore, the EEOC's sanction is litigation, not contract cutoffs. Litigation in this sense is more surgical. It can focus on the precise issue of discrimination and can create flexible remedies.

EEOC, however, currently suffers from a backlog of 85,000 cases (about 1,500 in higher education.) Despite the fact that it has doubled its budget in the past three years and has made many administrative improvements, some of its own planners predict a backlog of 250,000 cases by the end of this decade.

It should not come as surprise, then, that it takes an average of 32 months to settle a case. Since most higher education grievance cases are unique and complex, investigations tend to be especially time-consuming. Furthermore, the commission will soon be following a track system policy. Cases assigned to the first track—national employers with a large number of employees—will receive priority. Although EEOC will take some higher education cases to establish internal policies and judicial precedents, most academic grievances cases will not be on its priority track.

In short, EEOC and the other federal agencies will play an important role in setting policy, defining employment discrimination and in eliminating systemic problems, but it is too much to ask them to settle all of the future campus personnel conflicts where discrimination is alleged. It is not only logistically impossible but ultimately inconsistent with the interests of acadamic freedom to have federal authorities play that role.

State and local agencies are not going to be so much help, either. Although they vary in quality, the nonfederal agencies combating discrimination do not enjoy a particularly distinguished record of effectiveness, and the risk of political manipulation of campus grievances is even greater than at the federal level.

MORE FOR THE COURTS

It is inevitable that an increasing number of academic discrimination charges will be decided in the courts. In the long run, however, the courts cannot play a comprehensive monitoring role either. Litigation is costly, time-consuming, and erratic. Furthermore, courts may decline to become enmeshed in such decisions. In *Green* v. *Texas Tech*, the only academic discrimination case to reach a Federal Circuit Court of Appeals thus far, the unanimous opinion was "the findings and decisions of academic administrative bodies are to be upheld by the courts when reached by correct procedures and supported by substantial evidence."

For these and other reasons, most academics still regard the traditional academic procedures (AAUP or campus committees) as the most appropriate forum for pressing a grievance. AAUP has expanded its long-time preoccupation with academic freedom to include discrimination cases. (The number of complaints it processed increased from 550 in 1970 to 1,139 in 1973.) But AAUP is changing its role to participate more aggressively in collective bargaining. As a potential bargaining agent, it is barred from deciding grievances at campuses where other organizations represent the faculty and is not welcome in situations where collective bargaining is being considered. As AAUP becomes more aggressively "labor," it cannot maintain its honest broker image of pursuing only abstract values of academic freedom and nondiscrimination in administration/faculty conflicts.

It becomes increasingly clear that there is a need for an appeal process from the individual campus to a body that would be both competent to judge academic performance and that would also be knowledgeable about discriminatory practice and discrimination law. Here the major disciplinary associations could play a role. About 90 percent of full-time faculty are in the disciplines represented by the 20 largest associations. Individual membership varies by discipline. Most of these associations (such as the American Political Science Association and the Linguistic Society of America) possess the rudiments of a grievance procedure, but these procedures have not been well funded, staffed, or used. There is now a need for the associations to respond to the demands for settling discrimination complaints in a more structured way. Given the tight academic job market and the changing national ethic about appealing to outside authority, negative campus personnel decisions may produce as many as 20 to 200 formal grievances in the large disciplines a year. The most difficult and perhaps most frequent cases will be instances where the charging party alleges discrimination and the institution alleges insufficient performance for promotion and tenure. (Most of the current cases involve women, but a rash of reverse discrimination charges can be expected in the future.) Selected and trained members of the discipline can probably be the best judges of the merits presented by the party and the institution.

Each discipline could appoint a panel called the Academic Review Committee (ARC) that would be prepared to hear such cases. The 10 or 12 members might be on sabbatical leave, recently retired, or otherwise available. While I believe it should be the association's role to select the panel, they should not administer the system for two reasons. First, they lack the personnel and fiscal resources. Second, an association of professors could not maintain membership loyalty and still be completely objective in deciding a number of administration-faculty disputes. For that reason, the associations should nominate the panelists, but the system should be administered by the American Council on Education or some consortium of higher education associations. It should receive the funds, determine the schedule, and select the three or five ARC members for particular investigation or working teams. By separating the nomination and administration functions, neither "labor" nor "management" should feel that the system is biased.

How should the system be funded? Initially, it might be financed as a foundation experiment, but eventually the costs should be borne by the institutions themselves, perhaps supplemented by federal money. Institutions are going to have to pay for the settlement of these cases in some way, whether through litigation costs or professorial time on campus grievance cases.

JURISDICTION AND AUTHORITY

The most complex questions are not those of organization of financing, however, but of jurisdiction and authority. ARCs should accept cases only where both sides have agreed in advance to abide by the decision. At this point, if either party should renege on that agreement, it is not certain that either the federal agencies or courts would regard the agreement as binding. (The Supreme Court has ruled that neither EEOC findings nor decisions of arbitration proceedings can ultimately prevent an employee from exercising the Title VII right to final court determination.)

Nevertheless, if the ARCs develop sound procedures and carefully follow Title VII law, I think the courts will pay them great heed and ultimately merely monitor their results. The courts are not eager to invest their resources in sorting out scores of tenure decisions. Further, appeal from an ARC decision that both parties naturally sought may not be very common. A university that reneged on its agreement to accept the ARC ruling might be barred from further use of the ARC alternative and might discover that the courts are not very hospitable. The grievant, on the other hand, would probably find it too difficult to get a court to overturn the judgment of a nationally selected, trained panel of disinterested peers that decided a lack of merit rather than discrimination existed.

In short, if the ARCs are well administered and render verdicts consistent with public policy, I believe they will establish a role even without any statutory change or formal agreements. Eventually, Title VII may need to be amended to recognize this kind of alternative.

Instituting effective review committees will require some rethinking of institutional roles, and some hard decisions and compromises. But the ARC alternative offers a number of advantages. For the grievant, the ARC alternative offers a forum that ought to be quicker, cheaper, and more private than other routes. To be vindicated by one's academic peers will make restoration to a normal professional role much more likely than if the judgment is strictly governmental. For the university, a timely and efficient hearing is also advantageous. Preserving the privacy of personnel judgments and records is equally important. Utilization of the ARCs ought to reduce the federal investigatory presence on campus and keep evaluations of persons and programs out of the public record of briefs and court decisions. Too often damage is done to the reputations of persons who are not directly parties of the case but whose career records are introduced as comparative evidence.

For the disciplinary associations, the ARCs create a mechanism for protecting members' rights. These procedures can provide a focus for the associations to articulate professional standards in the light of equal employment opportunity requirements. For the government agencies, the ARCs can be a resource of much needed expertise on academic issues. To the extent that they actually settle some cases, they will reduce the backlog and permit a federal focus on systemic issues, policy development, and blue-collar problems. An entirely new body, such as the one proposed here, may be the best way to eliminate discrimination and protect academic freedom.

DePauw University,
Department of Political Science,
Greencastle, Ind., September 17, 1974.

Congressman James G. O'Hara,
Special Committee on Education,
Cannon House Office Building,
Washington, D.C.

Dear Congressman O'Hara: Thank you for your letter of September 11, 1974 inviting me to submit written testimony to your committee for the purpose of expressing my views on the question of compliance with civil rights laws and institutional eligibility for federal funds. I am pleased that Mr. Miro Todorovich of the Committee on Academic Nondiscrimination and Integrity has submitted my name as a possible witness before your special committee, or in lieu of the restricted time, to present my views in written form.

In my opinion the policy of affirmative action has many worthwhile features and it should be maintained. As specified in the Civil Rights Act of 1964 and Executive Order 11246, this policy strengthens the very worthwhile effort to broaden the recruitment process at institutions of higher education to include candidates from all kinds of minority groups and all elements of American society.

However, I believe this policy has been improperly administered by the Office of Civil Rights at the Department of Health, Education, and Welfare. This office has interpreted this law and executive order in a manner which has established quotas and/or timetables by which universities and colleges receiving federal aid must have a certain number of faculty members from a few specified minority groups. This action in turn has increased the demand for persons from these minority groups which has resulted in grossly augmented salaries and created many inequities in the salary scales at numerous institutions of higher education. It has caused the recruitment of blacks, women, Chicanos, etc., in a manner which ignores the interests and professional qualifications of white males. This policy has damaged morale and professional standards in the academic community.

I am not familiar with the specific legislation pending before your special committee on education. I frankly doubt if much new legislation is really needed to restore equality and justice in the recruitment, compensation, promotion, and tenure of faculty members at institutions of higher education. The present legislation is adequate for this purpose and upholds the basic principles of our society and our political system. What is needed, I believe, is the proper implementation of this legislation by the Department of Health, Education, and Welfare. More precise guidelines and more careful oversight of the bureaucracy involved in administering the policy of affirmative action is the most urgent need.

Sincerely yours,

FRANK C. DARLING,
Professor and Head.

STATEMENT OF JUDY BERTELSEN, PRESIDENT, INTERNATIONAL STUDIES ASSOCIATION/WEST

In the current period of retrenchment in employment in institutions of higher education, affirmative action programs are even more important than they have been in the past. If opportunities for minorities and women are to be developed, federal leadership is essential.

Despite the efforts of recent years, the attitudes of many people in positions of influence in higher education remain negative toward minority and women candidates. In many cases, different standards for appointment and promotion are applied to minority and women candidates from those applied to other professionals. Furthermore, the criteria are often stated in vague terms that allow prejudice to masquerade as evaluation of subtle professional qualities. Unless institutions are required to comply with clear and fair standards, persons in positions of academic power in many cases continue to apply capricious (and in some cases vindictive) criteria in appointment and promotion of personnel, while hiding behind the doctrine that academics are somehow above the law, above due process, and beyond question.

The Carnegie Commission report on Opportunities for Women in Higher Education (September, 1973) paints a gloomy picture, due to a wide ranging retrenchment in higher education projected for the coming 25 to 30 years. It is important that the hardships of this period not be used as a smokescreen to "explain" failure to hire and promote qualified minorities and women.

SCIENTIFIC ANALYSIS CORP.,
San Francisco, Calif., September 20, 1974.

Hon. JAMES G. O'HARA,
Chairman, Special Subcommittee on Education,
Cannon Office Building,
Washington, D.C.

DEAR CONGRESSMAN O'HARA: As Chief for the Center of the Study of Women in Society at Scientific Analysis Corporation, and as the Chairperson of the Committee on the Status of Women and Minorities for the Pacific Sociological Association, I have had some experience with why affirmative action is necessary.

It seems to me, that many valuable additions to the Educational Committee are slighted by the patterns of what might be called institutionalized racism and sexism in our institutions of education. Many persons, even with the best will in the world, do not see how their notions of appropriate teachers and professors and researchers have become confused with their notions of the roll of men and women. My own experience has been in higher education, primarily with large universities. And I have been surprised, in that context, to see how many men and even women of good will have not yet grasped the issues of sexism, of reverse discrimination, of the unwitting use of standards of excellence which do not really examine issues of excellence but differentiate between men and women.

For these reasons, I wish to submit the enclosed report on one of our affirmative action investigations at U.C. Berkeley for the record. And I would like this report to stand as the testimony from me and my committee on the way affirmative action programs have not yet been properly accepted and incorporated into the workings of even a very good university with a faculty having the best wishes in mind for their students and teachers.

I would very much like to have a copy of this report inserted in your record and also in the Congressional Record. And for this purpose I enclose two copies.

Sincerely yours,

Dr. ARLENE KAPLAN DANIELS,
Chief, Center for the Study of Women in Society, Chairperson, Committee on the Status of Women and Minorities for P.S.A., President, Sociologists for Women in Society.

Enclosure:

SCIENTIFIC ANALYSIS CORP.,
August 15, 1974.

DEAR COLLEAGUE: The enclosed report of the joint investigation by the Pacific Sociological and American Sociological Association Committees on the Status Women has been sent to you for your information. This report has already been received by appropriate officials in the sociological societies and approved for distribution. The first group to whom this report was sent after association approval was the members of the faculty and student body at UC Berkeley with whom interviews were conducted.

We are now sending the report to other officials in the California University administration, representatives in HEW and OCR, local and state government officials from this region, members of feminist organizations, and other professional organizations concerned with AAP implementation and enforcement, and, finally, members of the press concerned with issues in higher education.

If you wish any particular official or person to receive this report, we will be happy to oblige. We would also be happy to receive any comments or suggestions you may care to make.

Sincerely,

ARLENE KAPLAN DANIELS,
Chairperson, PSA Committee on the Status of Women and Minorities,
Chief, Center for the Study of Women in Society.
RACHEL KAHN-HUT,
Representative,, ASA Committee on the Status of Women in Sociology
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REPORT OF THE INVESTIGATION OF THE COMMITMENT TO AFFIRMATIVE ACTION, BY THE U.C. BERKELEY DEPARTMENT OF SOCIOLOGY, CONDUCTED BY THE JOINT COMMITTEES ON THE STATUS OF WOMEN OF THE PACIFIC SOCIOLOGICAL AND THE AMERICAN SOCIOLOGICAL ASSOCIATION

(Submitted by Rachel Kahn-Hut, San Francisco State University, representing the ASA Committee on the Status of Women in Sociology; Arlene Kaplan Daniels, Scientific Analysis Corp., chairing the PSA Committee on the Status of Women and Miniorities; Nona Glazer-Malbin, Portland State University and Solomon Kobrin, University of Southern California, PSA Committee Members)

INTRODUCTION

Early in the academic year 1973–74, a complaint charging discrimination against women and minorities in hiring practices was filed against the Department of Sociology at U.C. Berkeley by the League of Associated Women on that campus. The complaint was addressed to the chairperson of the PSA Committee on the Status of Women and Minorities, Dr. Arlene Kaplan Daniels. In an effort to establish a liaison with the parallel committee of ASA, Dr. Daniels contacted Dr. Cora B. Marrett, Chairperson of the ASA Committee on the Status of Women in Sociology, requesting a representative from that committee to aid in conducting the investigation. The purpose of this request was two-fold: 1) to develop a precedent and a format by which national and regional committees could work together on problems of common concern in the profession; 2) to follow the original mandate of the regional committee—to engage in investigations and projects at geographical distances too great (and too expensive to underwrite) for the ASA National Committee network. This first attempt at liaison was aided by the fact that a national committee member, Dr. Rachel Kahn-Hut, was located close to the investigation site.

Ideally, such investigations should be conducted by persons who do *not* live and work near the site of investigations to avoid any appearance of undue influence from or bias toward any of the parties involved. Unfortunately, since neither regional nor national organizations have yet been able to allocate funds for these investigations, these precautions cannot be taken. In this case, the committee owes much to the dedication and disinterest of Drs. Glazer-Malbin and Kobrin who made the trip and participated in the investigation entirely at their own expense.

The investigation occurred over a four-week period in March and April 1974. The major effort involved one evening of interviews with concerned parties and then a one-day visit to the campus by the entire committee. A final two days of investigation were undertaken by the two local members of the team, Drs. Kahn-Hut and Daniels, during the following three weeks. In addition, a number of telephone calls and letters were addressed to persons absent from the area but concerned in the case.

This report is divided into four parts: 1) the substance of the complaint; 2) the explanations from departmental spokesmen about why the complaints were not justified; 3) the dissenters' rebuttal; and 4) the evaluation and conclusions of the joint committee.

1. The Substance of the Complaint

On December 26, 1973, the Committee on the Status of Women and Minorities of the Pacific Sociological Association received a request to investigate hiring practices at the Department of Sociology of the University of California at Berkeley from Isabel Welsh, Coordinator for the League of Associated Women (an organization concerned with Affirmative Action at the University of California, Berkeley).

The League of Associated Women made its complaint after stating that the sociology department's own women's caucus had protested to the chancellor but had received no response from him. The core of the complaint against the department concerns secret hiring practices going counter to affirmative action guidelines. The specifics involved the disappearance of a position for a social demographer (when the Personnel Committee nominated a woman) which had been publicly advertised and the redefinition of a Chicano studies position (when the committee nominated a Chicano). The department voted not to accept the nominees of the Personnel Committee and shortly afterward hired two white men who met neither of the publicized job descriptions.

On November 29, 1973 the League of Associated Women, in a letter to Dr. Mary Lepper, Division of Higher Education, Office of Civil Rights, DHEW, charged bad faith was shown by the publication of announcements for jobs which had disappeared.

"The Department publicly (announced in Footnotes, a publication of the ASA) for a specialist in Chicano studies and a demographer under the guiding principles of equal opportunity and affirmative action hiring. This may be construed as the *public* response to the Women's Caucus protest (against the department). In the meantime, however, the Department . . . is negotiating an extra position of assistant professor (for a white male specializing in neither of the advertised fields) . . . behind the scenes and . . . on the ground of previous commitments."

The League concluded its complaint with the following statement:

". . . the professional bodies of colleagues responsible for monitoring the ethics of a profession should intervene and conduct a thorough investigation. We trust that you will accept this grave professional responsibility."

Thus the complaint states that the sociology department "repeatedly and deliberately violated both affirmative action guidelines and professional ethics in hiring practices." The basis for this charge was the hiring of two white males as assistant professors in positions which had not been publicly announced in advance. An additional charge was that these positions were filled with white males despite the recommendation of a legitimately constituted Personnel Committee that two women be hired for these positions; and that a Chicano be appointed to teach Chicano studies.

This complaint has a history within the administrative hierarchy of the University of California at Berkeley. The chairperson of the Affirmative Action Committee of the Academic Senate had questioned the hiring practices of the sociology department. When this questioning process elicited no satisfactory response, another interested organization (L.A.W.) filed the complaint described above. (See Appendices 1–4 for the Academic Senate Committee correspondence with the administration.)

2. *The Departmental Justification of Its Position*

Departmental spokesmen had a number of explanations for why the complaint was ill founded. a) One of the major arguments of departmental spokesmen was the general "good faith" shown by their department long before the law required it. The department hired women and blacks before such action was mandatory and the department can now point to that record by showing, on its roster, three women and four blacks. One in each of these categories is tenured.

One woman was hired after a university-wide fight against the nepotism rules in which many departmental members joined. Another woman was hired over two excellent male candidates, despite prior commitments to them. A majority of the temporary (acting) assistant professors chosen from their own students are women.

The fate of the non-tenured female and black faculty is not yet clear; but the department has made a diligent search for a professor of Chicano studies (i.e. a Chicano) and has gained from the administration the promise of an eventual slot should a suitable candidate be found.

Additional signs of good faith are shown by the pledge to admit a ratio of 50–50 male and female graduate students, despite one senior faculty member's estimation that in terms of excellence, the ratio should be closer to 70–30. Finally, with regard to minority graduate student recruitment, early efforts to find such students at out-of-the-way schools, initiated before AAP requirements existed, are now being resumed.

These, then, are the general arguments in evidence of solid good faith in efforts to meet AAP goals. In addition, a number of arguments are presented to explain why decisions *not* to hire women and minorities recommended by the Personnel Committee should not be taken as evidence of any bad faith.

(*b*) *The candidates discovered by the Personnel Committee were not sufficiently excellent.*—Neither the Chicano studies nor the demography candidate were sufficiently strong to warrant receiving an offer. An additional female candidate (considered when the other two slots appeared) is variously described as not strong enough because her work was rated somewhat below that of one of the male candidates; her area was not needed; the department does not hire its own PhD's. We were told that even the Personnel Committee did not strongly support her candidacy. They saw her only as equal to the other two candidates and left the choice to the department.

(*c*) *Prior commitments.*—There were prior commitments to the two white males for the next available openings. The fulfillment of such commitments is not a sign of bad faith because they were made before AAP guidelines at UCB explicitly prohibited such agreements. (The men were hired on temporary appointments in September 1972).

(*d*) *New positions.*—The two men found in an earlier (1971–72) search were hired in positions which existed either prior to or independent of the two advertised positions (1973–74). The department was able to persuade the administration to make these slots available because the growing enrollment in sociology made expansion necessary. And, in any case, these two professors took line appointments in 1973–74 before the advertisements for the Chicano and demography positions were public.

(*e*) *There was no deliberate effort to mislead in announcing openings for Chicano studies and demography.*—The advertisement for demography and Chicano studies slots (and the request to the Personnel Committee to search for candidates when openings were really not available) were not signs of bad faith. One informant explained that these may only be signs of poor synchronization of efforts and faulty communication between department and Personnel Committee, and department and the administration. There were no advertisements for the openings ultimately filed by two white males because these positions were tentative and questionable until the last moment. Therefore, the positions could not be advertised widely. Another informant argued that at least one appointment was possible as a trade off because the demography position had not been filled by a minority or a woman. Under these circumstances the administration allowed the department to hire a white male qualified in another field.

3. Dissenter's Rebuttal

(*a*) *Lack of good faith.*—Some argue that the appearance of minorities and women in faculty positions was not in and of itself a sign of good faith. It does not necessarily mean either a broad search or a review of other equally qualified minority and women candidates. Nor does it mean that any extra considerations were given to minorities or women. For example, one woman was hired as a person of superior excellence, demonstrated by her market value (competing offers) and her greater experience and training than that of two competing male candidates (without such excellent competing offers). Another woman was generally regarded as outstandingly able by many on the senior faculty though her appointment became possibly only because of simultaneous pressure for a woman candidate from student groups. Similarly, the black faculty member also received competitive offers at the time he received tenure in this department and had several times previously rejected a non-tenured offer.

(*b*) *The criteria by which minority and women candidates are judged are unfair (capricious, idiosyncratic, over-demanding).*—One instance which exercised virtually all dissenters from the departmental justification was the refusal to hire a specific woman PhD. It is argued that she was invidiously compared to one male candidate on publication and to another on area of needed expertise in the department. If she had been compared to the first on teaching, she would have been considered demonstrably superior. And if she had been compared to the second on publication, she would also have been superior. Therefore the Personnel Committee ranked her superior to one male candidate and equal to the other. If the department were truly committed to Affirmative Action, she would have been a strong candidate on the basis of this recommendation. Yet she was not presented as an Affirmative Action candidate; for her advisor thought it demeaning to such a candidate to raise extrinsic issues.

(*c*) *The dubiousness of prior commitments as an argument*—Were the department to continue in its concern for prior commitments, it might well have made such a commitment to this female candidate. Instead the decision was made to abandon a system of commitments which had caused so much trouble and which, in any case, was frowned upon by Affirmative Action guidelines. (See Appendices 5-6 for evidence that Affirmative Action was official policy on this campus at the time these issues arose.) But the system is only encouraged when it favors white male candidates. Similar "commitments" have been withdrawn from other women brought to the department on the ground that "no slots were available". Finally the question of these prior commitments is dubious. No written evidence for these commitments exists, and a senior faculty member denies that such commitments were made. He explained that there were no commitments beyond the assurance that these men would be candidates for future openings in the department. Other sources say they do not believe the commitments could exist; for one white male candidate was heard to worry about his chances for a post just *because* he had no such commitment in writing.

(*d*) *There is no evidence that announced openings for Chicano studies and demography were not intentionally misleading while there is reason to indicate these announcements were misleading.*—Negotiations between department and administration are cloaked in mystery. There is no way to assure the good faith of department assertions in this matter. However, there is reason to believe that one of the white males was hired in the Winter—after the advertisement of the demography position had appeared—and after experienced women candidates had applied.

(*e*) *There is no clear evidence that there has not been tampering with slots while there are indications of such tampering.*—Since the nature of administration-departmental relationships is hidden from public examination, it is impossible to feel secure that "negotiations" permitting the department to evade Affirmative Action guidelines were not made. Such suspicions gain strength, given that this administration was specifically warned much earlier by the Affirmative Action office of the Academic Senate that the issue was at best ambiguous and at worst might turn into an investigation by outside parties. (See Appendices 1-4) And, more generally, the administration is currently under investigation for long-term non-compliance with HEW regulations on Affirmative Action.

4. *Analysis.*

We are left with two questions. First, how good are the evidences of good faith presented to the investigation committee? Second, what powers do departments have, given the organization of academia, to subvert an Affirmative Action Program, either intentionally or unintentionally? In answering these questions we are somewhat limited because we were not permitted to see any records of the Personnel Committee and tenured faculty deliberations. Thus we are dependent upon reports and personal views of the people with whom we spoke.

(a) *Under these circumstances we feel forced to argue that clear evidence of good faith in working for Affirmative Action is missing.*—(See Appendix 5 for administrative recognition that the burden of proof of good faith lies in the University.) The basic difficulty stems from the fact that no clear understanding among the spokesmen (the word is carefully chosen here) of the department exists about what Affirmative Action means. First, every minority and woman present on the faculty is automatically defined as an example of working toward Affirmative Action goals. By implication such a view assumes or admits that each woman or minority would *not* have been hired without an Affirmative Action Program (or Title 7). Only in this perspective does the department appear conscientious in meeting Affirmative Action guidelines. But focussing upon this definition, the facts surounding the hiring of these persons are ignored. For example, one woman was hired in a tenured position after contributing teaching services without pay for several years in the department. Apparently her male colleagues bemoaned the injustice of this condition throughout these years without taking action until a much later date. And there is some possibility that this woman may have been accepted in the department because she wished part-time rather than full-time status. Another woman is claimed as an example of Affirmative Action hiring because she was given a line position when two men were actively sought at the same time as she were given lectureships. But this view ignores the fact that the woman already had a line position in another campus and would not have accepted a lectureship while the two men were not in the same bargaining position. (Interestingly, some faculty members see these two men as having been *deprived* of a job by Affirmative Action. In this view the redress of prior wrongs to women is subordinate to the sense that men unjustly lose their special prerogatives.) A third woman was hired on her merits, but at a time when there was cosiderable pressure from students to look for women candidates. Thus the interest in her candidacy was not clearly generated by department leaders.

(b) *Second, procedures used in the hiring of these women raise questions about departmental understandings of what Affirmative Action recruitment practices actually mean.*—One of the women was already employed for several years on the campus, one was a PhD from Berkeley living in the area, and a third was interviewed when she came to visit a professor under whom she had formerly studied. None of these candidates were found as a result of the systematic general search *required by Affirmative Action guidelines.* Thus, the presence of such members in a department is no sign of a commitment to Affirmative Action.

(c) *Similar doubts exist in examining the departmental assertions of good faith as evidenced in hiring blacks.*—Among this group only one has a tenured position. And he had refused a non-tenured offer several times. From his perspective, the research position he already enjoyed was better than a non-tenured line position (used as a "revolving door" position for minorities). Again pressure from students to keep this person may have played a part. One of the other blacks had a one-year appointment and two others were found in nationwide searches, but are in temporary positions and, we have been told, are unlikely to get tenure.

(d) *The same difficulty in finding evidence of a good faith understanding of AAP appears in the interpretation of the male-female graduate ratio admissions.*—One senior professor explained that applications were received at the ratio of 70% male to 30% females, while the admission ratio was 50–50. He interprets this selecton to mean less competent females must have been chosen over more competent males. But he presented no data to support the interpretation that sex ratio of application and excellence were correlated.

(e) *Claims of Affirmative Action are also weakened since we found little understanding of the notion that traditional criteria may not be relevant for hiring in certain positions.*—For example, the search for an appropriate candidate for a Chicano position involves finding an expert in Chicano studies. Such candidates are also evaluated for their expertise in theoretical and methodological issues. Thus they are held to the most exacting standards in areas besides their own. Such terms appear unfair unless candidates for other positions are similarly evaluated so that someone appointed as a methodologist should be required to show superior proficiency as a theoretician. The department demands high qualifications in all areas of specialization from Chicanos; departmental members are not willing to accept moderate proficiency in these areas in someone who can specialize in Chicano studies. This demand virtually closes off the possibility of hiring a Chicano, for all the Chicano faculty who have been produced come from three schools—Berkeley, Notre Dame and Texas. The department does not hire its own graduates and the training in the remaining schools is seen as not meeting the standards of the department. Therefore, there is no way for a Chicano person in Chicano studies to meet the requirements of this department.

(*f*) *Further, evidence of good faith is weak as long as women and minorities receive less advantageous offers than do others.*—For example, two white males may have been given "commitments" for future line positions when they were appointed as lecturers. When questions arose over the legality of such prior commitments, the department apparently restudied the situation, voted for these candidates strictly on the basis of their merit and found them superior to the minority (woman) candidate. The possibility of then making a commitment for the next line position to the woman candidate (about whose merit there was considerable agreement) was dismissed on the general grounds that moral commitments of this type seemed wrong. The force of such an argument would have been stronger had it not been selectively applied against an Affirmative Action candidate while upheld earlier in promises to two men. Such shifting of grounds for decisions is highly suspect as a disingenuous maneuver to justify prejudiced treatment of women and minority candidates.

The only requirement to assure the commitment to a line position for the two white males seems to have been adequate performance in their temporary jobs. The Chicano minority candidate and the woman were offered only temporary positions and told that they should not expect to move from a lectureship to a line position. In one case, the candidate was told that such a move was not possible. Thus, even if this candidate did accept the position and did perform adequately—let alone if he did better than expected—he could not expect to stay. The department seems to judge minorities as if such candidates were already up for tenure when in fact they are hired only for low- or off-ladder slots. Using such criteria eliminates any opportunity for a minority person to prove him- or herself. The operative concept of "qualified" according to one senior professor is, and should be "one of the leading one or two people in his field". Such a criteria will inevitably remove most minorities and women from consideration. This view shows no understanding of Affirmative Action guidelines. Permitting candidates from undistinguished schools or without distinguished sponsors to have a chance to demonstrate ability is *one of the major tenets of Affirmative Action.*

(*g*) *There are more subtle signs of lack of good faith—at least among some members of the department.*—One of the members—speaking for an hour and assuring the committee of the department's and of his personal acceptance of AAP was asked: "What do you think is the future of AAP on this campus?" The respondent gave a lengthy statement on the problem of hiring women. He expressed the belief there just aren't many good women around, and that many women are not committed to making a career in social science. As this situation changes—and he assumes it will be changing as child care becomes increasingly available—more committed and competent women will be available. However, he doesn't understand why we should assume that women will ever be attracted to academia in the same proportion as men. Further, he thinks a problem for women entering the field will always exist if they continue to be disinterested in what he sees as the core of the field—organizations, institutions, political and economic sociology. (We pointed out that one of the women who had recently been denied a position is exactly in this area; but his explanation for departmental resistance to her candidacy was that "At Berkeley they had enough people in this area.")

Such a position shows us a high-ranking professor in an important departmental status who still accepts all the traditional explanations for the absence of women in academia, ignoring the empirical information widely available, which destroys these myths. (No better critique of his view can be found than the document prepared by the Academic Senate on his own campus.) The position just cited also shows the continuing confidence in the conventional standards of excellence tied to a traditional view of the core of sociology. There are two ways in which this confident assumption works against Affirmative Action hiring. 1) Women and minorities have always experienced greater difficulty gaining acceptance in these traditional areas. 2) Areas where women and minorities tend to specialize can be ignored as peripheral and their expertise is not required in a prestigious department.

Another sign of lack of understanding—or appreciation of Affirmative Action—is reported by one of the candidates. She was told by her advisor that the issue of Affirmative Action had never been raised when discussing her candidacy—though the three people were considered by the department to be virtually equal in ability—because to do so would demean her. Affirmative Action guidelines appear to be interpreted by this advisor either to mean forcing "not as good" candidates on a department or to suggest she would be taking unfair advantage of her sex.

(h) We found difficulties in conducting an investigation without access to records.—We think some explicit prevarication by "responsible" departmental members to the committee may have occurred. It was explained to us that one of the newly appointed assistant professors, recently moved from a "soft money" to a hard "line" position, received a position written into the regular university budget for 1974–75. Such action would show that this position had *not* been traded for the demography position. Under very careful questioning a spokesman for the department assured us that the person moved into the regular position at the beginning of the budget year—July—as would be expected if the position were independent of other departmental and administrative issues. We were alerted to the possibility of prevarication by a faculty member who was out of the area in the fall and who received a letter reporting that the position for this lecturer had just been regularized. (As the faculty member remained on campus during the summer, there would have been no need to write about the matter if it had occurred in July as we were told.) Our suspicions were confirmed by a check of the payroll records which showed that this man was not in a regular line position as of October 1973.

Given the narrative materials offered the committee (we did ask for substantiation and were denied the opportunity to see any) there is little reason to assume good faith adherence to AAP from the Department of Sociology at Berkeley. We are in no position to prove specific intent to evade the law; however we find no basis on which to assume that departmental spokesmen have tried to live up to it.

The second, and more general, question to consider is what we may learn from this investigation about an academic department's ability to subvert the intentions of AAP. First, when there is no reason to assume that the university administration has shown good faith in requiring Affirmative Action (there is now a case filed against Berkeley), the fact that the department is accountable to administration is meaningless. The possibility of collusion between administration and the department exists in these circumstances. Without accountability to outside parties, such a possibility cannot be seriously discounted. For example, the department at one point argued for the hiring of a man on the basis of "prior" commitment. The administration said that such a reason was not acceptable. The faculty merely had to conduct a new vote, now assessing the candidates purely on the basis of "merit" and send the same file back in order to gain administrative approval. Once the "paperwork" has been formalized, no legal or administrative basis for complaints about the validity of prior commitments could be ascertained.

Further, as long as debates within the department are not reported, it is relatively easy to make a strong case for any decision which is ultimately reached. The administration has no basis on which to evaluate and decide otherwise. (Or when supporting materials are sent to the administration, they do not become available to the Academic Senate's Committee on Affirmative Action; hence there is no interested, advocate witness to decisions.) In addition, there are no requirements within the U.S. Berkeley Affirmative Action Program for administrative review of vitae and qualifications of candidates who were *not* selected. Therefore, the procedures currently exclude a way for the administration or an internal advocacy group to be assured that Affirmative Action candidates (of relatively equal merit to non-Affirmative Action candidates) were not unfairly judged.

Within departments, there may be even more subtle and more interesting forms of bias. One such appears in the use of language. As one respondent noted, in discussions about white men one often gets inflated descriptions such as "the best in the field", "superb", "perhaps a genius". But women and minorities are usually discussed in more cautious and realistic terms—"solid", "well-trained", "quite sound". And their weaknesses are more likely to be emphasized. "She is strong theoretically, but weak when it comes to empirical research." And so, simply in the terms of discussion, the men *appear* to be the stronger candidates to those who want to maintain excellence. Women and minorities are automatically ranked on all possible criteria; men tend to be evaluated mainly in the area of their strength.

Another issue is the willingness of the department to fight. In the current tight market and with declining enrollment quite common, many departments will often find they do not have an empty position waiting. The administration may use all available positions wherever departments do have candidates. One consequence of this situation is that a departmental committee can go to administration and say, "We have a candidate and want a position" when the committee members care to do so. Conversely, they can explain inability to hire women and minorities by pointing to the hard facts of life: no empty slots are available—and none expected in the near future. (Nevertheless, there are two new white men in tenure-line slots.) There is no way to judge the validity of these "hard facts" in any one instance; for the department can always argue that any obstacle to hiring comes from the administration. The chance to avoid responsibility and play "good guy" to the administration's "bad guy" is always an option when confidentiality of personnel committee negotiations is given high priority and secrecy in negotiations between the administration and the department results.

Given this confidential relationship between the administration and the department, the departmental spokesmen's claim that it is almost impossible to know for certain if slots will be available cannot be assessed. Similarly, the departmental claim that it is, of course, improper to make a wide search for candidates under these conditions cannot be evaluated. But it is clear that this view of the situation provides an inside track for any who are hired in non-AAP positions; but who happen to be on the scene when positions become available, and who are strongly favored by powerful spokesmen in the department.

CONCLUSION

Investigation by professional organizations is necessary if we are ever to discover the extent of good faith adherence to affirmative action goals by departments. Within the current understandings of departmental autonomy, there is no way to make such assessments; for there is no outside accountability. Recognition of the necessity to develop such accountability systems might lead to professional review boards which could examine the working of AAP, department by department. The work of professional organizations can be expedited by opening the personnel ad administrative files on university campuses to duly appointed representatives of the associations. In this view we are supported by a former chairman of the Department of Sociology who wrote this committee the following: "I am in favor of such reviews as you are conducting, and believe that we should be answerable to bodies such as yours. . . If you can't point to the good chance that there will be a lot of noise if you appoint a white male, then people are likely to return to a "pure qualifications" ideology, and Affirmative Action will have a harder and harder time. . . I'm glad a lot of noise is being made (about this issue), because I think that decisions taken at a high noise level are likely to be only those that are really quite strongly justified. Of course that requires having administrators who don't mind working in the noise, and I hope I'm one of those." Without the ability to review information by outside sources, there will always be doubts about the good faith adherence to Affirmative Action goals by individual departments.

RECOMMENDATIONS TO THE DEPARTMENT

(1) The Department of Sociology at UCB should formulate a definite statement of anticipated teaching and research needs for the coming years. These requirements should be listed in terms of their priority and should be publicized when openings arise.

(2) The Department of Sociology at UCB should adopt an explicit and public policy both at the personnel committee level and at the departmental level towards Affirmative Action. This policy should include explicit goals and timetables based on reasonable estimates of the availability of qualified women and minority applicants.

(3) Membership in the following departmental committees should include graduate students: personnel, academic progress, graduate admissions and awards. Such action prohibits secrecy in deliberations which may later lead to charges of bad faith or inadequate attention to Affirmative Action requirements.

(4) The final deliberations of the tenured faculty on any of the recommendations presented by the above committees should be open to review by accredited members of the appropriate committees within the national and regional sociological associations.

APPENDIX 1

BERKELEY DEPARTMENT OF RHETORIC,
May 23, 1973.

Provost RODERIC PARK,
Chancellor's Office,

DEAR PROVOST PARK: I have recently received further information from senior faculty regarding two hiring cases in Letters and Science. The fact that one of these cases has already passed your review leads me to wonder about the firmness of standards of affirmative action being applied.

1. *Physics department.*—During the fall quarter, the physics department voted on a male candidate in nuclear physics. The department had not been given an FTE yet, they did not advertise the post, they did not make a search, but they took a vote. Many senior nuclear physicists were not present when the vote was taken.

At your behest, the position was announced briefly through the campus paper. When Elizabeth Scott asked to see the search committee summary, she was turned down, so we cannot evaluate the extent of the search. How long and in what places was the position publicized? Was an announcement of the position sent to the women on the roster of nuclear physicists? The total list cannot be so long as to prohibit such total advertising.

The President's affirmative action guidelines of January 5 (as well as national regulations) prohibit age discrimination, but the department officially declared that it was looking for a candidate under forty. This was used as a reason not to consider a woman candidate locally available. Was the chairman told that it is not permissable to make age discrimination official policy?

It may interest you to know that a number of the senior faculty expressed astonishment that the search passed your approval: their astonishment implies that they did not themselves regard the search as meeting affirmative action standards. May we see the search summaries in this case to judge whether their astonishment is merited?

2. *Sociology.*—In recent hiring decisions in the sociology department, two women and a Chicano were turned down. I am particularly concerned in this history with the role of prior commitments.

Several years ago, the department promised a slot to a male, and they have since put another on "hold" in the same way. At a meeting of the Personnel committee, subsequent to the loss of the Chicago candidate, a vote or ranking was made of various candidates for the then available slot. In this ranking a woman candidate with two books, numerous articles, and five years teaching experience was ranked ahead of one of the men to whom a commitment had been made, who was also being considered. She was regarded as having research abilities equal to his, but as superior in the range of courses she could teach. Affirmative action regulations state, of course, that even if they were just equal she should be given preference. It is interesting to note that she was offered, after the vote, a temporary position—but without such future commitments!

When the issue came to a departmental vote, the prior commitment led to prefernece being given to the male candidate, in spite of the recommendation of the personnel committee. Not only was this position given to a male rather than a female, of equal or perhaps superior qualifications, but there are indications that commitments are being made to the other white male in the case which may again tie up future slots and prevent their use for affirmative action.

One of the senior faculty members mentioned this case in a meeting attended by one of my committee members. I have since discussed the case with him, and he gave me the information mentioned above.

In connection with one of the cases I mentioned to you on an earlier occasion, I have been worried about possible repercussions of a negative sort for the women involved. There are at least two cases I know of where women have been effectively blackballed for complaining about the way hiring is being done. The way this happens is that when departments are consulted in connections with recommendations for fellowships or jobs, the faculty tell the person making the inquiry that the woman is an activist, or some other term suggesting she is likely to complain if ill-treated. In one instance I learned about this hazard because a woman on a fellowship committee found that a superbly qualified candidate was very nearly turned down because of such material coming from her department. If women speak or write to you about instances of possible affirmative action problems in their departments, I urge you to protect them from injury by not revealing your sources to the department faculty. In both the cases I am reporting to you now, my sources were male faculty, but it is quite possible that the chairmen will choose to believe otherwise. I just hope you will keep this problem in mind in talking with charimen.

Sincerely yours,

S. M. Ervin-Tripp.

Appendix 2

December 20, 1973.

Chancellor Albert Bowker,
Chanceller's Office,
California Hall,
Campus.

Dear Chancellor Bowker: The first appointment that has been announced since the distribution of FTE for 1974–75 is one that violates affirmative action in spirit and in procedure. I refer to the appointment of ——— to the Sociology Department. Had this record been scrutinized by an affirmative action coordinator I am sure it would have been flagged: it's approval is good evidence of weaknesses in the present system of monitoring appointments.

1. The Sociology Department has been advertising for positions in Chicano studies and in Demography, which have for two years been identified as programmatic needs. *Mr. ——— is a specialist in neither of these fields.*

2. In March, 1971, October, 1971, and Novembers, 1972 the administration made pronouncements requiring affirmative action searches, documentation, and submission of supporting documents demonstrating adequate, complete, searches prior to ladder apponitment submission. *There is no such documentation submitted with the ——— papers.*

3. The evidence on the case strongly suggests that ——— was recruited by the traditional "old boy" letter method, although the recruiting letter was not included, merely referred to. He was given a temporary position, and oral, but apparently not written assurances that he would be taken onto the ladder staff when an opening appeared. Such promises are in clear violation of the affirmative action program. It takes no very elaborate thought to see that tying up future positions by such commitments would foreclose the required searches. That implication was as clear in 1972 as it is in 1973. *Future positions cannot and could not be promised, under the affirmative action program.*

It is interesting to see that the documentation submitted with the records is opaque as to the actual reasons for this appointment. In this, as in other cases, it is imperative to include in the materials the dossiers of the alternative candidates, and information about the choices the department was making. In 1971–72, the department voted that it wanted three candidates which had arrived by various recruiting methods. One of them was in a superior barganing position: the woman was then an assistant professor whereas ——— was still a graduate student. The department sought a way to hire all three. Since the woman required a ladder position, the department gave her the one opening they had, and the two men were put in temporary positions with oral assurances they would get the next ladder openings.

One of the two men has a rather complicated history, in that he had been offered regularization proceedings in 1971, but was required to return to his country for reasons beyond his control. For this reason further action was suspended, and the department promised to take the case up later. The history of this case is longer and more complicated than ——— case, which is one of transparent preferential treatment.

It is interesting to speculate, given the long evidence we have on treatment of lecturers in this as in other departments, on what would have happened had the sexes of ——— and ——— been reversed. It is unlikely that such promises would have been made. Indeed they were not made to a woman lecturer voted by the Personnel Committee more qualified than ———, according to reports, not the written record.

This particular case is a violation of affirmative action. Mr. ——— did not fit the specifications for the positions sought. He was put in his position purely because the department made a private arrangement in violation of the requirements of open search. There are not any of the required documents showing a good faith genuine search to fill a specified position. In all of these respects the ——— case is evidence of poor control by the "Affirmative Action Officers" over affirmative action. The filling of all ladder positions is supporedly covered by these requirements. This is the first exception to be made this year. I hope you will be alert to avoid others, since they are public testimony to the inadequate implementation of the program, and have a demoralizing effect in the departments concerned.

Sincerely yours,

S. M. Ervin-Tripp,
Committee on the Status of Women and Ethnic Minorities.

Appendix 3

Berkeley: Office of the Dean,
College of Letters and Science,
January 25, 1974.

Prof. Susan Ervin-Tripp,
Department of Rhetoric.

Dear Prof. Ervin-Tripp: I reply to your letter of 20 December to Chancellor Bowker about the appointment of ——— to the Sociology Department. This appointment was made on the basis of a commitment which goes back to 1971 and thus antedates the Affirmative Action guidelines which did not appear until December 1972. I believe you have already seen the documentation on this case. This documentation shows clearly that the case went to the Budget Committee in February 1972 and received their approval. Unfortunately, at that time there was no FTE available and so the appointment had, in effect, to be postponed until an FTE became available. The matter has been carefully examined by the Administration, including Chancellor Bowker, and all agree that the appointment of ——— is the result of a sequence of events initiated before the present Affirmative Action search requirements were in effect.

I now turn to some of the specific points in your letter. The appointment of ——— does not come from the FTE available for 1974-75 as you state in your first sentence. It was an extended authorization of an FTE which the Sociology Department had for recruitment during the academic year 1972-73. The advertisements that the Sociology Department made for positions in Chicano Studies and Demography are in response to long-felt needs in the Department. In neither case have suitable candidates appeared. The Department is following Affirmative Action guidelines in these searches. I cannot emphasize too strongly that Affirmative Action is now strictly applied to all new appointments.

The Department of Sociology has been very eager to provide appointments for women and minorities. Their efforts long antedate Affirmative Action. The first woman was appointed in 1966 and the first Black in 1967. The Department has been notably successful in attracting Black and Chicano students, many of whom have been placed in good positions all over the country. The Department is continuing its efforts in this direction.

Sincerely yours,

Roderic B. Park,
Provost and Dean.

Appendix 4

Berkeley: Department of Rhetoric,
February 6, 1974.

Provost Roderic Park,
Chancellor's Office.

Dear Provost Park: In reply to your letter of 25 January regarding the appointment of Mr. ————, let me review the three objections which I made: (a) Mr. ———— is not a sepcialist in either of the fields in which the department was recruiting and was authorized to recruit; (b) There were requirements for affirmative action searches as early as March, 1971, but no such required documentation was submitted in this case; (c) a future commitment had been made which foreclosed possible affirmative action hiring.

1. The Higher Education Guidelines require that an employer articulate the criteria by which appointments shall be made, to prevent arbitrary and discriminatory employment decisions. While neither the minimal or ideal criteria for these positions are explicitly defined by the Sociology Department, we can assume from their advertising that at least a minimum criterion was significant publications in demography or Chicano research. To my knowledge, there were candidates who met those criteria. Have you examined their dossiers in order to evaluate whether -------- in fact was better qualified by the department's professed criteria? As the line officer responsible in this case for affirmative action it is hard to see how you could recommend this appointment without making sure some qualified minority or female demographers or Chicano specialists were not being overlooked. If you don't make this affirmative action check, who will?

2. You state that "this appointment was made on the basis of a commitment which goes back to 1971 and thus antedates the Affirmative Action guidelines which did not appear until December 1972."

The laws requiring affirmative action in federal contractors go back to 1968 and the courts have awarded back pay back to that time to women and minority litigants from universities. By March, 1970, department chairmen were told to conform to those regulations. They may have been ill-informed about them, but ignorance of the law cannot excuse them. In March, 1971, Vice-Chancellor Raleigh required that departments "demonstrate that for every new appointment proposed an adequate search has been made for possible women appointees. Such a search should also encompass a review of women currently holding non-ladder appointments on the Berkeley campus." In October, 1971, he elaborated these requirements further.

These requirements are included in the report to H.E.W. as evidence of the university's long-standing commitment to affirmative action. How can you account for the failure of the department to include, or the line officers to enforce inclusion, of affirmative action search evidence in the ---------- materials?

I am glad to hear that the Department of Sociology is very eager to provide appointments for women and minorities. In our report of 1970 we pointed out that at that time there were no women in the department, although a quarter of the Ph.Ds were going to women in the top five Sociology Departments. They had hired the last ladder woman in 1925. According to your own figures, they still rank among the top quartile in underutilization of women; we do not yet have figures for minorities.

While the future good efforts of the department are to be applauded when they occur, appointments are few and far between, and there is no slot allotted to Sociology for next year. The women and minority men who responded to the departmental advertisement, and who are better fitted to those specialties advertised than is Mr. ------, have a legitimate grievance. Where do you recommend that they turn for a remedy?

In summary, the evidence suggests that:

a. The criteria put forward by the department are not met by the candidate appointed. No line officer required to protect affirmative action has examined the alternative candidates to see if there were qualified candidates in the specialties sought.

b. The laws requiring affirmative action, and even the campus directives, antedate the initial appointment.

c. None of the required documentation pertaining to the search for the authorized positions and the candidates' relative qualifications was submitted.

d. There is no apparent grievance procedure available to the candidates whose rights have been violated.

Sincerely yours,

S. M. ERVIN-TRIPP,
Chairperson, Committee on the Status of Women and Ethnic Minorities.

APPENDIX 5

BERKELEY: OFFICE OF THE CHANCELLOR,
March 17, 1971.

To: Deans and department chairmen.

There is much concern now that the American universities are discriminatory in their appointment and advancement procedures regarding women. Both conscious and unconscious factors have been cited and adduced. The law of the land states and the policy of the University of California affirms that there be no discrimination by sex in employment. The fact, however, that charges of such discrimination exist makes it clear that the burden of proof lies on the University itself. Accordingly, it is now requested that Departments demonstrate that for every new appointment proposed an adequate search has been made for possible women appointees. Such a search should also encompass a review of women currently holding non-ladder appointments on the Berkeley campus.

JOHN HENRY RALEIGH,
Vice Chancellor for
Academic Affairs.

APPENDIX 6

BERKELEY: OFFICE OF THE CHANCELLOR,
October 7, 1971.

To: Deans, directors, and department chairmen.

This memorandum concerns (a) the University's expressed dedication to equity in the hiring practices for academic personnel, and (b) the internal study committees' and the relevant outside agencies' demands for proof of compliance.

Understandably, then, certain mandatory requirements must be observed, effective at once.

1. When a new appointment is proposed, the initiating unit must provide documentation showing that the search for the person finally recommended has included a survey of qualified candidates who are women and who are members of ethnic minorities. (In the past, separate reminders have been sent to the campus stressing the importance of increasing our ratios in the employment of women and Blacks; this memo also emphasizes the need actively to seek qualified Chicano, Native American, and Asian American candidates.)

2. In addition, it is most important that all departments keep full and accurate records on all their hiring practices. We must have a complete factual account of all persons considered for any faculty position, with the reasons why one was finally chosen and the others were not.

3. At the same time, the University will continue to evaluate all its faculty members in its traditional manner. Presumed excellence in teaching, scholarship and service will be expected for entry, and certified excellence in these categories will be required for tenure, irrespective of sex or ethnic origin.

JOHN HENRY RALEIGH,
Vice Chancellor for
Academic Affairs.

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN,
Woodland Hills, Calif., September 20, 1974.

Hon. JAMES G. O'HARA,
Chairman, Special Subcommittee on Education, House of Representatives, House Office Building, Washington, D.C.

DEAR CONGRESSMAN O'HARA: The California State Division of the American Association of University Women, representing over 30,000 members, firmly supports the concept of affirmative action programs to help bring women and minorities into equality in education and employment programs.

We support the goals of:

1. Equal opportunity in education, training, employment, housing, credit, mortgage funds and insurance.
2. Elimination of discrimination based on sex, race, color, creed, national origin, marital status or age.
3. Equal opportunity for women in all aspects of life.

Affirmative Action Programs have been a major step toward meeting these goals and we urge you to continue to support and extend them.

Sincerely yours,

SHARON SCHUSTER,
Legislative Program Chairwoman.

STATEMENT BY CHARLES FRANKEL, OLD DOMINION PROFESSOR OF PHILOSOPHY AND PUBLIC AFFAIRS, COLUMBIA UNIVERSITY

I am grateful for the invitation to submit my views on the question of compliance with civil rights laws as it affects universities, and also on the methods used by the executive branch in recent years, particularly the Department of Health, Education and Welfare, in determining a college or university's eligibility for federal funds.

I speak for myself and not as a representative of any organization. However, as a member of a university faculty I have seen some of the effects on my own university, and as the chairman of the International Committee on the Future of the University, I have been in a position to observe events and tendencies on numerous campuses and to compare notes with many colleagues, administrators as well as professors.

I have also had an opportunity, as Assistant Secretary of State for Educational and Cultural Affairs (1965–67), to look at these matters from the governmental side of the question, and I would stress, at the beginning, my sympathy with the objectives of the civil rights program and my sense of affinity with the people in government who have the delicate and difficult task of attempting to move the nation ahead on the path laid down by the Congress and the Supreme Court.

The beginning of wisdom in the approach to these problems, in my opinion, is to make a distinction between the issues posed by the situation of blacks and other long-disadvantaged minorities, and those posed by the situation of women. In the latter case there has been, I believe, a considerable, though largely unconscious, prejudice against having women on the faculties of large universities. Somehow, without thinking much about it, the assumption was simply made that college and university teaching would be attractive only to a small number of women and that these would find positions in colleges for women. It must be added that most women accepted these assumptions, and only occasionally gave evidence that they found them mistaken or burdensome. Broadly speaking, and despite current rhetoric, the situation was not on which deserves to be described as "oppression." However, there can be no doubt that unmeasured valuable talent was lost to higher education in consequence, and that social attitudes have now changed fundamentally. Prejudices against women in universities cannot be permitted to continue.

The basic question is the appropriate remedy. I believe that the old prejudices were largely unconscious. I believe that the conscious effort to overcome them is now massive. More and more women are entering graduate schools and choosing academic careers. In not more than five or ten years, I would expect that the faculties of major universities, with or without the benefit of legislation, will be composed of women in numbers approaching 35–50 percent. This will happen in the natural course of events, now that psychological attitudes among both men and women have changed; I also hazard the guess that there will be a certain amount of leaning over backwards to make it happen.

It would be a great mistake, I believe, under these circumstances, to assume bad faith on the part of university faculties on this matter and to impose bureaucratic supervision upon them. Nothing could be at once more comic and more insulting, for example, than to have visitors from Washington treat the cosmopolitan members of my own faculty at Columbia as though they were harboring deep designs to keep women out. Such intervention is bound to be heavy-handed and will aggravate the already difficult problems of transition to the new situation in a period of acute job shortage. Many male graduate students believe they are being unjustly denied jobs. Many women of first-rate quality who would be members of our faculty in any case resent the imputation that they are there only because they are women and that they are second class. In periods of acute job shortages it is particularly important to avoid tight bureaucratic regulation. Even in the best of times such regulation is to be avoided in universities unless an otherwise incurable situation exists.

In brief, the situation with regard to the recruitment of women on university faculties is well on the way, in my judgment, to complete and satisfactory resolution. What makes it difficult is essentially the job shortage. The imposition of "guidelines" has really been, in practical effect, an imposition of quotas. One of the principal consequences is to give a good and sensible cause, which is in the process of succeeding, an unnecessarily bad reputation.

When we turn to the question of blacks and other groups, the situation is more complex. The pool of available talent among blacks for the teaching of physics, mathematics, foreign languages and the like, is extremely limited. By introducing special programs for blacks and other such groups at the college level, this situation can presumably be rectified to some extent. However, progress is inevitably slow and considerable time is required. It must be remembered that the source of the problem is the woefully inadequate education that blacks receive in primary and secondary schools. The colleges cannot do more than pick up the pieces at the end of this process and do a minor mending job.

The temptation under these conditions is to substitute tokens and symbols for realities. It is possible quickly to increase the number of blacks and others on university faculties not by improving educational opportunities but by making degrees easier to receive. In these circumstances, either the tone of the entire higher educational system is lowered, or a double standard is introduced, so that blacks are treated effectively as a privileged category. That this has happened in many places will be admitted, I am persuaded, by every informed and candid observer. The damage is threefold. Blacks, no matter how gifted, become once again second-class citizens on campuses. Bitterness and racial hostility is encouraged. Last and not least, intellectual disciplines are treated with contempt, as though nothing important was lost when levels of competence in fields like chemistry or medicine were lowered. Few of us would wish to reduce the level of competence in professional football or tennis by introducing guidelines concerning proper ethnic representation. Are mathematics and medicine less important?

These opinions do not mean that I am opposed under all circumstances to the imposition of guidelines and targets. If a pattern of deliberate and persistent racial discrimination can be shown, if the number of qualified minority group members can be easily increased with proper measures, and if the jobs for which they are being trained are essentially interchangeable, there is a strong case for programs like the Philadelphia Plan. However, in colleges and universities teaching is a highly individual affair and when an opening on a faculty occurs the job description is highly individualized. The guidelines ntroduced by HEW would be appropriate for mass production industries. The pressures that are making colleges and universities mass production industries are already considerable and the strongest and most imaginative efforts are required to retain the distinctive values of higher education under these circumstances. I fear that the continuing operation of HEW guidelines will be the straw that breaks the camel's back. In the name of racial amity we will create racial disharmony. In the name of better education for all we will introduce the methods of mass production. The worst sufferers will be students of all races, and the parents and taxpayers who foot the bill.

UNIVERSITY OF CALIFORNIA, LOS ANGELES,
September 20, 1974.

Hon. JAMES G. O'HARA,
Chairman, Special Subcommittee on Education, House of Representatives, Congress of the United States, Cannon House Office Building, Washington, D.C.

DEAR CONGRESSMAN O'HARA: My thanks for your kind invitation to submit material for possible inclusion in the record of your subcommittee hearings.

The enclosed tables give data on the 1973 salaries of college and university faculty members, and then of doctoral professionals generally, broken down into the broad racial categories of "white," "black," and "Oriental." This particular segment of the labor force was chosen for study primarily because important *qualitative* measures of differences are available in these fields. In particular, the quality of individual's training can be ranked according to rankings given by members of their respective professions, as recorded by the American Council on Education. For faculty members, there are also records of the extent of their scholarly publications, as listed by the individuals themselves. The data compiled from the National Academy of Sciences study also permit rankings of the quality of each individual's degree and an age breakdown, as an approximate indication of experience.

The most striking fact to emerge from these data is that "average" differences between groups represent the effect of the different *distributions* of these groups among fields, degree quality, publications records, etc., rather than simply racial or ethnic differences as such. For example, Table 1 shows white faculty to average $627 per year higher than black faculty, but within the cells—holding degree quality and publications constant— blacks earn more than whites more often than not. We are still in the process of compiling data on women, but existing studies already indicate that women are distributed very differently than men with respect to fields of specialization, kinds of employing institution, etc. Like minorities, women tend to be distributed toward occupations which feature lower pay—for example, the humanities rather than the natural sciences, colleges rather than universities. For women, our data will need to hold constant the years of continuous professional employment—a crucial variable on which there are major differences between the sexes. With women, as with minorities, internal breakdowns are often very revealing as to specific reasons behind intergroup differences. For example, studies of academic women show that in many respects the main differences in pay, promotion, publication, etc., are between *married* academic women and all others. Single academic women are much closer to academic men than the married academic women. This is lost sight of in most comparisons of "women" in the aggregate versus "men" in the aggregate.

Another pattern of great importance is the difference in black-white salary by *age*. Table 2 shows older blacks to be earning less than their white counterparts in comparable degree-quality cells, while younger blacks earn more than their white counterparts in each cell. This may well reflect the difference between the more restricted educational and employment opportunities of the past, as reflected in the current position of older black doctorates, versus the better education and increased opportunities available to the younger blacks whose careers have been moulded in more recent years. A pioneering study by Professor Finis Welch in the *American Economic Review* (December 1973) showed significant differences by age bracket in black-white earnings ratios for persons with comparable educations—and this not restricted to professional or academic fields.

A more general way of looking at all of this is that it is not enough to say that discrimination has occurred to justify the sweeping conclusions and sweeping procedures of the so-called "affirmative action" programs. The *locus* of the discrimination is also important—whether it is past employer discrimination and the discouragement of preparation caused by it or current discriminaton among equally prepared individuals, whether it is due to educational discrimination and its continuing consequences in career choice, whether it is due to social stereotypes, home values, etc.

The longer run consequences of "affirmative action" is a sobering subject requiring more time and space than is appropriate here. I hope the enclosed data will help toward putting the discussion on a more factual basis.

Sincerely,

THOMAS SOWELL,
Professor of Economics.

Enclosure:

1973 ACADEMIC YEAR MEAN FACULTY SALARIES
BY ETHNIC GROUP

DEGREE QUALITY ARTICLES PUBLISHED	TOTALS		"DISTINGUISHED" AND "STRONG" Ph. D.		LOWER-RANKED Ph. D.		UNRANKED DOCTORATES		LESS THAN DOCTORATE	
	Sample Size	Salary	Sample Size	Salary	Sample Size	Salary	Sample Size	Salary	Sample Size	Salar
WHITES	363,773	$16,545	41,249	$18,003	53,907	$17,449	46,867	18,198	241,751	$15,77
5 +	118,167	19,944	23,793	20,077	29,432	19,377	26,477	20,025	38,475	20,23
1-4	107,069	15,498	12,110	15,456	16,409	15,259	13,185	16,170	63,365	15,43
0	153,629	14,633	4,829	14,023	7,326	14,502	6,642	14,926	134,831	14,64
No Response	4,909	17,453	517	19,372	749	18,488	563	18,366	3,079	16,712
BLACKS	9,742	15,318	379	20,449	600	18,433	804	19,672	7,959	15,00
5 +	1,188	22,101	189	21,159	319	20,730	262	28,405	409	19,585
1-4	2,546	15,978	107	19,041	174	16,173	336	15,862	1,928	15,80
0	5,753	14,461	56	16,411	100	15,385	177	14,155	5,421	14,434
No Response	256	15,571	19	33,151	7	13,726	29	20,896	200	13,231
ORIENTALS	5,028	15,471	485	18,206	1,349	17,175	2,134	16,771	2,057	12,73
5 +	2,173	17,328	487	17,551	814	18,341	1,301	18,019	330	13,367
1-4	1,058	15,503	242	20,676	244	14,875	485	14,694	405	13,129
0	1,745	12,917	[illegible]	13,328	283	15,837	332	13,899	1,293	12,171
No Response	52	22,901	7	13,000	8	15,802	15	19,131	29	28,280

TABLE 1.

SOURCE: Compiled by the Urban Institute from data supplied by the American Council on Education.

1973 MEDIAN SALARIES OF FULL-TIME SCIENTISTS AND ENGINEERS
BY ETHNIC GROUP

AGE BRACKETS	DEGREE QUALITY					
	TOTAL		"DISTINGUISHED AND "STRONG"		OTHER	
	Sample Size	Salary	Sample Size	Salary	Sample Size	Salary
WHITES	28,048	$20,988	$ 8,589	$22,146	$19,459	$20,275
Under 35	6,615	17,228	1,827	17,879	4,788	16,933
35-49	14,024	21,757	4,167	22,480	9,857	21,342
50 +	7,409	25,357	2,595	26,333	4,814	24,704
BLACKS	261	21,445	54	23,268	207	20,597
Under 35	44	18,660	4	20,476	40	18,396
35-49	149	21,256	26	22,998	123	20,668
50 +	68	23,460	24	24,307	44	22,770
ORIENTALS	1,087	20,005	330	20,222	757	19,362
Under 35	210	16,230	60	18,162	150	15,364
35-49	676	20,613	206	20,378	470	20,761
50 +	201	23,261	64	22,429	137	23,660

TABLE 2.

SOURCE: 1973 Survey of Doctoral Scientists and Engineers
National Research Council, National Academy of Sciences

STATEMENT OF JANET WELSH BROWN, OFFICE OF OPPORTUNITIES IN SCIENCE, AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE

As Director of the Office of Opportunities in Science of the American Association for the Advancement of Science I want to offer to the Special Sub-Committee on Education some of my experience that testifies to the importance of affirmative action regulations in achieving equal opportunity for women and minorities, including minority women.

The Office of Opportunities in Science is part of the AAAS, a huge professional association which has more than 126,000 members and 283 affiliated societies and state academies of science. As part of our responsibility for increasing the numbers and improving the status of minorities and women in the sciences, we have had ample opportunity to see how affirmative action works. After two years of experience in trying to achieve equal educational and employment opportunities, I am very firmly convinced of the necessity for strong affirmative action regulations and enforcement.

This office receives literally hundreds of requests for information on minority and women scientists, not only from prospective employers but from leaders in science who seek to include women and minorities in their committees, symposia, research and other professional activities. I can assure you from working extensively with these gentlemen that the likelihood of most of them making such efforts without the pressure of affirmative action regulations is nil. Most caucasian men of science have little awareness or interest in the problems. If this were not so we would not have so disgraceful an underutilization of women and minorities in U.S. science.

Without federal leadership the situation has actually worsened over the years. The enclosed chart shows that *the percentage of women doctorates graduated in the 1920s was higher than that of the 1960s in all fields.* Likewise, *the percentage of black doctorates decreased in the decade of the 1960s*—a decade remarkable for its educational and scientific expansion, and presumably of progress for black Americans.

Recently the professional societies have established commissions on the status of women and/or minorities in the profession. Every one of them reveals the same pattern: the women and minorities receive proportionately fewer admissions and fellowships to graduate school; they seldom get the choice post-doctoral appointments; they are found in greatest numbers in the lower ranks, in the less prestigious institutions, carrying the heavier course loads, enjoying fewer benefits and less security. They are paid less than men in every field. It is quite clear that the very persons who attack the principle of affirmative action are the very persons who built and would perpetuate this terrible record.

I can further testify from direct and extensive experience that the "top men in the field" do not know "all the good people in the field" and that "qualified" women and minorities *do* exist—contrary to the allegations of Professor Richard Lester in his latest, most unscientific publication on affirmative action, *Antibias Regulation of Universities.* Time and again I have brought to the attention of such people the existence of highly qualified minority and women scientists with specific areas of expertise. These women and minorities tend to have been overlooked by their employers, colleagues, editors and professional societies in which they have played only a token role. They are often not listed in the prestigious *American Men and Women of Science.* Most academic administrators do not know of their existence and would not be looking at all were it not for the federal affirmative action requirements.

Please do not allow the Sub-Committee to be used for an attack on affirmative action, the most positive and intrinsically American concept to be developed in a long time. "Reverse discrimination" is a bogey man thought up by men who have guilty consciences and feel threatened. Never has a case been proven. It is hard to find jobs these days in many fields and unscrupulous employers are sometimes not above using "affirmative action" as an excuse for not hiring men they would not have hired anyway. The unemployment rate for women is still higher than for men in all the sciences. They and the minority professionals must not once again be made to bear the brunt of national economic difficulties under the guise of non-existent "reverse discrimination."

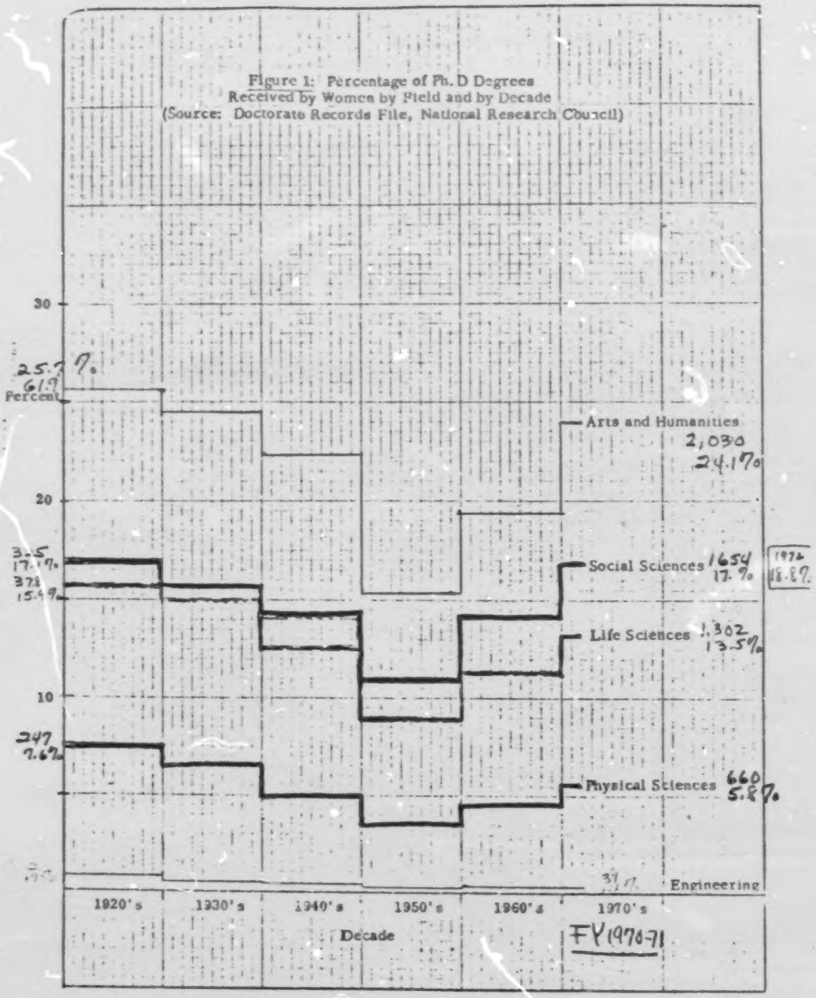

Figure 1: Percentage of Ph. D Degrees Received by Women by Field and by Decade (Source: Doctorate Records File, National Research Council)

TESTIMONY BY LILLI S. HORNIG, EXECUTIVE DIRECTOR, HIGHER EDUCATION RESOURCE SERVICES, BROWN UNIVERSITY

Mr. Chairman and Members of the Subcommittee: I am most appreciative of the opportunity to present my analysis of the impact, effectiveness, and administrative problems of Affirmative Action programs in postsecondary institutions to this distinguished Subcommittee. This is particularly true because my views are seriously at variance with other testimony furnished, for example, by Ms. Lucy Sells; I intend to present evidence to amend that record.

My own concern with the employment problems of academic women dates back many years to when I first became a member of a university faculty. I have been in constant touch with these problems since then, as a senior faculty member and department chairperson, as Executive Director of Higher Education Resource Services at Brown University, and as Chairperson of the Committee

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on the Education and Employment of Women in Science and Engineering of the Commission for Human Resources in the National Research Council. My overview of the field has been broad in all these activities, and I have an intimate knowledge of faculty hiring practices. My concern with the employment problems of academic women has become much more intense during the last two and a half years while I have directed Higher Education Resource Services. The prime charge of this office is to expand and improve the employment opportunities for women in academic careers. In the course of this work we have dealt with the faculty and administrative personnel needs of well over two hundred institutions of higher education, about one-tenth of the total number in this country. They represent nearly every state and certainly every type of institution—public, private, sectarian, community colleges to the largest universities, and include almost all of the "elite" institutions. We have thus gained some unique insight into the hiring practices of a group of colleges and universities which, because they are so varied and include nearly all of the large state systems, constitute perhaps half of the total higher education effort. This unusual overview has led us to a number of conclusions concerning the necessity for and effectiveness of Affirmative Action programs.

Let me comment first on the need for these programs. There is solid evidence that without a legal mandate forcing postsecondary institutions to provide equal employment opportunity for women as well as minorities, no such efforts would have been undertaken. The proportion of faculty posts held by women had dropped steadily from the 1920's until 1972; even during the 60's, the decade of great expansion of faculties, opportunities for women decreased. In the past few years a great many professional societies and a large number of universities have established commissions on the status of women in the various professions and on faculties; without exception, their studies demonstrate shocking underutilization of highly trained women. Not only are women underrepresented on faculties in relation to their presence in the doctorate pool, but they are predominantly hired at lower ranks and denied opportunities for advancement. At leading universities at most 2–3% of senior faculty are women, although women in the relevant age groups earned 15–20% of the doctorates. Unemployment among women PhD's is significantly higher than among men.

Only a year ago the American Council on Education studied the salaries of men and women on academic faculties and found that, averaged across all institutions, all ranks, and all disciplines, women were paid 17% less than men; the differential was considerably greater in some institutions.

For many years, educational institutions also acted deliberately to deny women access to the advanced training which would prepare them for faculty positions and other professional careers. Law and medical schools maintained strict and disproportionately low quotas for the admission of women; graduate schools discriminated against them in admissions, fellowships, and support services such as career development.

It is difficult to believe that these problems existed as part of the natural order of things; they were created by the deliberate exclusionary policies of the institutions. It is equally difficult to believe that these glaring inequities and the attendant shocking waste of human— and financial —resources would have been corrected by voluntary action on the part of the institutions.

The reason for my skepticism on this score is that the administrations and senior faculties of most major institutions have vigorously resisted implementation of Affirmative Action plans, either overtly or covertly. Their objections have rested on two types of arguments: (1) that the selection and promotion of faculty members is traditionally conducted by a system of peer review within the profession, is based exclusively on merit, and is therefore non-discriminatory by its very nature, and (2) that the requirement to hire women and minority candidates in proportion to their presence in the relevant labor pools is based on an industrial model not applicable to the academic environment and will result in a reduction in quality of faculties.

Both of these arguments are open to very serious question. While it is true that the traditional faculty selection system of peer review is based on merit, the people who are seen to posses merit have been almost exclusively white males; women and minorities were by and large simply excluded from consideration on the basis of sex or race, without regard to merit at all. In fact the operation of this system has been more like that of a private club than of truly professional selection: the people who were eligible for consideration on merit had to possess prior qualifications of race and sex. The system has long been known succinctly as the old-boy network. In practice it meant that when a faculty appointment was to be made, the senior members of a department would inquire of their friends in other institutions who their "best man" was; a short list of candidates resulted, and from it the man who best fitted the particular requirements of the position was chosen. It should be pointed out that this process discriminated not only against women—who would nominate a woman when asked who his best man is?—but it also discriminated strongly against men who were not already at prestige institutions. Prior to World War II it discriminated almost totally against Jews.

The important point to bear in mind about the academic profession is that traditionally it has not been one which granted open access to all aspirants. Rather, membership was by invitation only. At least at the leading institutions, the ones who set the pace for the whole profession, no positions were ever openly advertised and no search procedures were carried out in public. Likely candidates for future academic careers were identified by their professors in graduate school, and ultimately recommended by them for suitable academic openings. At later stages in their careers, the protegees of already prominent professors were invariably the ones appointed to the best positions. Women and minorities were never members of the club, either in graduate schools or later, and therefore had virtually no access to faculty careers. If they were hired by colleges and universities at all, it was by relatively low-prestige institutions and in inferior positions, and they had to beg for employment in a field where jobs were conferred on their male white colleagues by a "grace and favor" system.

The second argument of the opponents of Affirmative Action, that the requirement for setting hiring goals in proportion to the presence of women and minorities in the relevant labor pool (the doctorate population in a given field) will result in a reduction in quality, is as invalid as the first. Indeed, there is every reason to believe that the opposite is true. The reason for this is that just because of previous discrimination, which imposed much stricter criteria for admission to and successful completion of advanced training on women than on men, the women were more highly selected. On the average, then, those women who do complete advanced training would be expected to be *more* able than the average male PhD, and indeed a number of studies substantiate this fact.

The actual implementation and administration of the Affirmative Action programs designed to remedy the problems I have outlined have given rise to a good deal of controversy which is the basis of the present hearings. On the one hand there have been charges of inefficiency, ineptitude, inconsistency, and unwarranted interference with intra-institutional affairs against the Office of Civil Rights in HEW and the various regional branches. On the other hand there have also been charges of continued discriminatory practices, unresponsiveness, evasion, and general foot-dragging on the part of universities. I would like to comment on these points in some deail, based primarily on evidence obtained by our office since 1972.

It is certainly true that the administration of the Higher Education Guidelines by HEW regional offices has been often inconsistent, generally inefficient, and sometimes inept. The administrative history of *all* legislation and regulations prohibiting sex discrimination (Title VII of the 1964 Civil Rights Act, the 1971 amendments to the Public Health Service Act, the Equal Pay Act, the Education Amendments Act of 1972, Executive Order 11246 as amended, and Revised Order No. 4, in addition to the Higher Education Guidelines) has been marked by delay, inaction, confusion and simple non-enforcement. A nationwide class action complaint on grounds of sex discrimination was filed against all colleges and universities by the Women's Equity Action League in January 1970, and similar charges were brought against Harvard University by the National Organization for Women at that time. In April of that year a compliance review was begun at Harvard, the first to be conducted anywhere, thus making it a landmark case. More than three years later, in July 1973, Harvard finally submitted an Affirmative Action plan which was eventually accepted by the Regional [illegible] Rights Director in November 1973.

Such protracted delays have been typical of both the administration of sex-discrimination regulations by HEW and of the responses to complaints and compliance reviews by academic institutions. HEW Regional Offices have typically been sloppy in following their own procedures, often neglecting to notify an institution when a complaint is filed and giving insufficient notice of impending compliance review. There is no uniformity whatsoever among the Regional Offices in setting standards for the kinds of information institutions must furnish either during compliance reviews or in Affirmative Action plans. When an institution does file a plan, it frequently receives no written response whatever—either acceptance or rejection or even a Letter of Findings. A case in point is Brown University, which filed an Affirmative Action plan with the

Region I office in April 1972, following a compliance review. Since then the University has received one letter from that office, requesting clarification of certain data. This was provided, and as of two and one half years later, no further written communications have been received by the administration.

At last count, something under 1% of all the colleges and universities in the country have received formal acceptance of their Affirmative Action plans—a full two years after the Higher Education Guidelines went into effect, and nearly five years after the first sex discrimination complaints were filed. Indeed, less than 10% of *all* the institutions of higher education have even filed Affirmative Action plans. The great majority clearly do not intend to do so until compelled.

It is my understanding that during the past year the Office of Civil Rights has been reviewing its enforcement procedures and intends to issue a uniform set of guidelines shortly.

That enforcement has been slow, haphazard, and inept is only one side of the coin, however. The other is that institutions have on the whole been evasive and uncooperative, with the exception of a shining few who voluntarily filed Affirmative Action plans. The majority have not bothered to educate their faculty and middle-level administrators in the requirements of and necessity for Affirmative Action, yet it is just these people who make most of the hiring decisions. In working with faculty members and search committees, it has been the experience of our office that once they understand fully what the needs and requirements are, they become much more cooperative.

Since the area of faculty recruitment and hiring is the one with which we are most closely involved, I would like to discuss this in some detail.

To put the overall problem in perspective, it must be pointed out that between 1968 and 1973 the total number of women on faculties increased by less than 1 percent, from 19.1 to 20 percent. Virtually all of that increase is due to hiring at the lowest ranks. No national statistics are yet available on any increase in the number of women at senior or tenure level; in early 1973 our office attempted to survey all of the New England institutions in an effort to obtain such data on a regional basis. Out of a 55% response rate, so many of the replies were evasive or nonresponsive to the specific questions that it is difficult to draw firm conclusions, but the data do suggest that there has been no measurable increase in the proportion of women in senior faculty ranks. In other words, while junior faculty in general continue to be promoted to tenure despite economic pressures on the institutions, such promotions are still rare for women.

Because broader and more open recruitment for faculty is central to providing equal opportunity for women and minorities, and is therefore required for Affirmative Action, most institutions have devoted some effort to adapting their formerly exclusive recruitment procedures to the new necessities. This usually takes the form of designing explicit procedures for defining the position and the *bona fide* prerequisities of training and experience, open advertising, and the actual recruitment, review, and hiring process, together with procedures to monitor each of these steps. However, no procedures ever devised has been without loopholes, and faculty and administrative search committees have, in our experience, been quick to take advantage of these.

Among common abuses are the following practices:

(1) *Misleading advertising of positions*

This involves selecting a desired candidate privately before *pro forma* advertising of the position, and appears to be common. One woman reported to us that she had applied for seventy-two positions advertised in the *Chronicle of Higher Education* within 24 hours of their appearance; *in every case* she received replies stating either that the position was already filled or they were in the final selection process and could accept no further applications. One president of a state college, searching for a new dean, wrote us confidentially asking to review our files of candidates "before we have to go public".

(2) *Late advertising of positions*

An estimated five to ten percent of all the vacancies listed with our office have been received either after the deadline for applications or so close to it that no response was possible.

Very frequently we receive telephone calls a few days or sometimes literally hours before a final selection is to be made by a search committee, asking us to furnish at least one female candidate "because there aren't any on the final list". Such cases nearly always involve major positions, including university presidencies, and the women are obviously requested as tokens. Their chances of selection under such circumstances are nil; the collecting of necessary information about a serious candidate for a major position takes many weeks or months.

(3) Discriminatory treatment of applicants

Hundreds of women have reported that interviewers did not show up at scheduled interviews during professional meetings, or that interviews were scheduled only at times when they had clearly indicated they could not be available. Similar numbers report that they receive no replies at all to applications. One women reported that when she applied for an advertised college administrative position she promptly received a letter stating the position was already filled; in the same mail two of her male colleagues, one which similar qualifications and one clearly less qualified, received letters warmly inviting them for interviews.

Instances of such discrimination, or of similar kinds, have been fully documented in hundreds of legal briefs; most victims of sex discrimination, however, do not have the funds to pursue legal action. It is evident that the advent of Affirmative Action has not yet stopped discrimination; it is also evident that many of the procedures need refining and standardizing. But to those of us who observe the field closely it is equally evident that Affirmative Action on the part of colleges and universities is essential, and that the only way it will be achieved is by strict, prompt, and equitable enforcement.

An argument has been made in some quarters that Affirmative Action data-gathering and enforcement are costing the universities money which might be better spent on hiring more faculty and improving instructional programs. This argument is fallacious in that most of the money spent on researching and designing a proper plan is a one-time expenditure, often results in increased efficiency and therefore savings in general personnel procedures, and could not possibly support such long-term commitments as added faculty and teaching programs.

It is difficult for institutions which for decades and perhaps centuries have renewed themselves only in their own established image to accept a changing order. It is also remarkable that with all the limitations inherent inthe traditional discriminatory faculty recruitment and hiring practices of universities, we have so many excellent institutions. But such practices are no longer responsive to the expressed needs of society, nor will it serve the institutions' own best interest to deprive themselves and their students of the improvement in the quality of education which must result if their faculties draw on the talents of *all* educated people rather than only one half.

I earnestly urge this Subcommittee to continue its own distinguished tradition of support for non-discrimination, and to issue a clear mandate in support of truly equal opportunity for all.

BIOGRAPHICAL NOTE

Lilli S. Hornig is Executive Director of Higher Education Resource Services, a project co-sponsored by the Ford Foundation and Brown University to improve the opportunities and status of women in faculty and administrative posts. She received her A.B. from Bryn Mawr and her M.A. and Ph.D. (Chemistry) from Harvard, where she first became fully aware of the problems of women in higher education. She has taught chemistry at Radcliffe and Brown, and chaired the Chemistry Department at Trinity College, Washington, D.C. Her research interests have focussed on biochemical reaction mechanisms, especially in the action of drugs. She also has a long-standing interest in international educational and technological development, and has served as a consultant to the Agency for International Development and as a member of several Presidental missions to explore scientific cooperation with various countries including the Soviet Union, Australia, South Korea, Japan, and a number of West European nations.

Her sensitivity to the career problems of educated women was sharpened not only by the discrimination she saw her women students encountering and by her own professional experience, but also by her personal problems in maintaining a career while raising four children and following a husband whose distinguished accomplishments made him more mobile than most. The combination of these experiences led her to accept her present post, where she feels she can work to tackle the problems of academic women on a broad front while making use of her knowledge of and insight into the workings of universities.

Dr. Hornig has published a number of scientific papers and technical reports and a translation from German, *From My Life*, (the autobiography of Richard Willstatter), and has written and spoken widely on the status of women in academia. She is a member of several professional societies, a trustee and member of the Executive Committee of the Woods Hole Oceanographic Institution, and chairs the newly appointed Committee on Women in Science and Engineering of the Human Resources Commission (National Research Council).

STATE UNIVERSITY OF NEW YORK AT ALBANY,
Albany, N.Y., September 26, 1974.

Hon. JAMES G. O'HARA,
Special Subcommittee on Education, House Education and Labor Committee,
Cannon House Office Building, Washington, D.C.

DEAR CONGRESSMAN O'HARA: I would like to submit, as part of the factual record for your hearings on affirmative action programs, the enclosed material relating to the State University of New York at Albany. As you may be aware, the program as originally proposed was discriminatory on its face; the aid of outside organizations (principally the B'nai B'rith Anti-Defamation League) was sought, and HEW eventually sustained the majority of the ADL's charges in what had by then become a well publicized case. The detailed record of events at SUNYA establishes beyond any doubt that certain specific features of the program, later admitted by HEW to have been discriminatory, were created at the urging and with the knowledge of HEW's own compliance officer, and enables one to fairly infer that other objectionable features were created at the behest and with the knowledge of HEW.

The SUNYA story begins with a compliance review by HEW in the spring of 1971. The resulting report (enclosed) is uncompromising in tone, and in its insistence that the 24 listed "deficiencies" be remedied. Among these deficiencies were the following items:

Deficiency 6.—There are no minority group Deans, Associate Deans, and Assistant Deans.

Deficiency 7.—Aside from the Dean and Assistant Dean of the School of Nursing—traditional jobs for women—there are no females occupying positions at the level of Assistant Dean or higher.

Deficiency 9.—Minority group underultilization in faculty positions is reflected by the following:

	White	Minority
Professors	279	5
Associate professors	201	5
Assistant professors	250	3
Instructor	91	1
Other	76	13
Total	897	[1] 27

[1] In reply, SUNYA noted that there were 71 nonwhite faculty, and that the figure of 27 included only Negroes and Puerto Ricans.

Deficiency 12.—A review of the new hires in the past 12 months discloses that less than five percent were minority group members. Additionally, many departments have hired no minority members.

Deficiency 15.—Only 20 percent of the new faculty hired during the past 12 months were women. Further, many departments hired no female faculty members.

Mr. Peter Holmes of HEW has testified that goals are supposed to be set on the basis of the current availability of qualified minority members and women. However, in Deficiency 12 above, HEW complains that only five percent of "new hires" the previous year were blacks or Puerto Ricans, when, in fact, only about one percent of doctoral degrees are held by blacks, and an even smaller proportion are held by Puerto-Ricans. Deficiency 15 cites as inadequate that only 20% of faculty hired the previous year were women whereas women hold roughly 13% of all doctoral degrees. While the low proportion of doctoral degrees held by women and minority members is no cause for satisfaction, it is clear that HEW is not measuring underutilization according to the standard suggested by Mr. Holme's testimony.

The minimal conclusion to be drawn from the above list of deficiencies is that any department without a minority member or a woman had better hire one, and that women and minority deans and assistant deans should be appointed at the next opportunity. In January, 1972, I phoned Mr. Thomas Barnette—the author of the list of "deficiencies"—and this is precisely the impression of affirmative action which he communicated to me. For example, I began this conversation by describing myself as one who had long been committed to civil rights but who was troubled by affirmative action policies. In reply Mr. Barnette just asked me how many blacks were in my own department, and upon getting an answer of none, said that if we were really committed to civil rights we would go out and hire a black.

SUNYA's reply to Barnette (dated 6/11/74) committed the University (item 24) to a policy of "one-to-one hiring of minorities . . . [to] affect all of the administrative staff," which meant, according to the Vice President for Management and Planning, that for each non-minority member hired, a minority member was to be hired. There is no evidence that Mr. Barnette ever suggested to SUNYA that this would be improper, and it is very difficult to resist the conclusion that Mr. Barnette and others within HEW not only approved of such measures, but insisted on them. However, when HEW had to adjudicate publicized charges that SUNYA was establishing quotas, the one-to-one policy was one of the specific features of the program for which SUNYA was then rebuked, and it goes without saying that HEW has never acknowledged its own culpability in this matter. (Enclosed as evidence is HEW's correspondence with SUNYA President Benezet.)

SUNYA's reply to Barnette refers (with regard to deficiency 9) to a "newly installed faculty vacancy control system" and to "faculty line allocation and appointment" procedures which will be a "major stimulus to the acquisition of minority members." What this meant—as indicated in other documents all but one of which formed part of SUNYA's affirmative action plan and which presumably were forwarded to HEW—is that a moratorium was declared on the renewal of term appointments so that a pool of lines could be accumulated and then reassigned to departments for the purpose of hiring women and minority members. [To explain the terminology: a term appointment is an appointment for a specified length of time—usually for a term of one, two, or three years, as opposed to a tenure appointment which is unlimited in time. A "line" is simply a position. When a term appointment expires, a line becomes available on which to make a new appointment. Lines usually remain within a given department whether or not a given individual is reappointed, but the administration reserves the right to reassign a line from one department to another as well as to approve or disapprove of the proposed appointment or reappointment of a given individual.] Therefore, a department might not be able to reappoint someone whom it wished to reappoint, but it could retain the line if it had a minority or female candidate to propose as a replacement, a procedure which amounts to firing white males in order to replace them with minority members and women.

There is every indication that the SUNYA administration intended to implement the policies it had enunciated. Having become publicly involved with this issue, I was sometimes contacted by people who were offended by affirmative action policies which they were under pressure to implement, and the general pattern which emerged from such communications was absolutely consistent with officially stated policy. The administration appears to have made its greatest efforts in the areas in which it had relative autonomy; i.e., with respect to non-academic jobs and academic administrative jobs, and some people with direct hiring responsibilities in the first of these areas claim to have received direct orders to fill certain positions with blacks. With respect to academic jobs, pressure to hire women and minority members took the forms stated in official documents; i.e., requiring departments to fill certain positions with women and minority members, and allocating lines to departments on the basis of the race or sex of proposed candidates. In an effort to verify that such policies were really being implemented, I called two deans and inquired about the pool of ten lines which the Vice President for Academic Affairs had stated were reserved for the appointment of women and minority members. In reply, I was shown a computer printout of all lines under one dean's jurisdiction, and my attention was called to asterisks in the margin next to a few lines. These were described as "affirmative action lines" which could only be filled by a woman or a minority member. The other dean confirmed that he too had such a list, and placed the same interpretation on the asterisks.

As a result of the public controversy, pressure to discriminate in favor of women and minority members decreased toward the end of the academic year, and some of the reserved lines appear to have been filled by white males after efforts to find women and minority faculty had failed. However, the policy of allocating lines to departments on the basis of the race or sex of proposed candidates was continued, with the sanction of HEW. But the more important point is that in January 1972 SUNYA fully intended to implement the policies it had enunciated, and, to the extent that it failed to do so, was hindered only by the simple unavailability of women and minority members in certain specialized fields, and by the off-campus pressures which its naively candid policy statements had generated.

In conclusion, perhaps a few words on the climate of opinion at SUNYA during the period of the controversy would be appropriate. While there was much grumbling about the program, most of the criticism I heard concerned the feasibility of the stated objectives, and the bullying tactics of some of those responsible for enforcing the program. Comparatively few faculty were willing to argue forthrightedly that equal employment opportunity did not mean reserving jobs or establishing minimum quotas for minority members and women—much less firing white males in order to replace them with women and minority members. There were even informal discussions on this last point in which several young white male faculty members of new left or new politics leanings argued that it would be proper to replace them with minority members. No resignations were submitted in consequence, but this bizzare detail illustrates the rhetorical climate on the campus during this period. Even after the controversy surfaced as a result of ADL involvement, few faculty were willing to take a public stand against SUNYA's travesty of affirmative action. In a general way, it is still far safer to advocate certain selective forms of discrimination than it is to oppose all forms of racial and sexual discrimination.

While the abuses at SUNYA are clearly the fault of HEW, which demanded and approved of the policies which were put into operation, it is equally true that universities are fertile soil for the growth of reverse discrimination as a remedy for more conventional forms. I think there is a clear need to design programs with this fact in mind, and to eliminate from university affirmative action plans the coercive features (goals and timetables) which inevitably lead to abuses. There is also a clear need to call HEW to account and to insist that its programs be consistent with the laws and executive orders from which it derives its authority.

Thank you for your consideration.

Sincerely yours,

MALCOLM J. SHERMAN,
Associate Professor of Mathematics.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
New York, N.Y., May 27, 1971.

Dr. LOUIS T. BENEZET,
President, State University of New York at Albany,
Albany, N.Y.

DEAR DR. BENEZET: This letter is to report our findings as a result of the Compliance Review held at your institution on April 13, 14, and 15, 1971. Before recording these items we want to thank you and your staff for the cooperation given to us while the review was in process. We are particularly appreciative of the information and statistical data gathered to conduct the review.

The following deficiencies exist relative to your institution's Equal Employment Opportunity Program:

1. Faculty handbooks and other employee media do not contain the institution's Statement of Policy regarding Equal Employment Opportunity. Nor, was there any evidence found indicating that periodic meetings are held to disseminate the institution's policy on Equal Employment Opportunity.
2. An Affirmative Action Plan has not been prepared in accordance with Section 60–1.40 of the Rules and Regulations issued by the Office of Federal Contract Compliance.
3. Purchase Orders do not contain the contract language as required by Section 202, Paragraphs 1–7 of Executive Order 11246.
4. Advertisements do not carry the tagline, "Equal Employment Opportunity Employer".
5. There is no indication that tests have been validated in accordance with the test validation order issued by the Office of Federal Contract Compliance.
6. There are no minority group Deans, Associate Deans and Assistant Deans.
7. Aside from the Dean and Assistant Dean of the School of Nursing—traditional jobs for women—there are no females occupying positions at the level of Assistant Dean or higher.

8. Under the classified services there are no minority group member Administrators or Professionals.

9. Minority group underutilization in faculty positions is reflected by the following:

	White	Minority
Professors	279	5
Associate professors	201	5
Assistant professors	250	3
Instructor	91	1
Other	76	13

10. Of the twenty-seven (27) minority facutly members listed in Item 9, eighteen (18) are in the Afro-Culture Program.

11. There is a dearth of tenured minority group faculty members i.e. three (3) out of a total of twenty-seven (27). Also forty-three (43) percent of the faculty has tenure. Minority group faculty members, however, comprise less than one percent of the tenured faculty.

12. A review of the new hires in the past twelve (12) months discloses that less than five (5) percent were minority group members. Additionally, many departments have hired no minority group members.

13. Women comprise only eighteen (18) percent of the total faculty. Further, only six (6) percent of the Professors and fourteen (14) percent of the Associate Professors are female. While in the lower level positions females comprise twenty-four (24) percent of the Assistant Professors; thirty-five (35) percent of the Instructors and thirty-five (35) percent are below the Instructor level. Male distribution by job classification on the faculty is as follows:

35% are Professors.
23% are Associate Professors.
25% are Assistant Professors.
8% are Instructors.
8% are below Instructor level.

Female distribution:

9% are Professors.
19% are Associate.
36% are Assistant Professors.
18% are Lecturers.
18% are below Instructor level.

These statistics further indicate that there is a disproportionate percentage of females on the faculty in the lower level positions.

14. Thirty (30) percent of the women have tenure as opposed to fifty-six (56) percent of the men. Only fifty (50) percent, however, of the females with tenure are in the higher level positions while eighty-nine (89) percent of the males with tenure are in these higher classifications. These facts tend to indicate (a) a greater percentage of men are being hired into the Professors and Associate Professor rank than women (b) women are spending a longer time in the lower ranks than men.

15. Only twenty (20) percent of the new faculty hires during the past twelve (12) months were women. Further, many departments hired no female faculty members.

16. It was noted that there were only three (3) minority group members and four (4) females in the salary bracket of $20,000 a year or higher as opposed to one hundred sixty-eigth (168) males in this classification. Hence, less than four (4) percent of the faculty members earning $20,000 or more are women and minority group members.

16(A) There is, in fact, a marked pattern of salary differentials between men and women in nearly all job classifications on the faculty. For example, all male Full Professors are higher paid than women.

17. In the Department of Nursing there are twenty-three (23) female faculty members. Not any of them, however, are Full Professors. It was also noted that there are no male faculty members in this department.

18. There is a dearth of minority group member representation in the Laborer category, Grades 1–6 i.e. five (5) percent. In the higher levels—Grades 7–20, there is only one minority group member and no females.

19. Minority group members represent less than one (1) percent of the Service Workers in the Grade Levels 1–14. There are no minorities nor females in the higher levels of 14–20.

20. In the Protective Service Worker Category there are no females and less than three (3) percent are minority group workers.

21. There is a paucity of minority group members and females at all job levels in the category of Operators.

22. In the Craftsmen category there is only one (1) minority group member and no females out of a total of eighty-three (83) employees.

23. Minority group members and females are conspicuously absent in the Technicians category—especially at the higher grade levels of 21–30.

24. Minority group members comprise less than three (3) percent of the Clerical Workers. Additionally, there are only two (2) at the levels of 7–13 and none are in the classifications of 14–30.

Before a contractor can be found in compliance with the Executive Order, it must make a specific commitment in writing outlining the action it intends to take to correct any and all deficiencies. We are requesting that you submit to us, within 10 days, a letter which will indicate in clear terms the specific steps which your administration will take to correct the deficiencies noted in this letter (except item 2). We would appreciate it if your response would follow the numerical sequence of the stated deficiencies.

It is recognized that the University must first complete its Affirmative Action Plan, and in view of this fact, you may defer submitting your College plan until 30 days after the University submits its plan. However, in the meantime, it is suggested that you begin to gather the essential ingredients for the plan based on the information outlined in Order No. 4.

We are asking that you submit to us in your letter of commitment a full explanation and justification in cases where the salaries of women and minorities are lower than for men and majorities.

Should you have any question or need further clarification on any portion of this letter, please do not hesitate to contact me.

Sincerely yours.

THOMAS W. BARNETTE,
Contract Compliance Specialist,
Office for Civil Rights.

STATE UNIVERSITY OF NEW YORK AT ALBANY,
OFFICE OF THE PRESIDENT
June 8, 1971.

MEMORANDUM

To: Vice presidents, deans, directors, and department chairmen.

SUNY-Albany is one of the test campuses selected throughout the country for Compliance Review in the area of equal employment. We have been visited by officials of the Department of Health, Education, and Welfare to whom we supplied detailed records.

The eventual report from Mr. Thomas W. Barnette of the Regional Office of HEW in New York is of such uncompromising nature that we are enclosing it for each of you to peruse. This is not an academic exercise. The sanctions, as you may know, involve the termination of Federal grants of all types.

We are replying as required and will shortly put together a plan of Affirmative Action. We find not all items listed to be comletely accurate; at several points our position has not been fully described. We will specify those points in our reply. We expect to engage each of you in the difficult work of changing the University's record in minority and women's employment at all levels and classes.

May I ask for your understanding in this matter for which, in turn, I pledge my efforts to face with you the many problems that will be involved. Mr. Barnette and the office he represents expressed understanding that dramatic change overnight is not possible; but definite programs of change will be expected of us in the months ahead.

LOUIS T. BENEZET.

STATE UNIVERSITY OF NEW YORK AT ALBANY,
OFFICE OF THE PRESIDENT
June 11, 1971.

MEMORANDUM

To: Vice presidents, deans, directors, and department chairmen.

Having distributed the Compliance Review letter from the Office for Civil Rights of the Department of Health, Education, and Welfare (New York

Region), we feel it is important for you to be kept informed of our full response on the matter of equal employment status for minorities and women. Therefore I am attaching a copy of our "letter of commitment" which we were required to send back to the Office for Civil Rights within ten days after receipt of their letter.

There will, of course, be much to say and do in implementing these procedures. We will need to work together in countless ways to move forward on the changes which quite literally are going to be required of us.

LOUIS T. BENEZET.

STATE UNIVERSITY OF NEW YORK AT ALBANY,
OFFICE OF THE PRESIDENT,
June 11, 1971.

Mr. THOMAS W. BARNETTE,
Office for Civil Rights,
Department of Health, Education, and Welfare,
Federal Building, New York, N.Y.

DEAR MR. BARNETTE: This letter may be interpreted by the Department of Health, Education, and Welfare as a statement of commitment in response to your letter of May 27, 1971 which was delivered to us on June 4. My colleagues and I appreciated the interchange with you in our office on June 4.

As a general acknowledgement, State University of New York at Albany is aware that employment and status of minorities and women have not been at a satisfactory level. The fact that this is an almost universal condition throughout universities in the country does not affect our commitment to improve. What we can do and how fast we can do it will start with a spirit of resolve. It will by necessity be affected also by our ability both to recruit more minorities and women throughout the University and to arrange the necessary discretionary funding. This last is a critical problem at State University of New York this year. The Legislature and the State Division of the Budget have so constrained us that we anticipate literally no discretionary funds with which to make salary adjustments for 1971–72, and it appears that we will have only limited discretion in filling positions as they become vacant. I cite these circumstances not as excuses for inaction but as fundamental facts of our current economic condition.

With these pre-conditions, we shall move to prepare a plan of Affirmative Action for SUNY-Albany which you are to receive not more than 30 days following the submission of a plan for the entire State University of New York.

This first letter of official reply is, as you have requested, a comment upon each of the items you have listed in your May 27 letter. Where we acknowledge deficiency without qualification, you may assume that such acknowledgement implies a commitment that we will inquire further into the circumstances of deficiencies and work for improvements as part of the forthcoming plan of Affirmative Action.

The balance of this letter follows the itemization in yours of May 27.

1. Comment.—Machinery was established during 1970–71 to disseminate and implement State University of New York at Albany's policy on Equal Employment Opportunity. An all-university committee functioned throughout the academic year to develop and recommend strategies for carrying out this responsibility across the board. This committee met with each Academic Dean to determine the status of minority and female employment in each school, to identify the magnitude of special recruitment efforts, and to urge the development of a plan for affirmative action.

Two other faculty-staff committees were created during the spring semester of 1970–71: one for minority employment, and one for female employment. These committees are working closely with all academic departments and administrative offices to upgrade the recruitment and career development efforts for minorities and women in these units. All three of the above committees will make major inputs to State University of New York at Albany's affirmative action plan.

Minority and female employment have been action items on the agenda of both the Deans and Directors groups and the Conference of Academic Deans—throughout the year. These groups committed all new secretarial items anticipated in the 1971–72 budget to minority employment.

Unfortunately, all those items were deleted from our budget by the Legislature.

Commitment.—Through the Equal Employment Opportunity Committees, the several regular administrative councils, and the University Senate, State University of New York at Albany's policy on Equal Employment Opportunity will be disseminated widely and our commitment and implementation will be reinforced throughout the University during the 1971–72 academic year. Future handbooks and other employee media will contain a statement of policy regarding the Equal Employment Opportunity Program. An addendum to the present handbook will be distributed reflecting the Equal Employment Opportunity policy. There will be periodic feature articles in the University campus newspaper, *The Tower Tribune*, on the Equal Employment Opportunity policy.

2. Comment.—An Affirmative Action Plan will be submitted 30 days after the plan of the Central Office of the State University of New York has been submitted.

3. Comment.—The State University at Albany is one of many state agencies required to purchase under the General Specifications of the State Office of General Services. These specifications are provided to each contractor and include the general statement regarding the seller's responsibility for compliance with the anti-discrimination clause of these General Specifications. Standard State purchase order and voucher forms are used.

Commitment.—Effective immediately, vouchers and purchase orders for services and/or goods released directly to the vendor by this University will be stamped with a statement referring to the anti-discrimination clause of the General Specifications.

4. Commitment.—Personnel who deal with the news media will be instructed by letter that the inclusion of the statement, "Equal Employment Opportunity Employer," is to be included in all advertisements recruiting employees or soliciting services. This requirement will be included in the University's Affirmative Action Plan.

5. Comment.—The Department of Civil Service, State of New York, has statewide responsibility for State employee testing and test validation. It has been assumed that validation required by the Federal Contract Compliance is accomplished by this agency.

Commitment.—In coordination with the Central Office of the State University a letter will be forwarded to the New York State Commissioner of Civil Service requesting information relative to test validation requirements of the Office of Federal Contract Compliance.

6. Comment.—Apparently, the personnel information reviewed by the Compliance Review Team failed to identify the Associate Dean for Innovative and Developmental Programs in this category.

Commitment.—Deans and any future Search Committees for Deanships will be requested to make efforts to recruit minority candidates for Assistant Deans, Associate Deans and Deans.

7. Comment.—Apparently, the personnel information reviewed by the Compliance Review Team did not reveal a number of women holding positions at the level of Assistant Dean or higher. Among those not identified are: the Associate Dean of the School of Library Science; the Director and two University Physicians, and the Nurse Administrator in the Student Health Service; the Associate Dean of Students; the Associate Director of the Educational Opportunities Program; the Assistant Dean of the School of Nursing, and an Assistant Dean of the School of Social Welfare. All these are at the level of Assistant Dean or higher.

Commitment.—Special efforts will be made to recruit women candidates for all positions at or above the level of Assistant Dean.

8. Comment.—Under New York State Civil Service categories, classified service does not include administrators or professionals. However, we acknowledge a deficiency of minority employees in supervisory and professional positions.

Commitment.—Priority will be given to the recruitment of prospective minority group administrators and professionals.

9. Comment.—Our personnel information system indicates 71 non-white faculty members instead of the 27 contained in your findings. This larger figure includes other ethnic minorities in addition to Puerto Ricans and Negroes. The deficiency with respect to Negro and Puerto Rican underutilization is acknowledged.

Commitment.—Through our newly installed faculty vacancy control system, our recruitment committees for minorities and women, and our faculty line allocation and appointment decisions, wke will provide a major stimulus to the acquisition of minority faculty members. Through a more aggressive prosecution of our financial aid program for mniority graduate students we will endeavor to make a larger contribution to the available supply of prospective minority faculty members.

10. Coment.—The concentration of minority faculty members in the Afro-American Studies Department is acknowledged.

Commitment.—Through the steps in 9 (above) we will strive to achieve a wider distribution of our minority faculty resources across all academic departments.

11. Comment.—Statement acknowledged. Since the bulk of Black faculty are concentrated in a single, relatively new academic department, the proportion of tenured faculty is lower than for the faculty as a whole. Using our total of 71 non-white faculty members noted in 9 (above) we find 24 of these—or 6%—to be tenured.

Tenured decisions are based upon broadly-based collegial judgments made at departmental, school and university levels, and are thus not matters of administrative discretion.

Commitment.—To insure full opportunity to all present minority faculty members, we will ask departments to initiate tenure consideration for all eligible minority faculty members who wish to be considered during 1971–72.

12. Comment.—Deficiency acknowledged.

Commitment.—For faculty, commitment in 9 (above) applies; for academic administrators commitment in 6 (above) applies; for professional and administrative classified positions, commitment in 8 (above) applies.

13. Comment.—Deficiency acknowledged. Many females leave University employment after beginning teaching careers as instructors or assistant professors, because of marriage and family responsibilities.

Commitment.—An appropriate enlargement of female representation on the faculty particularly at the higher ranks will be sought through the mechanisms described in 9 (above).

To insure full opportunity to all present women faculty members, we will ask departments to initiate promotion consideration for all eligible women faculty members who wish to be considered during 1971–72.

14. Comment.—Apparently the analysis of tenure in the letter of findings was based on a comparison of tenured faculty with total faculty, including part-time personnel. Since part-time personnel cannot achieve tenure, this base may not be appropriate. Based on full-time personel, our records indicate that 44% of women faculty have tenure while 60% of male faculty are tenured. Likewise, we find that 73% of tenured female faculty hold ranks of Associate Professor and Professor, compared 94% of male tenured faculty at those ranks. These data do not appear to support your conclusion about level of appointment and length of service in lower ranks for women.

Commitment.—To insure full opportunity to all present women faculty members, we will ask departments to initiate tenure consideration for all eligible women faculty members who wish to be considered during 1971–72.

15. Comment.—Deficiency acknowledged.

Commitment.—An appropriate enlargement of female representation on the faculty will be sought through the mechanisms described in 9 (above).

16 and 16A. Comment.—Deficiency acknowledged. Our records show that all faculty members earning $20,000 or more, 12 are minority group members and 6 are women compared with 117 white males—a proportion of 13%. Of all professional personnel earning over $20,000, 13 are minority group members and 8 are women compared with 168 white males—a proportion of 11%.

Commitment.—We are initiating an analysis of the salary history of each female and minority faculty member compared with per white faculty members in the same departments, where applicable. The concerned department chairmen and deans will be required to justify any clear differentials in salary treatment of women and minority faculty members. In cases of unjustified salary discriminations we will seek authorization from the State University of New York Central Office and the New York State Budget Division to effect equitable redress. This University campus is not authorized to take such salary actions without extraordinary approvals of higher authorities and the provision of such discretionary funds from the State government.

17. Comment.—The School of Nursing is the newest School on this campus and presently offers only an undergraduate major. Its faculty are all quite recent to the University and their rank distribution accords with the level of instructional responsibility. The Dean of the School is a full Professor. During 1970–71 the School of Nursing had one full-time and one part-time male faculty member.

Commitment.—The faculty of this School will be accorded the opportunity described in commitment 13 (above) dealing with promotion. The School of Nursing will have a second full time male faculty member beginning in September 1971.

18—24. Comment.—Deficiencies acknowledged.

Commitment.—A policy of one-to-one hiring of minorities has been announced by the Vice President for Management and Planning and will affect all of the administrative staff. Objectives included in the Affirmative Action plans should correct this deficiency. Where Civil Service examinations are required to qualify for positions, we will coordinate with Central Office of State University and the State Civil Service Commission in correcting these deficiencies.

I have asked John W. Hartley, Vice President for Management and Planning, to answer any questions or provide additional information related to this matter, if required. Vice President Hartley may be contacted by phone. His number is (518) 457-4944.

Sincerely,

LOUIS T. BENEZET.

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH,
New York, N.Y., February 23, 1972.

Hon. LOUIS T. BENEZET,
President, State University of New York at Albany,
Albany, N.Y.

DEAR DR. BENEZET: On January 6, 1972, Prof. Malcolm J. Sherman wrote to us, as he did to you, in connection with the implementation by the State University of New York at Albany (SUNYA) of its Affirmative Action Program in behalf of minorities. Subsequently we received from Mr. Leon Calhoun, to whom you referred the matter, a copy of his memorandum of January 19, addressed to Professor Sherman, severely criticizing Professor Sherman's action in writing to us and disagreeing with Professor Sherman's point of view.

We believe Professor Sherman's position to be sound. Let us spell out why:

The Anti-Defamation League's very reason for being is its opposition to all forms of racial and religious discrimination against either groups or specific individuals. The ADL views such discrimination as an unconscionable violation of the moral and constitutional principles upon which American democracy stands and thrives.

The ADL's policy, therefore, has always been to oppose firmly quotas or other limitations based on race, creed, or color, and to support and demand practices in employment or in school admissions based solely on individual merit. We believe that our position supports the only final guarantees against discrimination and injustice toward minorities.

In our view, nothing can justify—let alone initiate—injustice against an individual or against a group because of skin color or other ethnic factors. "Preferential treatment" and racial quotas in behalf of minorities impose one form of racial discrimination in place of another. Like classic bias, it is the deliberate preference for an individual of one race, and solely because of his race, over an individual of another race, even in cases where the latter individual is better qualified in all other respects.

There is no question that Blacks have been greatly disadvantaged in the past due to a long and historical application of such bias and its continuing aftereffects. But past discrimination does not justify, as an attempted remedial measure, a new and equally deliberate and arbitrary discrimination against others. The questions that must be asked in this regard are: Is a white person to sacrifice his personal right to be judged on his own merit by accepting discrimination against himself based solely on the color of his skin? By what logic does some alleged "higher justice" legitimize such an injustice against an individual who has no personal responsibility for historic wrongs? And especially how does this apply at a university in a situation where there is no evidence that there has been any deliberate practice of anti-minority discrimination?

Because society in general bears the responsibility for such wrongs, society rightfully must, and indeed has begun to, undertake the job of righting them. This is the developing social philosophy behind "affirmative action" programs designed to secure better employment and educational opportunities for Blacks. But the aim of affirmative action should be broad social progress as regards racial equality, not the assignment of the historical blame upon, and then the penalizing of, single present individuals who happen to have white skin.

Here we must bear in mind that discrimination, looked at either legalistically or in terms of concrete everyday results, is always perpetrated against an individual, not against a broad and nameless mass. The right to be free from discrimination is an individual right, as the U.S. Supreme Court has consistently held, and it should not be abridged or modified on the basis of the indiviual's race or the history of his race. "Justice" for a group is utterly meaningless if it requires injustice toward individuals. This concept lies at the core of American and democratic values.

The reference by Mr. Calhoun to a U.S. Supreme Court decision that allegedly held constitutional an interpretation of affirmative action as including preferential treatment and racial quotas, is erroneous. The issue before the Circuit Court of Appeals in that case [*Contractors Assn. of Eastern Pa.* v. *Secy. of Labor*, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 92 S.Ct. 98 (1971)] is not the question before us in the SUNYA situation. Further, the Supreme Court in that case made no decision except to deny the application for review. Time and again the U.S. Supreme Court has said that in denying a writ of certiorari, it takes no position on the merits of the case.

If, indeed, one wants to know the law of our land as laid down by the U.S. Supreme Court on racial quotas, the landmark case is *Hughes* v. *Superior Court of California*, 339 U.S. 460 (1950) in which the Supreme Court clearly held that racial quotas in employment are unconstitutional. In that case the Progressive Citizens of America picketed a grocery store in support of its demands that, as white clerks quit or were transferred, the store hire Negroes until the proportion of Negro clerks to white clerks approximated the proportion of Negro to white customers. The Supreme Court upheld the injunction against the picketing granted by the lower court.

Mr. Justice Frankfurter, writing for the majority, stated that the picketing, if permitted, would "give constitutional protection to petitioners' efforts to subject the opportunity of getting a job to a quota system."

Now to the matter at hand:

In a memorandum over your signature, dated September 28, 1971, addressed to vice-presidents, deans and directors, you concerned yourself with the goals of the State University's Affirmative Action Program. In it you stated that one way of achieving these goals would be for the recipients of the memorandum to anticipate vacancies over a five-year period and indicate *how many* of them "could feasibly be allocated to minority members". Asking for numbers is a clear request for a quota in behalf of minority applicants. We think such a quota is in violation of the 14th Amendment, in violation of New York State's Constitution, of its laws, regulations and judicial decisions. We also believe such racial quotas to be inimical to the public weal, violative of the democratic concept and destructive of the right of individual merit. Instead of assuring equality of opportunity, you are engaging in a program of unequal opportunity.

We have before us, in contrast to your suggested quotas approach, the implementation of an Affirmative Action Program by Chancellor Robert J. Kibbee of the City University of New York. It is in the form of a December 10, 1971 memorandum to CUNY's administrative staff, expressly written to allay possible misunderstanding regarding the correct method in which the CUNY Affirmative Action Program is to be implemented. In so many words, the memorandum warns against erroneously interpreting policy as favoring the establishment of an "employment quota system based upon race, religion, gender or ethnic origin." Chancellor Kibbee expressly adds that in meeting the criteria of the Presidential Executive Order, no interpretation is to be placed upon it that the Program or its implementation "require preferential treatment in recruitment, hiring or promotion on the basis of criteria other than merit. It is our overall personnel policy, of which affirmative action is an important component, that the choice among candidates for hiring or promotion is to be that candidate demonstrating the maximum potential for meeting the job's requirements."

Anther document, dated August 10, 1971, from your State University (SUNYA), made available to us by Professor Sherman, is entitled, "Affirmative Action Program for Equal Employment Opportunity." On page 3 of this memorandum, it is indicated that "the University will defer the filling of some positions until qualified minority members and women are added to the staff of the University." In our view this instruction is similarly a violation of law, in that it virtually forces administrators to choose between hiring on racial or ethnic grounds or having essential jobs go unfilled.

A third instance of violation is the requirement in B-2b of the policy statement on this subject issued on August 31, 1971, by SUNYA. It calls for the "adoption of a deliberate posture of actively seeking . . . qualified or qualifiable persons of minority status . . . who are presently under-represented . . ." By itself, this instruction is thoroughly proper, but against the background of the other directives emanating from SUNYA, it must be read as requiring preferential treatment instead of individual merit, as required by the laws of our land. Under the merit system, only the *best* qualified person—not *any* qualified person—may be appointed. Furthermore, for a college to hire a merely "qualifiable" person to be a professor or administrator, would be a debasement of educational standards.

Confirming this improper implementation of your Affirmative Action Program, is the fourth instance before us, *i.e.*, a September 3, 1971, memorandum from Clifton Thorne, Vice-President for Student Affairs, directed to the University's Directors of Student Affairs Functions. It contains a directive that "to overcome present under-utilization of minorities, temporary preference in the hiring of new personnel must be given to members of minority groups with particular emphasis on the appointment of Blacks, Puerto Ricans and Indians, as well as to women."

As if the nail down the absolute illegality of the instruction, Mr. Thorne goes on to say, "as a guideline, I would urge that no fewer than one of every three new and vacant positions be filled with minority members . . . ." To eliminate any doubt whatever that this illegal instruction is authorized, the memorandum bears the University's imprimatur "APPROVED BY THE OFFICE OF EQUAL EMPLOYMENT OPPORTUNITY."

At the risk of repetition, we emphasize our view that this latter instruction in the Thorne memorandum, and the University's approval of it, are in clear violation of the Federal and New York law, as well as SUNYA's own policy statement respecting its Equal Employment Opportunity Program. Specifically, in New York State, and that is what we are here dealing with, there is an explicit statute prohibiting discrimination in employment on account of race, creed or national origin. N.Y. Executive Law, sec. 296, subd. 1(a). To say it another way, the thrust of all three mandates is expressed in the prohibition set forth in SUNYA's own policy statement—a mandate against "discrimination in employment because of race, color, religion, sex or national origin".

A fifth document in our hands, the Agenda for a January 21, 1972 meeting of the SUNYA University Senate, contains the report given by Dr. Philip Sirotkin, SUNYA's Vice President for Academic Affairs to a December 16, 1971 meeting of the SUNYA Council on Educational Policy. In his report Dr. Sirotkin states that 10 of the 86 faculty vacancies expected by September 1972 "were specifically earmarked for the appointment of women and minorities." We regard this commitment as a further blatant example of an illegal quota.

Finally, there is at hand a press clipping which, if accurate, is additional evidence of violation of law by SUNYA. It is a December 3, 1971, clipping from page 16 of the Albany Student Press reporting that "John Hartley, Vice President for Management and Planning, has announced a policy of one-to-one hiring of minorities affecting all of the administrative staff. This means that for every white (non-minority member) hired, a minority member is hired." This news story is still another clear indication of the imposition of an illegal quota in behalf of minority group people.

Presidential Executive Order 11246, as amended, and the official guidelines of the U.S. Department of Labor's Office of Federal Contract Compliance (which are binding on HEW and all other Federal agencies, as well as on all Federal contractors) are, of course, the source of SUNYA's obligation to promulgate an Affirmative Action Program in the first place. The detailed rules of the guidelines are directly relevant on this matter.

The specifically warn that "goals may not be rigid and inflexible quotas that must be met". The same guidelines state that goals are "not intended and should not be used to discriminate against any applicant or employee beacuse of race, color, religion, sex, or national origin". Distorting the Affirmative Action Program into a program of racial quotas or racial preferential treatment, is a clear violation of these guidelines.

For the foregoing reasons, the Anti-Defamation League of B'nai B'rith vigorously protests the distortion of the Affirmative Action concept at SUNYA.

In conclusion, let us reiterate that the Anti-Defamation League has always fougth for equal opportunity in employment, and other areas. We have always fought quota systems restricting equality of opportunity for any group. We strongly support both the merit system and affirmative action programs. We oppose the distortion of affirmative action programs into programs of preferential treatment of one person or group over another person or group on account of race or creed—as destructive of equal opportunity and violative of the Constitution and Federal and State laws. We deeply believe that affirmative action programs designed to achieve equality of opportunity for minority groups can be effectively implemented without violating the fundamental laws of our nation.

May we ask your response.

Sincerely,

Seymour Graubard, *National Chairman.*

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
OFFICE OF THE SECRETARY,
Washington, D.C., December 14, 1972.

Dr. LOUIS T. BENEZET,
President, State University of New York at Albany,
Albany, N.Y.

DEAR DR. BENEZET: As you may know, the Anti-Defamation League of B'nai B'rith, on behalf of itself and five other national Jewish organizations, has filed with this Department allegations of abuses in faculty and administrative employment by a number of colleges and universities, among them State University of New York at Albany.

These organizations are concerned that, in an effort to meet your affirmative action commitment to expand employment opportunities for women and minorities, you have possibly engaged in discrimination against white male applicants on account of their race or sex.

I am enclosing a copy of the allegation lodged against your institution. I would appreciate receiving from you a response to the allegation contained in the enclosure so that we might be able to determine whether further investigation is necessary.

While it is our purpose to ensure equal opportunity in employment, we are concerned that well-intent affirmative action efforts not be implemented in such a way as to promote or result in any form of discrimination prohibited by law.

Specifically, I would like to call your attention to the first paragraph, page eight, of the enclosed Higher Education Guidelines for Executive Order 1246, which states:

> In the area of academic appointments, a non-discriminatory selection process does not mean that an institution should indulge in "reverse discrimination" or "preferential treatment" which leads to the selection of unqualified persons over qualified ones. Indeed, to take such action on grounds of race, ethnicity, sex or religion constitutes discrimination in violation of the Executive Order.

I trust that your response will help to clarify this matter.

Thank you for your cooperation. If I may be of assistance to you in expediting a response, please do not hesitate to contact this Office.

Sincerely yours,

J. STANLEY POTTINGER,
Director, Office for Civil Rights.

STATE UNIVERSITY OF NEW YORK AT ALBANY,
December 28, 1972.

Mr. J. STANLEY POTTINGER,
Director Office for Civil Rights,
Department of Health, Education, and Welfare,
Washington, D.C.

DEAR MR. POTTINGER: Your letter about the Anti-Defamation League of B'nai B'rith's complaints of abuse in faculty and administrative employment has been referred to me for reply by President Benezet.

We have written both the Anti-Defamation League and the American Jewish Congress and have met personally with the ADL to explain the Affirmative Action Program of this University and to attempt to convince them that our plan is not discriminatory. I have enclosed copies of our letters to these organizations.

Following our face-to-face meeting with the Anti-Defamation League of B'nai B'rith earlier this year, we reviewed the language of our plan and issued a "Statement on Affirmative Action at State University of New York at Albany" (also enclosed) to clarify those parts of the program which might be misinterpreted. This statement was reviewed and presented to the University Senate by its Council on Educational Policy. The University Senate of this campus adopted this statement as Bill Number 197172–42. We think that *this* statement addresses itself to the alleged discrimination charges.

We have also formally explained to Mr. Seymour Graubard of the Anti-Defamation League of B'nai B'rith and more recently to Mr. Martin Hochbaum if the American Jewish Congress that the Affirmative Action Program of the University is designed only to overcome the past pattern of discrimination against women and minorities and to increase the pool of qualified persons available for employment consideration. The employment selection process of this University campus is based on suitable qualifications as determined by the professional standards established by faculty, staff, and the New York State Civil Service. We do *not* believe that "reverse discrimination" is an acceptable course of action to achieve our goal of increased employment and educational opportunity for minorities and women. We believe we have assured the campus community of this principle.

We are presently planning to rewrite our Affirmative Action Program to comply with the format soon to be issued by the Central Administration of the State University of New York. This will result in a change of the present language. There will be no change in the principles or objectives of the plan. Copies of the revised version will be made available to ADL, the American Jewish Congress and any other organization that would like to have one.

A review of the recent hiring statistics compiled since our Affirmative Action Program has been in effect does not reflect reverse discrimination as alleged but shows a successful trend toward overcoming the present "under-utilization" of women and minorities.

NEW APPOINTMENTS 1972-73

	Number	Percent
Total hired	150	100
Total white	128	85
White male	71	47
White female	57	38
Total minorities	22	15
Male	8	5
Female	14	10

I hope that this response answers your questions. If it does not or if there are other questions, please get in touch with me.

Sincerely,

JOHN W. HARTLEY,
Vice President for Management and Planning.

JANUARY 2, 1973.

Mr. J. STANLEY POTTINGER,
Director, Office for Civil Rights, Department of Health, Education, and Welfare, Washington, D.C.

DEAR MR. POTTINGER: Vice President John Hartley's December 28 analysis of our Affirmative Action Program expresses our position accurately. As you know, the principal difficulty remains to locate sufficient qualified candidates who are women or minority people.

From many years in this business, I feel safe in predicting that it will be a long time before there will be a market situation which could even permit "reverse discrimination" if an institution wanted to practice it—and I assure you we don't.

Sincerely yours,

LOUIS T. BENEZET.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
OFFICE OF THE SECRETARY,
Washington, D.C., January 31, 1973.

Mr. JOHN W. HARTLEY,
Vice President for Management and Planning, State University of New York, Albany, N.Y.

DEAR MR. HARTLEY: Mr. Pottinger has asked that I thank you for your recent response to his December 14 inquiry concerning an allegation of discrimination in employment procedures lodged against the State University of New York, Albany, by the Anti-Defamation League of B'nai B'rith.

On the basis of your letter and that of President Benezet, in addition to the enclosures, we assume that the review of your affirmative action policy was designed in part to preclude any future instances of discriminatory hiring under which, for instance, certain positions may be "earmarked" for minority persons in the sense that other persons may not apply or be considered for those positions. However, neither your letter nor the "Statement on Affirmative Action" makes specific reference to this and other alleged discriminatory policies cited in the report of the Anti-Defamation League and in the inquiry we sent to the University on December 14. I hope that you will understand that, as a law enforcement agency, the Office for Civil Rights must seek out the facts in connection with complaints submitted for review. Therefore, I would like to request that you address yourself to the specific instances of alleged discrimination noted in our earlier inquiry. If the statements and polcies attributed to the University by the ADL are correct, we would like such confirmation, including an indication as to whether and by what means the policies have since been modified, if at all.

Permit me to add that the University's commitment to affirmative action, as broadly set forth in your correspondence, including the establishment of goals and timetables, is not in question here. Your correspondence indicates an awareness of the distinctions between an affirmative action program that is acceptable and one that has the effect of discrimination in violation of the Executive Order. We would not want to give the impression, by this inquiry, that the Office for Civil Rights is disputing here your expressed understandng in this regard. We merely wish to ascertain the facts with respect to the specific action the University has undertaken to modify those policies cited in the report.

I trust that we will hear from you shortly. If I may be of assistance in expediting your response, please do not hesitate to contact me.

Sincerely yours,

SAMUEL H. SOLOMON,
Special Assistant to the Director, Office for Civil Rights.

STATE UNIVERSITY OF NEW YORK AT ALBANY,
February 26, 1973.

Mr. SAMUEL H. SOLOMON,
Special Assistant to the Director, Office for Civil Rights, Department of Health, Education, and Welfare, Washington, D.C.

DEAR MR. SOLOMON: I have your letter responding to our explanation of the alleged discrimination in employment charges made by the Anti-Defamation League. You have asked that we reply more directly to the specific charges cited in the report of the Anti Defamation League, so let me attempt to do that.

First, may I say that the instances which the Anti-Defamation League has cited all occurred in the very early stages of the development of our Affirmative Action Program. I think I must concede that in the spirited drive to get the Affirmative Action Program working to correct the imbalance of employment at this University there may have been some statements made which perhaps went beyond the intent of the program. But let me emphasize again that there has not been at any time any policy to employ anything less than the best qualified people for any position. We do wish to assure ourselves that minority and women candidates are solicited and considered for each job opening.

All of the incidents cited by the Anti-Defamation League reflect the urging of our principal administrators to their staffs to improve the employment situation with regard to women and minorities and are not examples of official policy.

Let's look at each of the alleged discriminatory actions.

We did request that deans and department heads anticipate vacancies over a five year period and indicate how many could be allocated to minority members. This was a matter of setting goals for the employment of minorities. We were not establishing quotas. I am sure you know the subtleties in distinguishing between goals and quotas and the controversy which has arisen around this. Our language may have left something to be desired but our intent was to set goals. The language has been made clearer in the subsequent official policy.

The Anti-Defamation League cites a directive which recommends that no fewer than one of every three new vacant administrative positions dealing with student affairs be filled with minority group members. Let me say again that this was not a policy but only the urging of one of our senior administrators to correct the employment imbalance. The language may have been broader than it should have been but this was early in the development of Affirmative Action. We needed to get people's attention.

The same is true for the news story in the campus newspaper reporting that I had announced a policy of one-to-one hiring of minorities. Again, this was a device to bring to the attention of our administrative departments that we were serious about implementing the Affirmative Action Program, as we still are. We wanted to be sure that minority candidates were interviewed for jobs. I think the ADL charges take these statements out of the context in which they were made. This gives a distorted perspective.

You have copies of our Affirmative Action Program. You have copies of the actions taken by the University Senate. These reflect the development of the Affirmative Action Program and are the official policies of the University. The urgings of members of the administration to try to implement the policy were necessary in the early days in order to get the program moving.

Finally, the chairman of the Judaic Studies Department, Professor Eckstein, did write to a professional association that the department was searching for a biblical scholar who is either female or a member of a minority group. Again, Professor Eckstein was attempting to assure that we would receive applications from women and minority candidates and the steps he followed seemed necessary to accomplish that.

Overall, it seems to me that the Anti-Defamation League is splitting hairs on this issue. I am quite willing to say that we were making concerned efforts to get minority candidates and women candidates to apply for jobs at this University and that we may have over-stepped a little in some instances to assure that this was done. Let me reiterate, however, that we do not intend to hire unqualified people. We do intend to have every job open to all candidates without discrimination. We think we are beginning to accomplish this. Our record shows that progress has been made in the past two years. It does not show, by any stretch of the imagination, that we have discriminated on behalf of women and minorities. We still have a long way to go to bring employment in balance.

I hope that this clears up the matters which you have inquired about. Please let me know if you would like further information from us. We would like to get the arguments settled and get on with the job of establishing equal employment opportunity.

Sincerely,

JOHN W. HARTLEY,
Vice President for Management and Planning.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE.
OFFICE OF THE SECRETARY.
Washington, D.C., March 29, 1973.

Mr. JOHN W. HARTLEY,
Vice President for Management and Planning,
State University of New York, Albany, N.Y.

DEAR MR. HARTLEY: Thank you for your letter of February 26. I appreciate your taking the time to set forth a more detailed response to the allegations cited in the report of the Anti-Defamation League.

As indicated in my correspondence of January 31, we are not questioning the University's commitment to affirmative action or the overall intent of its affirmative action program. The April 1972 "Statement on Affirmative Action" is generally sound. However, there is some difficulty with the rationale of your most recent correspondence. You seem to justify overstatement of purpose on the grounds that it has been utilized in pursuit of a positive end. You acknowledge statements which have gone "beyond the intent of the program," language that leaves "something to be desired," and language that "may have been broader than it should have been." These, you say, have been attention-getting devices, whose purpose has been to urge upon your administrators the seriousness of your equal employment opportunity efforts. I would suggest that if your administrators were to accept your urgings with the same seriousness with which they have been proffered and if they were to attain the objectives as set forth, then the result could conceivably be precisely that about which the ADL complains, namely quota hiring and reverse discrimination in recruiting. One-in-three or one-for-one hiring of minorities reflects quotas in employment. You indicate that this was not university policy, but certainly when it comes at the urging of senior administrators it has the effect of policy. Seen in this light, it is perhaps inappropriate to view the ADL allegations as "splitting hairs."

We believe that a strong affirmative action plan, implemented in a nondiscriminatory manner at the behest of a well-motivated and effective leadership, such as has been demonstrated at SUNY-Albany, develops its own momentum. As a major university administrator who deals with the problems of equal employment opportunity on a continuing and regular basis, you certainly recognize the sensitivity of the issues involved.

We want to encourage you in what appears to be a very comprehensive affirmative action program to expand employment opportunities for women and minorities. We hope, too, that you will be mindful of the concerns and potential repercussions that can result from over-statements, such as those cited in your letter. Your revision of the University's affirmative action plan appears to have been part of an effort to eliminate sections that might be subject to misunderstanding and to make the program's structure more responsive to the University's needs and to Federal regulations.

Once again, thank you for amplifying on your earlier comments. Please do not hesitate to contact us if we may be of further assistance.

Sincerely yours,

SAMUEL H. SOLOMON,
Special Assistant to the Director, Office for Civil Rights.

STATEMENT OF KENNETH B. LITTLE, PH. D., EXECUTIVE OFFICER, AMERICAN PSYCHOLOGICAL ASSOCIATION

On behalf of the American Psychological Association, I would like to share with the Special Subcommittee on Education some of the experiences our organization has had with affirmative action and to compare this experience with some information we have developed on the subject for psychology in general. Our own experience suggests that affirmative action is a positive step not only for the women involved, but also for the organization undertaking it. On the other hand, while affirmative action regulations have sensitized the psychological community to the operation of sex bias in research, the process of education, and hiring practices, actual changes in these practices themselves have not lived up to expectations. Hopefully, hearings such as these conducted by the committee will result in efforts to actualize the intentions of affirmative action regulations.

Since 1970 the American Psychological Association has moved to ensure that women psychologists would be fully enfranchised members of the psychological community. Within our organization that has meant the development of a Committee on Women in Psychology as well as other committees formed in response to affirmative action issues. These include a Committee on Academic Freedom and Conditions of Employment, a Committee on Equality of Opportunity in Psychology, a Task Force on Issues of Sexual Bias in Graduate Education, and a Task Force on Sex Bias and Sexual Stereotyping in Psychotherapeutic Practice. In reviewing the operations of the American Psychological Association for the period 1968–73, the Executive Officer was able to demonstrate significantly increased participation of women psychologists on various committees and boards of the organization as well as within the office staff of the Association.

This increased interest, concern, and gradual progress has been heartening and quite directly traceable to the impact of a general government commitment to affirmative action. On the other hand, the report, *Doctoral Scientists and Engineers in the United States, 1973 Profile*, from the Commission on Human Resources, shows that in the scientific community in general, "Women constituted about 9% of the science and engineering doctoral population—2,300. Their median salary was $17,620—$3,500 less than the median salary for men. Women reported an unemployment rate of 3.9%, while the rate for men was 0.9%." The position of women within psychology reflects this poor showing for science in general. This was clearly demonstrated among academic psychology programs.

Attached is the "Survey of Departments of Psychology—1972 and 1973" developed by the Committee on Women in Psychology of the American Psychological Association to evaluate the progress of women psychologists as faculty members of academic departments. Summary Table 4 on page 6 shows that although the percentage of women *instructors* on full time faculties increased from 36% to 43% between 1972 and 1973, the percentage of women *professors* decreased from 8% to 7% from 1972 to 1973. From academic year 1970–71 to 1973–74 there has been increased enrollments of both women and minorities in doctoral programs in psychology. (APA Manpower Survey). At the same time, as Summary Table 4 demonstrates, there has been a small increase in the number of women at the lowest ranks on psychology faculties. This is an initial step in equalizing opportunities for women within the profession of psychology, but in many ways is a misleading one. The Committee on Women in Psychology has received informal reports from numerous women who have been offered one year appointments at various universities. In this respect the universities are attempting to comply with the affirmative action regulations. At the same time the spirit of the regulations is being avoided since, regardless of the women faculty member's performance during her year's appointment, many of them have been notified that the university will be unable to continue that appointment. They thus have no opportunity of becoming a part of the regular tenured faculty. Increasing the input of women and minorities at the lowest level (graduate student and instructor) of the psychological profession without any parallel commitment to following through with increased representation at every level of the instructional staff creates a deceptive picture of progress in coping with sex discrimination.

The "Survey of Departments of Psychology," Summary Table 5 on page 6 of the attchment, also points up the fact that even when women do attain appropriate positions within the psychological heirarchy, they continue to be paid at a lower salary than their male colleagues. In fact, between 1972 and 1973 the salary differential between men and women increased. In 1972 male full professors received $1,720 more than their female colleagues; in 1973 that differential increased to $2,357. Thus, although it may be generally believed that women have made significant progress, particularly within the professions, in the past few years, for psychology the statistical data simply do not support this impression.

The lack of women scientists in the major positions of responsibility in psychology has had a significant impact on the development of psychology as a science. Psychology, as it relates to women, has been permeated with unexamined biases which may distort scientific conclusions. In addition to the fact that psychological theories are usually conceived by men with men in mind, women are used much less frequently as subjects in psychological experiments and their psychology is often inferred by reference to a male model. Moreover, whole areas of inquiry of importance to women are not researched at all, and the whole process of the research enterprise is frequently distorted by the sexually biased value orientation of the scientist without his/her awareness of such bias. The presence of women in the field of psychology on an equal footing with men would be a significant corrective for this distortion in the science of psychology.

In summary, a review of our organization's experience over the past few years with affirmative action demonstrates its importance as a spur to increasing the involvement of women in the psychological profession. At the same time it is clear that greater government action is necessary to promote an actualization of equal opportunity for women within psychology and society in general.

SEPTEMBER 20, 1974.

AMERICAN PSYCHOLOGICAL ASSOCIATION

WASHINGTON, D.C.

As staff liaison for the Committee on Women in Psychology of the American Psychological Association I am very concerned about the on-going hearings of the Special Subcommittee on Education on civil rights compliance on eligibility for federal assistance by institutions of higher education.

I am attaching a statement from the Executive Officer, Kenneth B. Little, Ph.D. of the American Psychological Association concerning the experience of our organization with affirmative action regulations that I would like to submit for the committee's record. In addition, in this letter I should like to share my personal experience with the importance of affirmative action.

In addition to my position here as staff liaison for the Committee on Women in Psychology, I am Administrative Officer for Policy Studies, a senior staff position. This position became known to me in an advertisement in the American Psychological Association *Monitor*. The policy of advertising such positions and encouraging the response of minority and women candidates is a clear result of affirmative action input to the American Psychological Association. In the past four years there has been a move away from filling positions of responsibility with "friends of friends" to a new awareness that since the friends of "white males" tend also to be "white males" such recruitment results in excluding qualified women and minority doctorates from positions of responsibility in the organization.

After taking my position as Administrative Office for Policy Studies and being invited to serve as staff liaison for the Committee on Women in Psychology, my own awareness of sexual bias was strikingly enhanced. Stimulated by affirmative action requirements, colleges, universities, and organizations such as ours have been polling our own memberships to determine what qualified individuals are available. In doing so I have been astonished to find the large number of well trained, competent and interested women available for positions of responsibility who until recently were simply assumed not to exist.

The attached statement will more carefully delineate the impact of affirmative action on the operations of the American Psychological Association.

Thank you very much for your consideration of this material.

Sincerely,

SERENA STIER, PH. D.,
Administrative Officer, Committee on Women in Psychology.

SURVEY OF DEPARTMENTS OF PSYCHOLOGY—1972 AND 1973

Data have been collected for the last three years from graduate departments of psychology to assess the status of women. The SPSSI (Division 9) Committee on Sex Discrimination Survey in the Spring of 1971 drew a response from 74 percent of the total 231 deparments. In Spring 1972 the Task Force on the Status of Women in Psychology modified the questionnaire to reflect the issues spelled out in its Guidelines to Department Chairpeople, and this mailing drew an 83 percent response from the population surveyed, which consisted of APA-accredited departments, and the largest Ph. D. and M.A. granting departments. With minor changes, the 1973 Survey Questionnaire was sent to the same institutions, yielding an 86 percent response rate of those who answered in 1972.

These data have been collected in order to monitor to what extent the Guidelines formulated by the earlier Task Force are being implemented. Thus, the reports serve the purpose of providing feedback for the Council of Representatives, boards and committees in the APA governance structure, as well as for relevant government agencies and psychology departments. Moreover, these data continue to point out the necessity of further actions in order to remedy the existing inequity in the status of men and women psychologists.

Data comparing academic years 1971–72 and 1972–73 are included in the attached tables. An examination of these data does not show apparent changes in the reward structure, such as rank and salaries. However, there are some positive changes noted with respect to institutional policies—e.g., parental leaves granted working parents, anti-nepotism regulations, and the offering of women's studies courses.

After three years, it is a well-documented fact that a great deal of work remains to be accomplished in order to effect change and achieve our goal. New measures must and will be sought to overcome the patterns of discrimination which have prevented equality for men and women psychologists.

LIST OF INSTITUTIONS AND PROGRAMS IN 1972 AND 1973 SURVEYS

A. Respondents in both 1972 and 1973:

Adelphi[1]
Arizona, Univ. of[1]
Arizona State[1]
Boston Univ.[1]
Bowling Green Univ.[1]
Calif., Univ. of (Berkeley)[1,2]
Calif., Univ. of (Los Angeles)[1,2]
Case Western Reserve[1]
Chicago, Univ. of (Psych.)[2]
Cincinnati, Univ. of[1]
Clark Univ.[1]
Colorado State[1]
Colorado, Univ. of[1,2]
Conn., Univ. of (Child Devel.)[1]
City College of CUNY[1]
Denver, Univ. of[1]
Detroit, Univ. of
Duke Univ.[1,2]
Emory Univ.[1]
Florida State[1]
Fordham Univ.[1]
George Peabody College for Teachers[1]
George Washington Univ.[1]
Georgia Univ.[1]
Harvard[1]
Houston, Univ. of[1]
Ill. Inst. of Technology
Indiana Univ.[1,2]
Iowa, Univ. of (Child Develop.)[1,2]
Kansas, Univ. of (Human Devel.)[1]
Kansas, Univ. of (Psych.)[1]
Kent State[1]
Kentucky, Univ. of[1]
Louisiana State Univ.[1]
Loyola[1]
Maryland, Univ. of[1]
Mass., Univ. of[1]
McGill Univ.[1]
Miami, Univ. of[1]
Michigan State Univ.[1,2]
Michigan, Univ. of[1,2]
Minnesota, Univ. of (Duluth)[1]
Minnesota, Univ. of (Minneapolis)[2]
Missouri, Univ. of[1]
Montana, Univ. of[1]
Montreal, Univ. of
Nebraska, Univ. of (Psych.)[1]
North Dakota, Univ. of[2]
Northern Colorado, Univ. of
Northwestern Univ.[1,2]
Oklahoma State Univ.[1]
Oklahoma Univ.
Ohio State Univ.[1,2]
Ohio Univ.[1]
Oregon, Univ. of[1,2]
Ottawa, Univ. of[1]
Pennsylvania State Univ.[1,2]
Pittsburgh, Univ. of[1]
Princeton[2]
Purdue[1]
Rochester Univ.[1,2]
St. Louis Univ.[1]
San Jose State
South Carolina, Univ. of[1]
Southern Illinois Univ.[1]
Southern Methodist Univ.
SUNY/Buffalo[1]
Temple[1]
Texas Tech. College[1]
Texas, Univ. of (Austin)[1]
Texas, Univ. of (El Paso)[1]
Toronto, Univ. of
Vanderbilt Univ.[1]
Washington State Univ. (Child Devel.)[1]
Washington State Univ. (Psych.)[1]
Waterloo, Univ. of[1]
Wayne State Univ.[1]
Western Michigan Univ.
Western Virginia Univ.[1]
Wisconsin, Univ. of[1]
Yale Univ.[1,2]
Yeshiva.[1]

N = 82 (85% response of those who also responded in 1972).

[1] Indicates APA Approved doctoral programs in clinical, counseling, and school psychology: 1973.

[2] Indicates ACE—Top Quality Rated Institutions in Psychology including institutions with rating over 3.0.

B. Respondents in 1973, but Late or non-respondents in 1972:

Arkansas, Univ. of
British Columbia, Univ. of
Catholic Univ.
Florida, Univ. of
Hofstra Univ.
Illinois, Univ. of
Iowa, Univ. of
Kansas State Teachers College
Minnesota, Univ. of (Counseling)
North Carolina, Univ. of
North Texas State Univ.
Syracuse Univ.
Tenn., Univ. of

C. Respondents in 1972, but Late or non-respondents in 1973:

Alabama, Univ. of
Calif. State College
Claremont
Columbia Univ.
Minnesota, Univ. of (Psych. Foundations)
Nebraska, Univ. of (Ed. Psych. & Meas.)
New York Univ.
Rutgers
Southern Calif., Univ. of
Stanford Univ. (Organiz. Behavior)
Teachers College (Columbia)
Utah, Univ. of (Ed. Psych.)
Washington, Univ. of (Psych.)
Western Ontario, Univ. of

D. Non-respondents or late both 1972 and 1973:

Chicago, Univ. of (Human Develop.)
Conn., Univ. of
San Francisco State
Washington Univ.
Pennsylvania, Univ. of

SUMMARY TABLE 1.—APPLICATIONS AND ADMISSION TO DOCTORAL GRADUATE STUDY—1972 AND 1973

Institutional group (1973)	1972				1973			
	Number applied		Percent accepted		Number applied		Percent accepted	
	Male	Female	Male	Female	Male	Female	Male	Female
All institutions (84)	14,621	6,818	12	12	19,069	10,796	7	8
Top quality (18)	5,740	2,822	10	11	6,555	3,678	9	10
APA accredited	12,326	5,864	9	10	17,304	9,735	7	8

SUMMARY TABLE 1A.—APPLICATIONS AND ADMISSION TO DOCTORAL GRADUATE STUDY—1972 AND 1973

Institutional group (1973)	1972				1973			
	Number applied		Percent accepted		Number applied		Percent accepted	
	Male	Female	Male	Female	Male	Female	Male	Female
All institutions (84)	4,723	1,780	25	47	3,110	2,205	18	21
Top quality (18)[1]								
APA accredited (61)	568	419	19	36	2,347	1,615	10	9

[1] The top quality category represents departments rated 3 or higher. See Roose, K.D., and Anderson, C.J. "A Rating of Graduate Programs." Washington, D.C.: American Council on Education, 1970.

SUMMARY TABLE 2.—DEPARTMENTAL POLICIES ON PART-TIME STUDY—1973 AND 1973

[In percent]

Institutional group (1973)	1972		1973	
	No part-time study	Part-time allowed	No part-time study	Part-time allowed
All institutions (84)	37	[1] 59	60	40
Top quality (18) [2]	9	91	72	28
APA accredited	45	[1] 51	66	34

[1] Does not total to 100 percent because of "No information given" category in 1972 questionnaire.
[2] See footnote, table 1A.

SUMMARY TABLE 3.—COURSES BEING OFFERED ON WOMEN—1972 AND 1973

Institutional group (1973)	In psychology department		In university	
	Number	Percent	Number	Percent
1972:				
All institutions (84)	36	37	50	51
Top quality (18) [1]	13	59	11	50
APA accredited	25	37	31	46
1973:				
All institutions (84)	49	58	40	48
Top quality (18) [1]	12	67	14	78
APA accredited (61)	38	62	29	48

[1] See footnote, table 1A.

SUMMARY TABLE 4.—COMPARATIVE RANKS OF WOMEN AND MEN FULL-TIME FACULTY—1972 AND 1973

Ranks	All schools				Top quality programs [1]				APA accredited			
	1972		1973		1972		1973		1972		1973	
	Total number	Percent women	Total number	Percent womun	Total number	Percent women	Total number	Percent women	Total number	Percent women	Total number	Percent women
Instructor	164	36	176	43	39	41	52	40	116	34	114	46
Assistant professor	758	15	720	18	185	10	180	17	568	12	539	16
Associate professor	630	14	622	14	129	11	148	11	456	13	464	13
Full professor	908	8	847	7	305	2	318	3	406	10	669	7
Resident appointment	66	48	59	49	46	52	14	43	42	52	44	52
Total	2,526	14	2,424	16	704	11	712	12	1,588	14	1,830	15

[1] See footnote, table 1A.

SUMMARY TABLE 5.—SALARY DIFFERENTIALS BETWEEN WOMEN AND MEN (TOTAL SAMPLE IN WEIGHTED MEANS)—1971 AND 1973

Ranks	Number	Men 1972	Men 1973	Women 1972	Women 1973
Instructor	78	$6,919	$10,888	$9,638	$10,690
Assistant professor	479	12,280	12,609	12,254	11,342
Associate professor	440	15,079	15,598	14,963	15,884
Full professor	659	20,873	21,572	19,153	19,215

Note: In 1972, 25 institutions out of 98 responding did not provide information. In 1973, 15 institutions out of 84 did not provide information.

SUMMARY TABLE 6.—DEPARTMENTS ALLOWING BOTH HUSBAND AND WIFE TO TEACH—1972 AND 1973

	1972				1973			
	Both allowed to teach		Both allowed as regular faculty		Both allowed to teach		Both allowed as regular faculty	
Institutional group (1973)	Number	Percent	Number	Percent	Number	Percent	Number	Percent
All institutions (84)	89	91	69	70	82	98	74	88
Top quality (18)[1]	21	95	17	77	13	100	17	94
APA accredited (61)	59	88	43	64	59	97	52	85

[1] See footnote, table 1A.

SUMMARY TABLE 7.—PARENTAL LEAVES GRANTED—1972 AND 1973

	1972		1973	
Institutional group (1973)	Number	Percent	Number	Percent
All institutions (84)	49	50	59	70
Top quality (18)[1]	11	50	12	67
APA accredited (61)	32	48	44	72

[1] See footnote, table 1A.

FEDERATION OF ORGANIZATIONS FOR PROFESSIONAL WOMEN,
Washington, D.C., September 22, 1974.

Hon. JAMES G. O'HARA,
Chairman, Special Subcommittee on Education,
Cannon House Office Building,
Washington, D.C.

DEAR CONGRESSMAN O'HARA: On behalf of the Federation of Organizations for Professional Women, I am submitting a statement of our views concerning your hearings on "Civil Rights Compliance and Federal Funding for Institutions of Higher Education." As I believe our Government Liaison Task Force Chairperson, Dr. Helene Guttman, has already indicated to you, the Federation was disappointed that it was not asked to appear before the committee. Our membership is especially concerned with the achievement of equal rights on campus and is therefore keenly interested in being assured that the recent forward progress will not be halted due to a relaxation of affirmative action requirements.

In addition to our statement, the Federation would also like to submit for the record three documents which we believe shed useful light on the hearing topic. These include the following:

1. Statement of Affirmative Action for Equal Employment Opportunities by the United States Commission on Civil Rights.
2. "Affirmative Inaction on Campus: Will the Real Victims Please Stand Up?" An unsigned article from *The Spokeswoman*, August 15, 1974.
3. Gertrude Ezorsky, "The Fight Over University Women," *The New York Review of Books*, May 16, 1974.

Thank you for your consideration of these submissions.

Sincerely,

JULIA GRAHAM LEAR,
Chairperson, Affirmative Action Task Force.

STATEMENT OF JULIA GRAHAM LEAR

CIVIL RIGHTS COMPLIANCE AND FEDERAL FUNDING OF INSTITUTIONS OF HIGHER EDUCATION

During the past year, the Federation of Organizations for Professional Women, an umbrella association of 53 professional organizations and caucases dedicated to equal rights for women, has watched with concern as a groundswell of opposition has developed to application of Revised Order No. 4 to institutions of higher education. It appears to us that the impression has been created that the order has forced universities to lower standards to hire women and minorities and that the only purpose the order serves now is to perpetuate the inordinate power women and minorities wield on campus. Our membership, which includes academicians in the social sciences, humanities and physical sciences, rejects this motion and wishes to stress to your committee our belief that equal rights both for women and minority students and faculty are as yet an unrealized dream at many universities. We still need strong, effective affirmative action programs to assure equal opportunity on campus.

The opponents of affirmative action and Revised Order No. 4 appear to base their claim that the bureaucratic procedures required by the order are unnecessary on the following grounds:

1. That universities now routinely follow non-discriminatory practices and seek out the best candidate, male or female, whether for teaching positions or scholarships.

2. That a lack of supply of quality candidates is the reason women have not been hired by some faculties.

3. That the order itself encourages reverse discrimination and is inherently unfair to universities.

We would like to comment on each of these contentions in light of our experience during the past several years.

1. *Universities routinely follow non-discriminatory practices and seek out the best candidates without regard to sex or race.*—Unfortunately, this is not the case. For example, in December 1973, the Committee on the Charles Bullard Fund for Forest Research, Harvard University placed a page length column in the journal *Bioscience* announcing fellowships for "advanced research and study by men." Throughout the advertisement references were to "his" and "him". While inquiries from the Federation and the Association of Women in Science produced assurances that women were welcome to apply, the announcement did not read that way and implied quite the contrary. Thus, despite two years of allegedly oppressive government regulation in support of equal employment opportunity, at least one group of senior professors at Harvard were unaware of their obligation to advertise for "men and women".

2. *A lack of supply of quality candidates is the reason why leading universities have hired so few women.*—Data from my own field, political science, calls this statement into question. According to statistics published by the American Political Science Association in 1974 the following major departments of government had no women on their faculties (the number of faculty members appear in parentheses): Columbia (25), Cornell (25), North Carolina (34) and Syracuse (26). Three departments employed one woman: University of California at Berkeley (42), Stanford (25) and Yale (27). What is peculiar here is that these same universities were graduating women doctorates at increasing rates and these same graduate departments would generally be the source of new assistant professors at the more prestigious schools. For example, in the past three years Berkeley graduated 18 women doctorates, Columbia—28, Harvard—22 and Yale—7.

Professor Richard Lester in *Antibias Regulation of Universities* suggests that women would be more in evidence on the faculties of elite universities if the federal government would undertake to finance graduate programs for women and minorities at the elite schools. But the evidence above indicates that the problem does not lie in the absence of women graduate students. Women are being accepted into the graduate programs at major universities; they simply are not being hired.

Some statistics covering other disciplines and institutions reveal that the situation in political science is not unique. *The Spokeswoman* printed the following statement in "Affirmative Inaction on Campus" (August 15, 1974): "In 1968, 26% of Ph. D.s awarded in psychology at major institutions went to women, as well as 20% in zoology, 21% in biochemistry, 13% in history and 11% in philosophy. In 1968–69, Berkeley had 163 men filling 163 positions in these disciplines. In 1960, Harvard awarded 10% of Ph.D.s in arts and sciences to women, and in 1969, 19%. Of 484 senior Harvard faculty members in 1969–70, 483 were men. . . . Unless these universities believe the degrees they give are worthless, they can only explain the under-utilization of women by saying that 1) women don't want to teach after they get the degrees or 2) that family pressures reduce ambition and output and thus justify low salaries and slow promotion rates. Ezorsky calls the rationalization of "family responsibilities" one of the most pervasive and pernicious, and gives it a name of its own: "famrat." Famrat doesn't stand up to the facts, however: 90% of women Ph.D.s are employed, primarily in lower ranking universities and at lower levels. A 1967 article in *Social Problems*, "The Woman Ph.D., a Recent Profile," found that married women Ph. D.s published as much or more than men Ph. D.s.

3. *The order itself encourages reverse discrimination and is unfair to universities.*—The widely-held belief that the order requires reverse discrimination and permits overbearing directives to universities from the Office for Civil Rights, H.E.W. is, we believe, not the result of careful study of the order's impact, but the result of a barrage of mis-leading criticism from some of our most distinguished scholars and administrators. For example, on October 27, 1973 (p. 59) *The Economist* reported the following from a conference in Vienna entitled "International Council on University Emergencies":

> . . Martin Seymour Lipset, a sociologist from Harvard, set out his argument in his report on the American scene. The state now has the whip hand over many universities in the United States, he said, because of the financial squeeze imposed by the Nixon administration. They are being asked by government departments and courts for "affirmative action": towards minority groups, defined as women, blacks, Latin Americans and American Indians.
>
> This means hiring university staff under special quotas laid down by the Department of Health, Education and Welfare, sometimes without regard for the academic merit of the candidates.

If Professor Lipset's presentation was reported correctly, this can only be described as the grossest distortion of what Revised Order No. 4 says. There is no requirement to hire unqualified people: there is only a requirement to recruit broadly and to open up the hiring and promotion processes.

An equally misleading statement was made by President William McGill of Columbia University concerning H.E.W.'s administration of Revised Order No. 4 in a *Life* magazine editorial, October 8, 1971. President McGill charged that, without "prior warning", H.E.W. had informed Columbia that it was not in compliance with the order and would face a cut-off of federal funds. McGill went on to state that "There was no notice of hearing or right to appeal, no clear indication in fact of the manner in which we had failed in compliance." As the committee is probably aware, H.E.W.'s rejection of Columbia's affirmative action plan culminated two and one-half years of negotiations between the university and H.E.W.'s Office for Civil Rights. During that time Columbia had consistently refused to provide basic employment data that was fundamental to the construction of a new affirmative action policy.

Opponents of affirmative action are probably correct, however, when they reject the order on the grounds it permits universities to make sex and race relevant criteria in hiring. The question is: Is this a bad thing? The Revised Order assumes that it is desirable to have women and minorities employed by universites to the degree they are available in the appropriate disciplines. And this may mean that in cases where women and minorities have been restricted or excluded before, the order is suggesting that one's sex or race may be relevant to the candidate selection process—*all other things being equal.* It can thus be argued that since the regulation does not encourage blindness to sex or color, the regulation is therefore defective. While this argument, on its face, is persuasive to all concerned with even-handed justice, we would suggest that a regulation that forbade any consideration of race or sex in evaluating job candidates *at this time* might be analagous to the situation Anatole France had in mind when he noted that the French government, with a passion for equal justice, had forbidden both the rich and the poor from sleeping under bridges. A regulation which on its face may appear fair may actually serve to perpetuate hardship for a traditionally deprived group. We believe that until the legacy of female and minority exclusion has been dissipated, some kind of mechanism (whether it be Revised Order No. 4

or similar legislation) will be absolutely essential to assure equal justice for women and minorities on campus.

As a final comment, we would submit that if there has been improper implementation of the order, that does not mean the regulation is bad, but it may mean that there has been poor enforcement and perhaps some bad faith. We think there are remedies for poor enforcement which would not require exempting universities from the obligations of Revised Order No. 4. It would certainly be appropriate before re-constructing the civil rights obligations of universities that some attempt be made to determine what has happened on campus under the revised order. To date an impartial study of this matter has not been made. Obviously, changes in the civil rights obligations should not be made lightly. Affirmative action did not spring full blown out of a meddlesome bureaucracy but, as Virginia Willis wrote in *Affirmative Action: The Unrealized Goal*, "Affirmative action has its roots in the failure of attempts over three decades to establish equal employment opportunity through passive prohibition of conscious discrimination." Any attempt to replace the order must proceed in full recognition of this fact and only after data concerning the implementation of the order has been received and carefully studied.

STATEMENT ON AFFIRMATIVE ACTION FOR EQUAL EMPLOYMENT OPPORTUNITIES BY THE U.S. COMMISSION ON CIVIL RIGHTS

Since its creation in 1957, the U.S. Commission on Civil Rights has investigated and analyzed the issue of employment discrimination. This pervasive problem continues to attract considerable attention although great strides have been taken by the Federal Government to remedy it. State and local Fair Employment Practices Commissions, Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Commission, and Executive Order 11246, are all products of the past 15 years of attention to this situation.

If laws had changed the conditions of employment discrimination, there would be little need for subsequent action today. But the employment picture for our society indicates that the groups victimized by discriminatory employment practices still carry the burden of that wrongdoing.

Unemployment for blacks, Spanish surnamed Americans, and other minorities remains far higher than that of white America. For the past 15 years, the unemployment rate for nonwhites has been twice that for whites. The national rate in 1971 was 5.4 percent for white Americans, but 9.9 percent for blacks and other minority individuals. In 1969–70 the unemployment rates in New York City showed the following disparity: Whites in the city recorded a rate of 4.7 percent; blacks, 5.4 percent; and Puerto Ricans, 9.5 percent. Underemployment (part-time workers seeking full employment), another plague on minority job seekers, is also a real problem. A 1966 Government study found an underemployment rate of 29.1 percent in minority (black and Puerto Rican) neighborhoods of New York City.

The underemployment rates for minority Americans are not just a consequence of past discrimination. A look at youth employment rates refutes this argument. For white male adults, the unemployment rate is 4.0 percent; for white teenagers, it is 15.1 percent. However, the statistics for minority male adults show a rate of 7.2 percent; and for minority teenagers, a staggering 31.7 percent.[1]

In whole industries such as building construction, higher education, and government civil service, racial and ethnic minorities and women are consistently absent or found in disproportionate numbers in low wags, low status jobs.[2]

Income is another measure of the job discrimination suffered by minority Americans. In 1971 the median family income for whites was $10,672 compared with $6,440 for non-writes, and $7,117 (1970 figure) for Spanish surnamed Americans. The discriminatory effects on minorities is obvious when one considers that 32 percent of blacks were below the low income level (poverty line) in 1971. Including Spanish surnamed Americans, Indians, and other minority groups, the figure declines slightly to 31 percent. But the number of white Americans living in poverty is only 8 percent. The receipt of public assistance is another indicator of the economic status of minority citizens. While 4 percent of the white population receives public assistance, 25 percent of the minority population receives aid. In toto, 6.4 million blacks, and other non-white persons, rely upon public assistance in order to survive.[3]

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[1] U.S. Commission on Civil Rights, Job and Civil Rights 5 (1969). U.S. Commission on Civil Rights, Demographic, Social and Economic Characteristics of New York City and the New York Metropolitan Area 10–12 (1972). U.S. Department of Labor, Bureau of Labor Statistics, The Social and Economic Status of the Black Population in the United States, 1971, 52, 53.

[2] In the construction trades, new apprentices were 87 percent white, and 13 percent black. For the Federal Civil Service, of those employees above the GS–5 level, 88.5 percent are white, 8.3 percent black, and women account for 30.1 percent of all civil servants. Finally, a 1969 survey of college teaching positions showed whites with 96.3 percent of all positions. Blacks had 2.2 percent, and women accounted for 19.1 percent.

The mechanisms created by Title VII alone cannot handle the dimensions of the problem. In FY 1972 the EEOC received 38,840 complaints; it expects 45,000 new complaints during the next fiscal year. The growing backlog of cases is now 53,410, 43,101 of which are pending investigation. Conciliation enforcement and litigation against employment discrimination cannot receive EEOC priority in such a situation.

The benefits of a Federal contract compliance program to accompany EEOC activities are impressive. Fully one-third of the Nation's labor force is employed by companies which are Government contractors. These companies are among the Nation's largest and most prestigious business firms and institutions. The ending of discriminatory employment barriers in this sphere of the Nation's economic life would go far to redeem the pledge of nondiscrimination contained in the Civil Rights Act of 1964.

Over the last years the Nation has been witness to this shift in equal employment opportunity policy from the enacting of legislation to the implementation of nondiscrimination laws. In its wake the move has given rise to a debate concerning the parameters of affirmative action and the possible sanctioning of quota systems and reverse discrimination to achieve nondiscriminatory employment.

To offer a Commission view of this issue, the Commissioners have prepared this Position Statement for public discussion and official consideration. Part I is a survey of the present status of the law and the basis for affirmative action. Part II is a review of certain terms relevant to this area—a look at what affirmative action is, and what it is not. Part III is an effort to respond to certain questions that inevitably evolve out of such discussions. And Part IV discusses the policy considerations invoked by the affirmative action issue and proposes ultimate objectives for nondiscrimination in employment nationally.

PART I

Federal, State, and local laws prohibit employment discrimination by employers, labor unions, and others. Where discrimination has occurred, the law requires that all continuing discriminatory effects be remdied.[4] However, intentional discrimination, such as job assignment by race, is but the tip of an iceberg. Racial and ethnic divisions in society have translated themselves into institutions which systematically deny equal employment opportunity to minority persons. Similarly, traditional and outmodel views of the role of women give rise to widespread patterns of employment discrimination on the basis of sex. Accordingly, one of the most pervasive forms of employment discrimination is "systemic discrimination" i.e., discriminatory practices—most, but not all, unintentional—built into the systems and instructions which control access to employment opportunity.

While erecting formidable and, at times, insurmountable barriers to minorities and women seeking employment, the effect of this has been to create a substantial preference for white males irrespective of their relative qualifications vis-a-vis members of the excluded groups. Viewed in this context affirmative action programs are designed not to establish preferential treatment for minorities and women. Rather, the purpose of such programs is to eliminate the institutional barriers that minorities and women now encounter in seeking employment and thereby to redress the historic imbalance favoring white males in the job market. The elimination of these disparities in employment opportunity is absolutely essential if the polarization with which the Nation is now afflicted is ever to be eradicated. Effectuation of affirmative action programs is, therefore, truly in the national interest.

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[3] U.S. Department of Labor, Bureau of Labor Statistics, The Social and Economic Status of the Black Population in the United States, 1971, 32–46. U.S. Department of Commerce, Bureau of the Census, Selected Characteristics of Persons and Families of Mexican, Puerto Rican and Other Spanish Origin: March, 1971.

[4] Thus, for example, a common discriminatory has been the assignment of minority workers to certain departments of a particular business. Under Title VII of the Civil Rights Act of 1964, the Federal courts require that such employees be given special remedial rights to transfer into departments from which they previously were excluded. *Papermakers and Paperworkers, Local 189 v. United States*, 416 F. 2d 980, 988 (5th Cir. 1969), *cert. den.*, 397 U.S. 919 (1970).

Affirmative action programs are aimed at, among other things, eliminating the existing discriminatory barriers to equal employment opportunity.

Some common examples of discriminatory barriers to equal employment opportunity are:

> Instances in which an employer or union rely upon word of mouth contact for recruitment, minority persons who have less acces than other persons to informal networks of employment information, such as through present employees or officials, are denied equal access to available opportunities.
>
> Recruitment at schools or colleges with a predominantly nonminority or male makeup is discriminatory when comparable recruitment is not done in predominantly minority or co-ed institutions.
>
> Rules against employment of married women and rules providing for the automatic termination of employment upon pregnancy amount to unwarranted discrimination against women.
>
> Job qualifications which are not substantially related to job requirements unfairly penalize minority persons with limited education or job experience.
>
> A past history of discriminatory practices continues to deter minority applications until the employer has clearly demonstrated that equal employment opportunity is being achieved.

There has been a growing awareness in recent years of these problems, and widespread adoption of remedies to deal with them. Despite these efforts, both intentional discrimination and systemtic discrimination remain widespread. Moreover, a point of even greater significance is that the *consequences* of years of such discrimination in the past remain. As long as the consequences of past discrimination—e.g., the employment opportunity preference in favor of white males—persist, the necessity to redress the imbalance continues.

These, then, are the considerations which underlie the need for remedial "affirmative action".

As part of the Civil Rights Act of 1964, Congress enacted Title VII of the act which makes it a violation of Federal law for an employer, labor union, or employment agency to discriminate against an employee or prospective applicant because of race, color, ethnic origin, religion, or sex. To enforce this new law, Title VII established an Equal Employment Opportunity Commission with the power to investigate complaints, conciliate, and recommend the initiation of civil action by the Department of Justice.[5]

In addition to Justice Department instituted procedings, Title VII permits the complainant to initiate suit in Federal court if EEOC conciliation fails.

In cases arising under Title VII, the Federal courts have established that where the proportion of minorities employed by the defendant employer is less than that which reasonably would be expected on the basis of the availability of qualified minority group members, a presumption of discrimination arises. *United States* v. *Ironworkers Local 86*, 443 F. 2d 544, 550–551 (9th Cir. 1971), cert. den., 404 U.S. 984 (1971); *United States* v. *Hayes International Corp.*, 456 F. 2d 112, 120 (5th Cir. 1972); *United States* v. *United Brotherhood of Carpenters and Joiners, Local 169*, 457 F. 2d 210, 214 (7th Cir. 1972). The burden is shifted to the defendant to demonstrate that such underutilization is not the product of discrimination. *Id.*

If the Federal court reaches a finding of employment discrimination under Title VII, it may "order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay." Section 706(g), Title VII. Because of the significance of the *consequences* of years of past systematic discrimination, the legal wrong ends only when all the consequences of past discrmination have been eliminated by the employer.

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[5] Under Title VII, as amended by the Equal Employment Opportunity Act of 1972, the EEOC has jurisdiction over those businesses engaged in interstate commerce that employ more than 25 employees. As of March 24, 1973, the jurisdictional number will drop to 15 employees as provided by the 1972 amendments. Coverage was also extended to include employment by State and local governments, and educational institutions exempt under the 1964 legislation. This extension was effective as of March 24, 1972.

The EEOC was also empowered to initiate legal actions in Federal court against violators of EEOC orders, and the courts were authorized to issue cease and desist orders enjoining unlawful employment practices when a violation of the law has been proven. This EEOC court enforcement power applies to discrimination by private employers only. The Department of Justice is responsible for enforcement of Title VII against public employers and educational institutions. Public Law 92–261 (March 24, 1972).

The number of cases which can be tried by Federal courts of administrative tribunals is small compared to the pervasive nature of employment discrimination. Responding to this void, the Federal Government over the last decade has promulgated a series of Executive orders that provide for nondiscriminatory employment by Federal contractors, and construction contractors on federally assisted projects. The current order is E.O. 11246.

The use of affirmative action remedies is basic both to Title VII and to Executive Order 11246. Thus, for example, when the court in an action under Title VII determines that the defendant has discriminated in violation of the Title, the court will order the employer to undertake affirmative action which will remedy the discriminatory consequences of past discrimination and prevent the recurrence of such discrimination in the future.

A principal difference between Title VII and Executive Order 11246 is that the Executive order imposes upon Federal contractors the duty to make a *self-determination* as to the need for affirmative action, without resort to a judicial determination. Thus, the keystone of the "affirmative action plans" which Federal contractors are required to adopt, is the self-analysis performed by the contractor.

Like other affirmative action requirements applicable to Federal contractors, this "self-analysis" requirement appears in regulations promulgated by the Office of Federal Contract Compliance (OFCC) of the United States Department of Labor (41 CFR 60). The regulations require:

> An analysis of all major job classifications at the facility, with explanation if minorities or women are currently being underutilized in any one or more job classification . . . . 41 CFR 60-2.11(a).

The regulations define "underutilization to mean

> having fewer minorities or women in a particular job classification than would reasonably be expected by their availability. *Id.*

While the regulations afford guidance in making the determination of "underutilization" (see 41 CFR 60-2.11(a)(1)), the determination is of necessity an approximate one. The determination will depend upon the industry of the contractor, and the location of the facility or institution. While it is probably that minority underutilization will include blacks, women, and Spanish surnamed individuals, it is quite possible that, in some locations, Jews, Asian Americans, ethnic Europeans, and Indians will be underutilized minorities for some Federal contractors.[6] Nonetheless, the crucial point to bear in mind is that patterns of systemic discrimination have been so pervasive that gross and unmistakable underutilization is a common occurrence.[7] As the OFCC regulations point out, this is most likely to be the case in such categories as officials and managers, professional, technicians, sales workers, office and clerical staffs, and skilled craftsmen. (See 41 CFR 60-2.11).

Once a pattern of underutilization is identified, the next step is to assess the obstacles (generally, form of "systemic discrimination" such as those described above) which have produced it, and to design corrective aaffirmtive action accordingly. (41 CFR 60-1.40; 60-2.24).

The kinds of affirmative action which may be appropriate are as diverse as the forms of systemic discrimination themselves. The OFCC regulations (41 CFR 60-2.24) list a host of affirmative actions which may be appropriate. These include actions in the area of determining qualifications, recruitment, training, promotion, counseling, and other areas.

The absence of a court order does not permit employers to legally continue otherwise discriminatory employment practices. All employers covered by Title VII and all Federal contractors covered by E.O. 11246 have a legal obligation to obey the law, and thus take steps to eliminate any discriminatory employment practices that may persist in their businesses or institutions. Since continuation of discriminatory practices may eventually give rise to an EEOC action or private litigation with its concomitant remedies of reinstatement, back pay, affirmative recruitment, proportionate hiring, etc., common sense and sound legal advice should compel the employer to take such steps. Thus, the employer would be well-advised to eliminate unlawful practices himself as opposed to awaiting future court or administrative action. Given the polarization which stems, in part, from the existing gross disparaties in employment opportunity, such steps are not only legally proper but are also consonant with sound management principles.

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[6] The Federal Regulations for the implementation of E.O. 11246, known additionally as "Revised Order No. 4," do not provide a comprehensive definition of the terms "minority" or "minority group." The Regulations do provide some limitation on the terms by referring to the affirmative action program's beneficiaries as "members of an 'affected class' who by virtue of past discrimination continue to suffer the present effects of that discrimination." 41 CFR 60-2.1. Thus, the term "minorities" applies generally to blacks, Indians, and Spanish surnamed Americans. In certain contexts, depending upon the geographic area and a past history of discriminatory practices, Asian Americans, Jews, and white ethnic groups may also be deemed "minorities" within the meaning of 41 CFR 60-2.10, 60-2.11.

[7] In the absence of such gross and unmistakable underutilization, discrimination and/or the present effects of past discrimination would, of course, have to be shown as the basis for any affirmative action effort.

1. Employer A never has had to recruit employees for an 800-person industrial plant engaged in interstate commerce. An abundant number of applicants always has been produced through word-of-mouth references from present employees. Because the employers' work force is all-white the applicants obtained by employee word-of-mouth are similarly all-white. Despite an abundance of present white applicants, and despite the expense involved, the employer nonetheless embarks on an intensive recruitment campaign, directed specifically at areas of minority residential concentration.

Such remedial recriutment efforts are directly supported by judicial decisions. In *Parham* v. *Southwestern Bell Telephone Company*, 433 F. 2d 421 (8th Cir. 1970), the court held that an ostensibly nondiscriminatory method of recruitment—by word-of-mouth through present employees—comprised illegal discrimination. See also, *Lea* v. *Cone Mills Corp.*, 301 F. Supp. [illegible]7 (M.D.N.C. 1969), *aff'd in part and vacated in part on other grounds per curiam*, 438 F. 2d 86 (4th Cir. 1971) ; *Clark* v. *American Marine Corp.* 304 F. Supp. 603, 606 (E.D. La. 1969).

In these circumstances, affirmative efforts to recruit minorities are necessary to counterbalance the pro-white bias inherent in word-of-mouth recruitment through a predominantly white work force.

The United States Supreme Court has stated a more general rule, of which the above case is an application. In a case pertaining to tests used in appraising applicants, the Court held that ostensibly "objective" criteria for employment or promotion are discriminatory if they result in a relative disadvantage for minority persons, without being plainly compelled by business necessity. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

2. In designing an affirmative recruitment campaign, the president of State College B, an institution with numerous HEW research contracts, may learn that the dearth of professional minority personnel employed at the college is due in substantial part to the fact that the college has a history in the black community as one which traditionally has not employed black faculty and staff. Although under no judicial compunction to take remedial action, the president may, nevertheless, conclude that the college is in a situation which requires remedial action. Such action typically involves affirmative steps assuring the minority community that the institution will afford minority applicants meaningful equal employment opportunity and that employment of qualified minority applicants will not be limited to mere token representation. To achieve such assurance the president of State College B might well embark upon a program designed to increase the pool of minority applicants for positions at the school and involving, at least for a limited period of time, a program of hiring a reasonable ratio of minority applicants.[8]

The premise of ratio hiring is that the employer has a pool of applicants—including whites and minorities—who are qualified for the job in question. The rationale of *Carter* v. *Gallagher* is that such ratio hiring will provide an assurance necessary to overcome the deterrent effect which past discriminatory practices have had upon minority applicants.[9]

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[8] The principle here involved has been enunciated as follows: Given the past discriminatory hiring policies of the Minneapolis Fire Department, which were well known in the minority community, it is not unreasonable to assume that minority persons will still be reluctant to apply for employment, absent some positive assurance that if qualified they will in fact be hired on a more than token basis. *Carter* v. *Gallagher*, 452 F. 2d 315, 331 (8th Cir. 1972).

[9] The same remedial principle of ratios was adopted by the court in *Local 53* v. *Vogler*, 407 F. 2d 1047 (5th Cir. 1969), requiring a union, which in the past had discriminatorily excluded minorities from membership to refer for employment—in its capacity as hiring hall—whites and blacks on an alternating basis. The one-for-one formula has been used in other Title VII cases as well. See, also upholding a one-for-one ratio: *NAACP* v. *Allen*, 340 F. Supp. 703 (M.D. Ala. 1972) (hiring of Alabama State police); *United States* v. *Local 10 Sheet Metal Workers*, 3 CCH EPD 8068 (D. N.J. 1970) (referral of temporary apprentices or seasonal help); *United States* v. *Central Motor Lines*, 325 F. Supp. 478 (W.D.N.C. 1970) (hiring of road drivers) entered on stipulated facts; *Coffey* v. *Brady*, No. 71–44–Civ–J (M.D. Fla. 1971), (hiring of firemen). A one-for-two ratio was upheld in *United States* v. *Ironworkers, Local 86*, 443 R. 2d 544 (9th Cir. 1971), *cert. den.* 404 U.S. 984 (1971).

The ratio hiring principle of these cases may be used by the president of the college in the design of the school's affirmative action program. Thus, the college may determine that it will be approximately two months before its recruitment efforts pay off in terms of substantial numbers of minority applicants. Inasmuch as hiring needs are flexible, the employer may determine to defer a certain proportion of hiring until he has a substantial number of qualified majority and minority applicants. Such an affirmative action program by State College B would be goal-oriented within the framework of E.O. 11246.

It may be argued, as it was in *Carter*, that such ratio hiring does violence to the concept of "first come, first served," thereby violating the constitutional rights of white applicants already on a qualified list. But the very essence of affirmative action is that white males have the "inside track" to the job opportunities (for example, through word-of-mouth channels) and that—until affirmative recruitment has taken hold sufficiently to overcome that advantage—the first come, first served principle will continue to give a discriminatory advantage to whites. Moreover, in some contexts, the first come, first served principle has no real meaning. In the case of construction employment, for example, the allocation of job opportunities among nonunion (often predominantly minority) and union (often predominantly white) sources often must be done through a process of deliberate allocation, there being no mechanism for hiring on a first come, first served basis equitably between the two sources.

Another common misconception is that affirmative action does violence to the concept of preferring the "better qualified" applicant. Proponents of this view maintain that, if an applicant has made a higher score on the employer's aptitude test, or if he has more years of education, he should be preferred as "better qualified" than another applicant who—while eminently qualified for the job—has a lower score or less education. But often comparative test scores or years of education do *not* accurately measure the applicant's ability to perform the job. Moreover, minorities and women have suffered decades of discrimination both in employment and in opportunities to obtain the education and training that are requisites for many jobs. The use of standards unrelated to the duties of the jobs being sought and having the effect of depriving such admittedly qualified persons from obtaining such jobs thus perpetuates discrimination. Accordingly, the courts have recognized that job standards must *realistically* and *specifically* be fitted to the jobs for which they apply. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) (holding that the "qualified" standard must be applied in a strictly job-related context).

3. The ratio hiring required in *Carter* v. *Gallagher*, it was noted, was predicated on the need to provide an assurance to minority employees that they will, in fact, be hired on a more than token basis. A similar kind of assurance may be necessary for affirmative recruitment to be successful wherever the likelihood of new employees being laid off is of major concern. Thus, where the last-hired, first-fired principle is applied, this may provide a serious obstacle to affirmative action recruitment—especially in industries subject to employment fluctuations. By shortening the work week for all employees, by giving a special period of guarantee against lay-off for affirmatively recruited employees, or by other means, the adverse effects of the lay-off threat upon affirmative recruitment may be limited. This can and should be done without being used as a basis for discharging present employees to make room for minority applicants.

4. Hospital C, another Federal contractor, notes that while minorities are applying in increasing numbers, many cannot meet the criteria established for entry job classifications. In addition to carefully screening and "validating" such criteria, the employer also may expand the range of employees he is able to hire by instituting programs of entry-level training. There are a variety of programs administered by the Department of Labor, under the Manpower Development and Training Act, pursuant to which an employer may receive Federal financial assistance in support of such programs.

While such affirmative action training opportunities, of course, are not restricted to minorities, it is entirely appropriate for such programs to be aimed principally at them. Thus, for example, the hospital can recruit for the program principally in central city, heavily minority areas. Equally basic to the MDTA training scheme is the relationship between identity as a minority individual and qualification as a "disadvantaged person". In order to qualify for MDTA on-the-job training assistance, an employee must have been identified as a "disadvantaged person" by the local employment service or Concentrated Employment Program. One of the indicia of being a "disadvantaged person" (when coupled with another factor such as youth, lack of education, poverty, etc.) is minority status. Closely related to MDTA on-the-job training programs, may be a restructuring of jobs, so as to create "job ladders", up which the disadvantaged are better able to rise.

5. Employer D, a medium size corporation listed on the New York Stock Exchange, is considering a shift of its facilities from the central city to a suburban area. The employer carefully weighs the impact of the move upon minority employees.

As a Federal contractor, subject to Executive Order 11246, the contractor is required to assure that the move would not have an adverse disparate effect upon minority employees. The General Counsel of the Equal Employment Opportunity Commission has taken the position that the same requirement of affirmative action arises under Title VII. Thus, the EEOC General Counsel has stated:

> The transfer of an employer's facilities constitutes a *prima facie* violation of Title VII if (1) the community from which an employer moves has a higher percentage of minority workers than the community to which he moves, or (2) the transfer affects the employment situation of the employer's minority workers more adversely than it affects his remaining workers, and (3) the employer fails to take measures to correct such disparate effect.[10]

Thus, under both Executive Order 11246 and Title VII, the employer must recognize barriers to minority access to employment in suburbia as an instance of "systemic discrimination", which must be combatted by affirmative action measures.

6. As a final example, among the requirements used by employer E, a Federal contractor, selecting applicants for employment is that they have no police record. Employer E has utilized this policy because he is convinced that, as a group, persons without police records make better employees than those with police records. In addition, some of his employees have stated support for this policy, indicating they feel it a protection to them. Nonetheless, noting that minority applicants are much more likely to have police records than are white applicants, and therefore are rejected in disproportionate numbers because of this fact, employer E determines to discontinue the requirement.

Judicial decisions squarely support this course; indeed, they state that it may be mandated under Title VII of the Civil Rights Act of 1964. Thus, in *Gregory* v. *Litton Systems*, 316 F. Supp. 401 (D.C. Ca. 1970), the court ruled that it constituted unlawful discrimination for an employer to reject employees with arrest records, since this resulted in the rejection of a disproportionately large number of minority applicants, without adequate justification in business necessity.[11]

The United States Supreme Court has stated a more general rule, of which the above case is an application. In a case pertaining to tests used in appraising applicants, the Court held that ostensibly "objective" criteria for employment or promotion are discriminatory if they result in a relative disadvantage for minority persons, without being plainly compelled by business necessity. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *U.S.* v. *Hayes International Corp.*, 456 F. 2d 112, 118 (5th Cir. 1972).

PART II

To state the law fairly is one thing, to administer it fairly may at times be a very different matter. The law relevant to employment discrimination is clear and receives few arguments. But the administration of Title VII and especially E.O. 11246 have given rise to a number of terms and concepts that have made its administration a controversial issue. Thus, this Commission finds it necessary to conscientiously define the concepts that it endorses to overcome the past and possible consequences of employment discrimination.

We have defined "affirmative action" as steps taken to remedy the grossly disparate staffing and recruitment patterns that are the present consequences of past discrimination and to prevent the occurrence of employment discrimination in the future. In order to properly undertake an affirmative action program under E.O. 11246 the Federal contractor must analyze its employment patterns and "utilization" of minorities and women.[12]

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[10] EEOC Memorandum, General Counsel to Chairman, July 7, 1971, at 2. This is the same principle as that declared in *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920 (2d Cir. 1968), where the court held that the relocation authority was required to recognize, and to take steps to overcome, the relocation problems special to minority relocatees.

[11] The discriminatory effect of rejecting employees on the basis of arrest records may be seen, for example, in the fact that minority persons, dwelling in high crime areas, are more likely to be arrested on "suspicion" than are other persons. Thus, nationally, while blacks comprise 11 percent of the population, they account for 45 percent of all "suspicion arrests." *Gregory* v. *Litton Systems*, 316 F. Supp. at 403.

Essential to an affirmative action program is the development of a comprehensive inventory of all employees by race, sex and ethnicity. Data should be collected by organizational unit and by pay grade. It is important that figures be collected concerning the number by race, sex, and ethnicity of job applicants, accepted and rejected, including the reasons for rejections, promotions, training opportunities offered, terminations, awards, transfers, and other matters relating to employee work conditions. These figures should be compared for each job category with estimates which are made of the availability of women and each minority group within the recruiting area designated.

Similarly an employer must determine the recruitment, hiring, and promotion standards and practices which govern the operation of each organizational unit. It is important to determine if any of these factors have the effect of denying equal employment opportunity and benefits to persons on a basis of their race, sex, or ethnicity. To the extent that these studies demonstrate that a problem exists with regard to the utilization of minority groups and women by the employer, then the matter must be treated in the same manner as other management questions. Goals, which are reasonably attainable by applying good faith efforts, should be established to overcome the underutilization. The goals should be based on such matters as employee turnover rate, rate of new hires, as well as upgrading and promotion actions. It is well recognized that the setting of goals provides a valid bench mark against which progress can be measured and the need for further action diagnosed.

Although it is possible that underutilization results from one practice of an employer, it is more likely that a number of accepted and institutionalized practices have caused an exclusion of women and minority groups from fair opportunity for employment. In the course of identifying areas in which minorities and women have been discriminated against, whether intentionally or inadvertently, an employer must first examine the recruitment and hiring policies and practices. Recruitment and hiring are two parts of one process whereby employees are brought into the work force, yet each have special problems which must be examined and dealt with separately.

Recruitment is the process by which an institution develops an applicant pool from which hiring decisions are made. It can be an active process, in which the employer seeks to communicate employment needs to candidates through advertisement, word-of-mouth, notification to schools or training institutes, conventions or job registers. Recruitment, however, may also be a passive function, the evaluation or inclusion in the applicant pool of only those persons who on their own motion or by unsolicited recommendation apply to the employer for a position.

Where underutilization is attributable to the fact that the number of minorities recruited is lower than the size of the available number of qualified persons within the minority labor force in the employer's recruitment area, then a strengthened search network must be developed. Sources other than the traditional avenues through which promising candidates have been located (e.g., professional journals, newspapers, and referrals from present staff and associates) must be utilized. These new sources would consist of individuals at predominantly minority colleges, minorities engaged in related industries and in government, minorities in training programs or engaged in research, minorities involved in community advocacy and development work.

Once a nondiscriminatory applicant pool has been established, the process of selection from that pool must itself be subjected to careful examination. All criteria used to select employees, whether or not they are discriminatory on their face, must be reviewed to determine if they hav a disproportionately negative effect on minorities. If so, they must be further examined to determine whether they are relevant to the duties of the particular position in question.

Tests must be validated to insure that they are both job related and not culturally biased. Other employment criteria must likewise be job related. This insures that they are not unnecessarily high and inadvertently discriminatory. Other selection techniques such as credit check, marital status considerations or arrest records must also be reviewed to determine if they cause a disparate result in employment patterns and whether they are objectively valid and job-related.

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[12] See discussion of OFCC regulations, *supra*.

In many cases an employer would want to consider additional factors in evaluating an individual's potential contribution to the establishment as, for example, the value which diversity in perspective and life experience may contribute to an academic program or the extent to which services to a Spanish speaking or black service population might be improved by the employment of bilingual and bicultural staff. This does not imply that unqualified persons should be hired or that genuinely valid standards should be eliminated or diluted. It simply means that the criteria which have traditionally been used in hiring and promoting must be broadened to include consideration of minorities and women. Where the qualifications of such applicants are substantially the same or better than nonminority male applicants and where the recruitment involved is in an area of employment in which there has been a dearth of equal opportunity for minority and women applicants a substantial effort must be made to recruit minorities and women and thereby redress the imbalance.

The Federal contractor within the context of its own "self-analysis" identifies "goals and timetables" as part of the affirmative action program. Thus, the basis for affirmative action is the contractor's underutilization analysis of minorities and women, and underutilization that under existing case law raises a presumption of employment discrimination.

The employer's affirmative action plan "goals and timetables", then set out the numerical increase in minority and female employment, by job classification, which the contractor aims to achieve in correcting identified underutilization.

As we have noted, one aim of affirmative action is to assure against the continuation of discriminatory practices. Another aim is to redress patterns of minority and female underutilization. The best test for determining whether these aims are being achieved is by a results test. Whether expressed in terms of applications, hires, or promotions, the results test is the best indicator of whether women and minorities *in fact* are achieving the access to employment opportunities required pursuant to the twin aims of affirmative action.

In essence, equal opportunity goals and timetables are no different from the performance goals familiar in many business contexts—for examples in sales campaigns. In all such instances, the key to effective management is a reasoned determination of what results ought to be achieved. Those targeted results then become the foundation for supervisory determinations as to when the ongoing effort should be strengthened. Thus, for example, if sales figures drop below targeted goals, this sounds a signal for corrective action. Similarly, if minority or women hires fall below targeted goals, this is a signal for a careful examination of whether systemic barriers to equal employment opportunity have been overcome, and whether more satisfactory progress can be made in redressing patterns of underutilization.

The crucial factor to be kept in mind with respect to goals and timetables is that they are a complement to affirmative action. They comprise a guide to determine whether the affirmative action plan is working. The ultimate legal obligation of the employer is *not* to achieve the established goals, but "the results which could reasonably be expected from [the contractor's] putting forth every good faith effort to make his overall affirmative action program work." (41 CFR 60–2.12(a)).

Thus, for example, the opinion of the Attorney General of the United States upholding the "Philadelphia Plan" for remedying the effects of past discrimination in the construction industry, 42 Op. Atty. Gen., N. 37 (1969), makes clear that the key question in the use of "goals" for increasing minority employment pursuant to the Plan, is whether "good faith efforts" have been made to achieve such goals.

As we have seen, there is an enormous range of possible affirmative action steps, each of which can be pursued with varying degrees of intensity and resource commitment. Because of this open-ended nature of affirmative action, it is virtually always possible for the employer to readjust performance upwards to assure adequate results. For this reason, "goals and timetables" are necessary for meaningful evaluation of equal employment opportunity efforts.

PART III

The Commission's position regarding the implementation of affirmative action by Federal contractors can be stated as responses to some commonly asked questions about this subject.

Question 1. Are not goals and timetables the same as quotas for racial, ethnic, and sex groups?

Answer. No. The essential difference is that under a quota system a fixed number or percentage of minorities or females is imposed upon the employer who has an absolute obligation to meet that fixed number. No excuses are accepted, nor can failure to meet the quota be justified.

Goals and timetables, by contrast, are result-oriented procedures by which the employer—subject only to the requirement that the targeted results are as much as reasonably can be expected—determines goals and a time schedule for correcting minority underutilization, and then makes every good-faith effort to achieve the self-imposed goals. Contrary to what would be true in the case of quotas, failure to meet goals and timetables is excused if the employer can show that good-faith efforts have really been made. However, an employer must be prepared to demonstrate in detail why good-faith efforts failed to produce desired results.

In a sense goals and timetables represent a shifting of the burden of proof from the government to the employer on the question of whether or not the employer used good-faith efforts to hire more minority individuals and women.

Question 2. Why are goals and timetables necessary?

Answer. The necessity for goals and timetables arose out of long and painful experience in which lip service to equal employment opportunity was paid by employers who then did little to correct the situation. It also arose out of the realization that *procedures* for assuring equal employment opportunity can accomplish little unless they are tied closely to results.

After generations of intentional and systematic discrimination against minorities and women, the pattern of unequal employment opportunity persists. Although intentional discriminatory practices are now illegal, many systemic practices still exist that limit the opportunities available to minorities and women. Patterns of employment have become firmly established creating many positions that minorities and women no longer even try to fill. Accordingly, if they are truly to get a fair deal in the job market, there is a compelling need for an effective program of affirmative action assuring women and minorities that meaningful equal employment opportunity—not mere tokenism—is what they can reasonably expect. To achieve such assurance employers must *affirmatively* seek out minorities and women and place them in jobs for which they are qualified but from which they have long been excluded. To bring about such affirmative action is precisely what goals and timetables are intended to do.

Question 3. Do not goals and timetables result in hiring on the basis of race or sex, rather than on the basis of who is best qualified for the job, thereby undermining the merit system?

Answer. No. There is a myth abroad that, in years past, hiring decisions always were made on the basis of objective and proven methods for assessing applicants' "qualifications." In fact, the hiring decisions of many if not most, employers were based in large measure on subjective and unproven criteria. As a result, racial and sexist stereotypes operated to exclude women and minorities without regard for their actual qualifications. Indeed, such criteria in some degree were institutionalized within the "merit system" itself. For example, under the well established "rule of three," public employers have been free to use subjective and unsubstantiated criteria in selecting among the top three candidates for a post. Following the principle of the *Griggs* case (discussed above), therefore, a major affirmative action step to be taken in achieving minority employment goals is to assure that job qualifications *are* accurately appraised. Thus, if a hiring standard disproportionately excludes women or minorities, the employer can use that standard only if such standard demonstrably assesses qualifications for the job. This does not weaken, but rather strengthens, the role of applicant "qualifications" in determining employee selection.

Question 4. Do not affirmative action plans establish preferential treatment for minority groups and women?

Answer. No. On the contrary their purpose is to undo a preferential system many years in the making and to redress the historic imbalances now favoring white males in the job market.

Redressing this imbalance requires that discriminatory patterns be eradicated and some measure of equity be established for persons who have been discriminatorily excluded in the past. Implementation of affirmative action plans must, therefore, necessarily involve a selection process aimed at achieving these goals.

For the purpose of remedying discriminatory practices, a selection process designed to achieve such goals is a valid technique so long as it does not produce a pattern of discrimination against qualified members of another group. The fact is that very few persons are ever hired on a totally objective basis. Even the Civil Service Merit system rarely requires the selection of a *specific* person from among a group of qualified applicants. The requirement is that from among such a group *a* person be selected. Obviously many subjective elements then enter into the selection process. The candidates personality, disposition, experience, apparent judgment, are just a few of the elements that always influence a selection. Unfortunately, a significant reason for the paucity of minority group persons and women in many job categories is that these subjective factors never included providing a fair share of employment opportunities to them.

An affirmative action plan must require some action that has not heretofore taken place otherwise it is useless. One of the requirements therefore is that in the subjective evaluations that always occurs in the selection process one factor previously excluded should now be included—a concern that a reasonable number of qualified minorities and women be hired until equity is attained.

Question 5. Are goals and timetables aimed at achieving proportional representation of minorities and women?

Answer. The concept of goals and timetables is *not* synonymous with proportional representation. Rather, the concept comes into play when it has been determined that women or minorities are underutilized or underrepresented in one or more job classifications. When underutilization has been established, affirmative action programs (as already described) are employed to bring minorities and women into the labor force in the numbers that "would reasonably be expected by their availability." Goals and timetables may be viewed as the measure or yardstick to determine whether the affirmative action programs are, in fact, achieving the goals of increasing the number of women and minorities in the labor force.

The concept of goals and timetables often conjures up an image of some precise mathematical division of a pie whereby each group or subgroup gets a share dependent upon the size of the group. But the concept in no way depends upon a precise mathematical formula. Rather, it focuses on the demonstrable results of past discrimination (the underutilization) and seeks to remedy that by compensatory programs (affirmative action). The "goal" that we refer to is nothing more than a description of what the labor force would look like absent the effects of illegal racial or sexual discrimination, and the "timetable" is the informed estimate of time needed to achieve the discrimination-free labor force without disrupting the industry or denying anyone the opportunity for employment.

PART IV

The moral and ethical imperatives of affirmative action in employment should need no further expansion. This need, we trust, was accepted by the American public long ago. This Commission, however, is concerned that in the current economic situation effective implementation of affirmative action will require greater—not less—commitment to the goal of equal opportunity in employment. And, with the unemployment of minorities twice as high as that of whites, with underemployment showing an even greater gap, the Commission feels the necessity to again call to the attention of the American public its obligations to create an equitable society for all.

Equity cannot be obtained without the application of effort and, in some cases, unusual measures. The measures now enacted into law or issued as Executive orders are not so unusual either in substance or in general practice as to evoke resistance on the part of Americans to adhere to them. This is as true in the employment of persons to serve in the Federal Government as it is private employment. In fact, it is incumbent on the Federal Government to establish the pattern and set the pace. We believe that where quotas as defined in this statement have been established without a judicial finding of discrimination such practices should cease. Goals and timetables, as defined in this statement are, we believe, fair and equitable. They represent the minimum measures necessary to assure that all Americans can be assured of equal treatment under the law. It is not complimentary of the American society to find it necessary to *require* any action designed to provide all citizens an equal opportunity to use their energies and their talents.

Unfortunately, in the immediate future the test of our commitment to the principles upon which the Nation stands may be less related to our willingness to voluntarily do what is right than to our acquiescence in following the law as it is written.

[From the Spokeswoman, Aug. 15, 1974]

Affirmative Inaction on Campus: Will the Real Victims Please Stand Up?

University faculties sinking into mediocrity; women and blacks paid higher starting salaries than well-qualified white males; institutions forced to play "musical chairs," pirating token minority appointees from one another to stay in compliance: these are some of the dangerous side effects of affirmative action on campus according to a report by Dr. Richard A. Lester published June 28, 1974 under the auspices of the Carnegie Commission on Higher Education. Lester studied the implemenation of affirmative action programs over a five-year period at twenty leading institutions with large federal contracts. He concluded that affirmative action is "a statistical system that deals more with the hiring of typists, bricklayers and punch press operators." Carnegie Commission chairman Clark Kerr, in a peface to the report, agreed that federal guidelines fail to take into consideration the inadequate supply of qualified people in seeking to impose "numerical hiring goals that often have little relevance to the character and mission of the universities."

Resistance to HEW's demands for compliance with equal employment guidelines began with the first complaints filed in 1971. Universities have often seen themselves as privileged systems in which general economic and political laws do not hold, and have based their resistance on this view. That Dr. Lester's "new" findings echo the old academic fears is shown in Gertrude Ezorsky's May, 1974 article in *The New York Review of Books*, "The Fight Against University Women." Hiring goals, the heart of affirmative action, are seen as a direct threat to the merit system that is supposed to operate in the universities. Merit, determined by standards best understood by the departments concerned, is no respecter of race or sex, and should therefore suffice to insure equal treatment of applicants. In fact, say Ezorsky and others, department chairmen typically ask old professors to recommend candidates; unsolicited applications fare badly under this "old boy" system. The claim that there aren't enough qualified applicants is also untrue. Ezorsky admits relevant differences in the position of women among other underutilized groups: less that 1% of Ph. D.s are black, and there is correspondingly strong competition for black candidates. But in 1972 one in eight Ph. D.s was a woman, while women were only one in fifty full professors at major universities. In 1968, 26% of Ph. D.s awarded in psychology at major institutions went to women, as well as 20% in zoology, 21% in biochemistry, 13% in history and 11% in philiosophy. In 1968–69 Berkeley had 163 men filling 163 positions in these disciplines. In 1960, Harvard awarded 10% of Ph. D. in arts and sciences to women, and in 1969 19%. Of 484 senior Harvard faculty members in 1969–70, 483 were men. There are plenty of women Ph. D.s from high-prestige institutions. Unless these universities believe the degrees they give are worthless, they can only explain the under-utilization of women by saying that 1) women don't want to teach after they get the degrees or 2) that family pressures reduce ambition and output and thus justify low salaries and slow promotion rates. Ezorsky calls the rationalization of "family responsibilities" one of the most pervasive and pernicious, and gives it a name of its own: "famrat." Famrat doesn't stand up to the facts, however: 90% of women Ph. D.s are employed, primarily in lower-ranking universities and at lower levels. A 1967 article in *Social Problems*, "The Woman Ph. D., a Recent Profile," found that married women Ph. D.s published as much or more than men Ph. D.s And L. R. Harmon's "Scientific Manpower Report No. 6" (1965) concluded from a study of more than 20,000 Ph. D.s that "women . . . Ph. D.s are superior to their male counterparts on all measures derived from high school records, in all . . . specializations" (page 60) and "earlier study found women Ph. D.s . . . brighter by any index . . . than men in the same . . . specialization." (pages 27–28).

Even if it *were* true that there aren't enough qualified women, the charge that affirmative action means hiring the unqualified is clearly false. There is also no support in law for paying minority appointees more than white males. At a conference held earlier this year at the University of Michigan, U.S. Representative Edith Green, author of Title IX of the Higher Education Amendments of 1972, refuted the idea of a quota system, saying that "quotas are the crudest form of mindless inequality." On the other hand, eliminating hiring goals would undermine what few gains have been made. Green outlined the current situation: there are 32,875 male full professors in the U.S., and 3,193 female: median pay for women professors is $11,000, for men $22,000; 69% of women enter college with a "B" average or better, 41% of men; in college men get more financial aid, in graduate schools all of the most important stipends go to men.

Affirmative action has in fact, then, effected little change in the status of women in higher education or in the mental attitudes and biases permeating white, male academia. And it is the institutions who have done the least who protest the loudest. Harvard has yet to come up with an affirmative action plan acceptable to HEW and still has its federal money (*The Spokeswoman*, August 15, 1973). Brooklyn College, which has refused since 1971 to act on HEW recommendations, still has its federal money. At the same time, HEW has accepted the good faith efforts of Rutgers, M.I.T., Princeton and other schools unable to meet their hiring goals.

Responding to Dr. Lester's report for Carnegie, Mary Lepper, director of the higher education division of HEW's Office of Civil Rights, took strong exception to the report's findings: "The charge that women and minorities are not prepared [to be] as potientially excellent educators as white males cannot be substantiated." One thing Dr. Lester, Representative Green and Dr. Lepper agree on is that there are grave flaws in the mechanics of affirmative action. Two and one-half years after Title IX was passed, HEW has just come up with guidelines for implementation (*The Spokeswoman*, July 15, 1974). The guidelines aren't much of a threat to educators: they're vague, leave many cases uncovered and, most important, make no provision for enforcement. As in the past, the burden of proof falls on the victims.

[From the New York Review, May 16, 1974]

THE FIGHT OVER UNIVERSITY WOMEN

(By Gertrude Ezorsky)

Four years ago, the first complaint of university sex discrimination was filed with the secretary of labor by a woman's organization called the Women's Equity Action League. WEAL requested that an Executive Order, which, as of 1968, prohibited sex discrimination by federal contractors, be enforced against universities. Millions of dollars in federal contracts were handed out every year to academic institutions which, as WEAL claimed, practiced extensive and vicious prejudice against women instructors and students. WEAL appended eighty pages of evidence for its charges and asked that HEW examine all universities and colleges holding federal contracts to see whether they were complying with the Executive Order.

Within six months complaints against more than one hundred academic institutions were filed by women's groups.[1] Under this pressure HEW's Office for Civil Rights began conducting reviews of the compliance of universities. Almost everywhere HEW found evidence of prejudice. The university administrators, in effect, had to promise to mend their ways or lose their federal allowances. Like other employers holding government contracts, they were required to draw up programs to eliminate discrimination in hiring.

The academic campaign against HEW on campus started on October 8, 1971, when Columbia's President William J. McGill, as *Life's* guest editor, complained that with "no prior warning" HEW had instructed Columbia "to get into [federal contract] compliance within thirty days or face a cut-off of federal funds." McGill's claim that Columbia had "no prior warning" was, as we shall see, utterly false. But within a few weeks Professor Sidney Hook of New York University was denouncing HEW's thirty-day edicts. While women's organizations were busy filing more university discrimination charges, Hook was busy telling university officials just what they wanted to hear: administrators "should not yield to [HEW] . . . ultimata."[2] Hook organized the Committee on Academic Non-Discrimination and Integrity, and in one article after another male professors wailed about HEW interference on campus.

These protectors of academic integrity against the HEW civil rights office use two kinds of argument. According to the first, university hiring practices are fine just as they are. Universities practice a "merit system" of employment.[3]

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[1] *Discrimination Against Women*. Hearings before the Special Subcommittee on Education of the Committee on Education and Labor, House of Representatives, June, 1970 (hereafter *House Hearings*), pp. 298–314.

[2] *The New York Times*, November 5, 1971.

[3] "HEW and the Universities," *Commentary*, February, 1972 (hereafter HU), p. 40; "The Idea of Merit," *Commentary*, December, 1972 (hereafter IM), p. 45.

Since a merit system is, *by definition*, free of sex discrimination, HEW's pressure to hire and upgrade women faculty is superfluous and, if successful, would corrupt "standards of excellence."[4] This argument is consistent. Unfortunately, its premise—that universities practice a merit system—is false.

Not all HEW critics agree that academic hirings and firings are so fair or so virtuous. Some even grant (sometimes) that universities have treated women badly. But, they claim, HEW remedies have bad side effects. First, HEW investigators ignore university rights to due process (e.g., by issuing orders that universities must end discrimination within thirty days). Second, HEW insists on increased numerical *representation* of women on faculty—a numbers game that is said to be logically absurd since any other group could demand faculty representation. Finally, by requiring that the universities set numerical goals, HEW is allegedly imposing a quota system that causes reverse discrimination against men. As Charles Frankel, a philosopher, put it: "If you hire unqualified women . . . bright white males don't get jobs."[5]

Let us see if the claims of these academics against HEW stand up.

THE MERIT SYSTEM

Paul Seabury, a political scientist writing in *Commentary*, describes HEW's enforcement of the Executive Order as an "assault on the merit system" of faculty recruitment. If the universities complied with HEW's demands, this would, he said,

> compel a stark remodeling of their criteria of recruitment, their ethos of professionalism and their standards of excellence. . . .[6] Somebody . . . has to pay when the principle of merit is compromised or replaced by preferential ethnic and sex criteria.[7]

Seabury explains that the idea of merit as a conception of justice means "to each according to his abilities . . . [and] works."[8] Of course, Seabury does not claim that throughout society people are rewarded according to their ability and works. Why then does he believe that this kind of justice looms so large in academies? Do professors have so much more integrity than ordinary mortals? Such discrepancy between the morality of academia and the rest of the world seems implausible, for a start.

Note that the idea of a merit hiring *system* does not mean merely that excellence is given some recognition. Superior quality plays a role in almost any market or hiring system. The force of talent is undeniable. It is unlikely that the three top sopranos would be unrecognized. Similarly, virtually anyone who has contributed significantly to knowledge will be offered a place in a major university. But it is a necessary condition of any hiring system based on merit that qualified candidates not be excluded, either because of (1) hiring procedures that tend to reject them, or (2) prejudiced attitudes, e.g., against women. Academic hiring fails on both counts.

HIRING

If any group can be expected to hire its faculty according to "standards of excellence," it should be the philosophers. Do not philosophers, far from petty concerns, seek Truth, Beauty, and the Good? But the fact is that hiring practices in philosophy are similar to those described in *US vs Local 46, Lathe Workers* where the court found a "deep-rooted and pervasive practice" in the lathe workers union of giving out jobs through their own network "on the basis . . . generally [of] 'pull.'"

As with the lathe workers, so with the logicians. The philosophy hiring network is revealed in a document issued by the officers of the American Philosophical Association:

> [we] have for some time been ashamed of the way in which we force young philosophers to . . . enter . . . the profession. . . . Candidates for junior positions, *no matter how able*, can . . . probably expect . . . serious consideration from only a few departments, . . . in a great many cases, departments having *some special tie* with [their] own. These conditions, together with the spectacle of the annual smoker . . . [where job interviews occur] can

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[4] HU, p. 38.
[5] *Newsweek*, December 4, 1972.
[6] HU, p. 38.
[7] HU, p. 44.
[8] IM, p. 41.

> hardly . . . instill . . . pride in our profession. [APA Bulletin #4, February, 1971 emphasis added]

This "special tie" is known in every profession as the "old boy" or the "buddy" system. Seabury's claim that American administrators seek "the best the world of scholarship could offer" is misleading.[9] Typically, a department chairman asks his former graduate professor to recommend a candidate. For example, colleges in New York City employ a large number of Columbia PhDs. Did New York college administrators just happen to find the best available candidates from "the world of scholarship" studying right in their own neighborhood? The fact is that a local phone call often fills the job. This "old boy" system tends to exclude talented people outside the closed circuit.

Seabury does offer one fact about academic hiring practices. The hiring "skill pool" used by "top universities" is "the top 5 percent of graduate students in the top ten universities."[10] But hiring among top institutions itself exemplifies the "old boy" system. A bright graduate student who didn't attend a top university is usually barred from a place on their faculties. In a merit system, such institutions would reasonably recruit, in good measure, from top universities; but no candidate would be denied a chance merely because of the status of his or her graduate school. The fact is, however, that a student's choice of graduate school (often made naively or ignorantly or because of family obligations) "has a determining effect on where he ends up."

> Just as a person's eventual position in society depends on the class he was born into as well as on his own talent, so his eventual position in higher education depends on the standing of . . . his PhD institution . . . as well as on his capabilities. . . . [R. Berelson, *Graduate Education in the US*, McGraw-Hill, 1960, pp. 109-113]

The "halo effect" conferred by a PhD degree from a high-status school is an advantage regardless of merit. But that halo does not brighten a mediocre PhD's own classroom, where generations of students may languish under incompetent instruction. In today's tight academic market, mediocrities with high-status PhDs can still expect decent jobs, while bright lively candidates from minor universities may worry whether they will ever get to teach a class. As the APA document reports, job candidates have a "desperate sense that one could find out where the jobs are if one could only be introduced to the right people."[11]

A resolution by young philosophers describes hiring procedures:

> Something must be done about the degrading and humilitating process of [convention] interviewing . . . the inhuman rush for jobs and candidates. . . . How are we to take philosophy as a great enterprise of the human spirit, when it becomes a scene of speedy uncaring encounters with recruiters and a race from interview to interview. [APA Bulletin #4]

Philosophers refer to the APA Convention, where "degrading and humilitating" job interviews occur, as "the slave market." Perhaps some day Seabury will explain how hiring procedures appropriate to a slave market sustain a merit system.

A system where job applicants are "desperate" to meet the right people also corrupts professional excellence, although more subtly. What happens when young people, who regard their profession as "a great enterprise of the human spirit," discover that to practice their profession they should know the "right" people? Ways of knowing the right people are the same throughout society; and profesors are no less susceptible to flattery than others. Young persons who become adept in getting to know the right people are likely to become less fit to practice any "great enterprise of the human spirit." (Such adeptness can also help a young academic to become one of those "right people" himself—a fact which helps to explain how mediocrity finds a home for itself on major university faculties; or—to skip a step in this story—how so much pale, male, dead wood got settled at the top.)

Recently, I ran into a philosophy instructor who as a student had seemed the model of intellectual purity. This model now held forth on the utility of something he called "deference." It is certainly true that deference is professionally most useful and can be practiced in a variety of ways. For example, one could, in one's own articles, defer to Profesor Joe Doaks, by such references as these:

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[9] HU, pp. 40–41.

[10] HU, p. 42.

[11] It should be said that in the last few years, the American Philosophical Association has attempted to reform these hiring practices, e.g., by publication of a directory, *Jobs in Philosophy*, where job openings are listed and described.

> Philosophers like Bertrand Russell and Joe Doaks. . . . This article is a footnote to Professor Doak's classic paper. . . . As Doaks has taught us. . . .

It is not surprising that many young academics come to resemble their Madison Avenue counterparts—junior executives on the make.

While Seabury mentions the hiring tie among top institutions, he says practically nothing about general hiring practices in the academic world. But the moral principle he praises—to each according to his ability and works—is a tenet of justice. Surely the person applying for an instructorship at Podunk College, as well as at Harvard, has a right to just treatment. Seabury might broaden his moral perspective by asking whether academic people are usually accorded fair treatment. He would find, I suggest, that applicants for instructorships share the fate of job seekers everywhere. Being the best qualified candidate is *one* way to get the job.

SEX DISCRIMINATION

The claim that universities use the merit system is weakened even more by the extensive evidence of university sex bias in employment. In this respect, universities looked no better in 1970, when HEW began a number of campus reviews, than did society in general.

Let us briefly recall how widespread sex bias had become by 1970. Excluded, for the most part, from positions of power in government, industry, labor, and the professions, women were concentrated primarily in low paying, unskilled and semiskilled jobs. (Even in an overwhelmingly female occupation, lower education, there were fewer than five women among 13,000 U.S. district superintendents.)[12] For every $100 earned by the average full-time male worker in 1968, his female counterpart earned $58.20.[13] A typical eigth-grade male graduate earned as much as a woman BA working full time.[14]

Such gaps have usually been explained by saying that employers are "naturally" reluctant to hire and promote women who "naturally" take time out or resign because of family obligations. This family rationalization is used so often it deserves a name, *Famrat.* But by 1970, studies had undermined this argument considerably. When the records of men and women were compared for the same job categories, it turned out that women resign or are absent less often (including time off for child care and pregnancy) than men. The status of a job roughly predicts turnover. Dishwashers leave their jobs more ofen than bank presidents.[15]

The scarcity of women's faces in high places has been coupled with a general belief in their inferiority. Thus, in experiments, the same article (appraised by both women and men) was rated significantly lower when attributed to a female writer.[16] The belief in female inferiority has shown up in radical as well as respectable society. At a 1966 SDS convention women who proposed a women's liberation plank were "pelted with tomatoes and thrown out of the convention."[17] As the power, position, and pay of most jobs increase, the smaller the ratio of women. This same pyramid appears within academies, where an institutional standing, rank, and salary rise, the ratio of women declines. Perhaps this pyramid has been based on women's academic inferiority? Let us see.

HIGHER HURDLES

A comparison of male and female students shows that "apparently only the very best of the good women students" entered graduate school.[18] Harmon, in his study of over 20,000 PhDs, reports:

> Women . . . PhDs are superior to their male countreparts on all measures derived from high school records, in all . . . specialization[s]. [Page 60] An earlier study . . . found . . . women PhDs . . . brighter by any index . . . used, than men in the same . . . specialization. [*High School Ability Patterns: A Backward Look from the Doctorate*, Scientific Manpower Report No. 6, 1965,

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[12] "Statement of . . . Chairman, Legislative Task Force, Professional Women's Caucus," *House Hearings*, p. 1061.

[13] Survey by the Economic Unit of *U.S. News and World Report*, April 13, 1970, reprinted in *House Hearings*, p. 22.

[14] *House Hearings*, p. 22.

[15] "A Strategy for Change," Eleanor Holmes Norton in *Women's Role in Contemporary Society*, The Report of the New York City Commission on Human Rights Hearings, September 21–25, 1970 (Avon Books, 1972, hereafter *WRCS*), p. 60.

[16] The experiment in which female college students rated the articles was conducted by Philip Goldberg ("Are Women Prejudiced Against Women?" *Transaction*, April, 1968, 5, pp. 28–30). The experiment was repeated informally, with male students doing the rating, by Sandra L. and Daryl J. Bem in their classrooms with the same result ("Training the Woman to Know Her Place: The Power of a Nonconscious Ideology," Sandra L. and Daryl J. Bem, *WRCS*, pp. 103–104).

[17] *Sisterhood Is Powerful*, Robin Morgan, p. xxi.

[18] *Academic Women*, Jesse Bernard (Pennsylvania State University Press, 1964), p. 80.

L. R. Harmon, pp. 27–28.]
There is a simple enough explanation for this marked academic superiority of women PhDs: since women students faced greater obstacles in obtaining PhDs, in general, only the very able made it. But the barriers these women encountered as students foreshadowed their treatment as instructors.

As a consequence of sex quotas, women needed higher grades for admission to many colleges. (The University of North Carolina at Chapel Hill restricted admission of women a few years ago "to those . . . especially well qualified." The entering class was 80 percent male.)[19] In academia, open expression of sex prejudice was considered respectable. Nathan Pusey, president of Harvard, upon learning that, because of the draft, fewer men would apply to Harvard Graduate School, complained, "We shall be left with the lame, the halt, and the women."[20] Sarah Lawrence president Charles de Carlo explained that "feminine instincts . . . demand that men be better than they are."[21]

It is unimaginable that spokesmen for major liberal academic institutions would have openly expressed such attitudes toward Jews or blacks. (It is also unimaginable that such institutions would have tolerated bulletins in their placement offices listing jobs for "whites only" or "gentiles only." Yet the *College Placement Annual* used by hundreds of major institutions often advertised jobs for "male only.")[22]

What college presidents said openly about women is a mild indication of what went on behind the scenes, when women's grades and recommendations were made up or when women students criticized a male professor's opinions in class. The following are samples from a collection of remarks by academic men about women:

> Any woman who got this far has got to be a kook. . . . The girls here get good grades because they study hard, not because they are more intelligent than men. . . . We expect women who come here to be competent, good students, but we don't expect them to be brilliant or original. . . . Women are intrinsically inferior. . . . Our general admissions policy has been, if the body is warm and male, take it; if it is female, make sure it is at least an A minus from Bryn Mawr.[23]

Women who survived in academic life had to be able, hard-working, and determined. A medical school dean exclaimed: "My God, . . . what [am I] going to do with all these female overachievers who keep applying?"[24]

EMPLOYMENT

Were "female overachievers" applying for jobs as instructors rewarded in accordance with "their ability and . . . works"? One study suggests they were punished because of their ability and work. Women PhDs ranking highest by academic standards turned up as the same women who reported academic sex discrimination (H. Astin, *The Woman Doctorate in America*, p. 107).

Let us look now at the general position of women PhDs. Over 90 percent are employed,[25] they work primarily in lower ranking institutions which require heavier teaching loads for lower salaries.[26] It is often the case that a junior scholar, beginning as an instructor or assistant professor, ascends the academic ladder to a full professorship. Yet never in the history of six social science departments at the University of Chicago (founded in 1892) has a single woman junior appointee become a full professor in her department. (The first woman to teach a political science course—Elizabeth Wallace in 1892—was also the last woman appointed in that department.)[27]

Seabury describes the scarcity of women on major university faculties as "statistical underrepresent[ation]" caused by the merit system.

> This [merit] system . . . left a myriad of American categories statistically underrepresented in the highest precincts of American higher education. . . . On faculties . . . women are underrepresented. . . . Jews . . . 3 percent of the population . . . are a vastly greater proportion . . . on the faculties of America's greatest universities. [HU, pp. 40–41]

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[19] Bernice Sandler, *WRCS*, p. 571.
[20] Ann Harris, *WRCS*, p. 583.
[21] Ann Harris, *WRCS*, p. 584.
[22] Sandler, *WRCS*, pp. 573–574.
[23] Harris, *WRCS*, p. 587.
[24] Joan Flannigan, *WRCS*, p. 358.
[25] *The Woman Doctorate in America*, Helen Astin (Russell Sage Foundation, 1969), p. 57 (a study of women awarded PhDs in 1957 and 1958).
[26] Sandler, *WRCS*, p. 571.
[27] "Women on the Social Science Faculties Since 1892, University of Chicago," Jo Freeman, *House Hearings*, pp. 994–997.

By women's "statistical" underrepresentation on major university faculties, Seabury means the disparity between the female percentage of such faculties and the 51 percent female proportion of the national population. To fault universities alone for that is, of course, to burden them with sins not of their making. But there is another revealing disparity which Seabury never mentions: the great gap between *women trained as PhDs* and *women hired as faculty* by major universities. Here are some pre-HEW 1970 comparisons between the ratio of women as PDs and as major university faculty:

Approximately one in eight PhDs is a woman, but at major universities one in fifty full professors is a woman.[28] Women are granted one in six sociology PhDs, but only one in 100 sociology professorships in top graduate schools.[29]

Women were awarded 10 percent of Harvard's Arts and Sciences PhDs in 1960, and 19 percent in 1969. But Harvard's 1969–1970 Senior Arts and Sciences Faculty (except for one woman's chair) was composed as follows: Men, 483; Women, 0.[30]

In 1968, Columbia awarded women 67 percent of its PhDs in French, 44 percent in anthropology, 36 percent in psychology, and 17 percent in philosophy. But no woman was included on these PhD-granting faculties.[31]

In 1968, major institutions awarded the following percentages of PhDs to women in five disciplines. Psychology: 26 percent, zoology: 20 percent, biochemistry: 21 percent, history: 13 percent, philosophy: 11 percent.[32] But Berkeley's 163 faculty positions in these five disciplines (instructor and up) were distributed in 1968–1969 as follows: Men, 163; Women, 0.[33]

Why does this enormous gap exist between women trained and women hired by major universities? *Famrat* surely competes with sex discrimination as a candidate for such an explanation: a woman PhD's family obligations are so consuming that she becomes less qualified than her male counterpart. When one notes that the average woman PhD does twenty-eight hours per week of housework, *Famrat* seems even more plausible as an explanation.[34]

But if *Famrat* were true, then there should be sharp differences between men and women PhDs in the amount of work published. In fact the difference is a negligible one.[35] Not surprising if we remember that it usually takes very hard-working, able, and determined women students to overcome the barriers of sex prejudice. Moreover, *Famrat* cannot tell us why the half of women PhDs who are single receive "markedly lower" salaries than male PhDs.[36] Or why, as a study of academic social scientists holding a PhD over twenty years showed, 90 percent of the men, but only 53 percent of the single women, had attained a full professorship.[37] Finally, while *Famrat* might explain why some academic women become less qualified than their male competitors, it cannot explain why academic women equally qualified with men are paid less and promoted more slowly.

An analysis of the 1969 survey by the Carnegie Commission on Higher Education and the American Council of Education sums up the story:[38] Allowing for practically all the relevant factors that might affect the outcome (demographic, educational, work experience, institutional), the results "clearly demonstrate the biases . . . against women in awarding rank." To pay women as much as men of "similar rank, background, achievements and work setting" would require an average compensatory raise of $1,000. This figure, according to the analysts, is "*extremely conservative*" since it does not reflect the salary loss from discrimination in opportunities for advancement, hiring, and rank. The amount of "*actual*" salary discrimination entitles women to a "substantially" higher compensatory average raise (emphasis in original).

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[28] "Women in Academia," *Science*, January 14, 1972.

[29] "Status of Women in Graduate Departments of Sociology, 1968–1969," Alice S. Rossi, *The American Sociologist*, Vol. 5, No. 1, February, 1970, p. 64; "Availability Statistics, Women Holders of the PhD, 1967–1969 (Top Degree Granting Schools)," published by Project on the Status and Education of Women, Association of American Colleges, Washington, DC, April, 1972 (hereafter, *Availability Statistics*).

[30] "Preliminary Report on the Status of Women at Harvard," *House Hearings*, pp. 183, 185.

[31] See the "Report from the Committee on Discrimination Against Women Faculty, Columbia Women's Liberation," *House Hearings*, p. 260; and *Columbia University Graduate Faculties Announcements, 1967–1968, 1968–1969*. Election of a department member to a Faculty usually implies permanent tenure.

[32] *Availability Statistics*.

[33] "Report of the Subcommittee on the Status of Academic Women on the Berkeley Campus," *House Hearings*, p. 1171.

[34] Astin, p. 95.

[35] Concerning "the two most direct (measures of productivity) . . . numbers of articles and books published, married women [PhDs] publish as much or more than men [PhDs] and unmarried women publish slightly less than men." "The Woman PhD: A Recent Profile," R. J. Simon, S. M. Clark, and K. Galway, *Social Problems*, Fall, 1967, Vol. 15, No. 2, p. 231 (a study of women who had received PhDs between 1958 and 1963).

[36] L. R. Harmon, *Careers of PhDs: Academic vs. Nonacademic*, Career Patterns Report No. 2 (Washington National Academy of Science, 1968), Ch. IV, pp. 74, 98.

[37] Harmon, 1968, cited in Rossi, p. 9.

[38] "Sex Discrimination in Academia," Helen S. Astin and Alan E. Bayer, *Educational Record*, Spring, 1972.

If sex bias deprives academic women of the salary and rank they deserve, it is surely reasonable to infer that such bias also deprives them of other professional rewards, e.g., of positions they merit in the "highest precincts" of American education. When Seabury's articles extolling the academic merit system appeared, mounting evidence of university sex discrimination had already been published, although nowhere does this social scientist refer to it. Sidney Hook assesses the degree of sex prejudice in universities as merely "peripheral." [30] Yet Hook—defender for decades of the scientific method—fails to offer a shred of evidence for this view. These self-proclaimed defenders of scholarship standards might start by doing some homework.

ENFORCEMENT

By 1971 the HEW civil rights investigators were conducting a number of reviews of university discrimination. Predictably, administrators in institutions where women had been kept in their place complained that the HEW investigators were violating their rights. The published reports about two such cases—Columbia University and Brooklyn College—suggest, however, that it is the authors of these reports who are violating rights—the right of their readers to be told the whole truth.

Columbia's President McGill had this to say about HEW's methods:

> If . . . we are to move quickly to truly equal opportunity for women under federal pressure . . . it would be advisable to protect the integrity of the experiment by suitable exercise of due process. To take one example, in late June of this year [1971] Columbia received a letter addressed to "President Andrew Carider" stating that we were out of compliance with the terms of the federal executive order enforcing equal rights in federal contract activities. We were instructed to get into compliance within thirty days or face a cut-off of federal grant funds. There was no prior warning. There was no notice of hearing or right to appeal; no clear indication in fact of the manner in which we had failed in compliance. All this required discovery.
>
> Such methods seem to me a bit heavy-handed. One would think that an agency threatening to cut off all our federal funds would at least make an effort to get the president's name straight. (I succeeded Andrew Cordier in 1970.) Even with the best intentions we cannot accomplish overnight what our social order has failed to achieve throughout all its history [*Life* guest editorial, October 8, 1971.]

No prior warning? No due process? Demand for overnight accomplishment?

The truth is that HEW had been negotiating with Columbia for two and a half years before McGill received this warning in June, 1971. McGill himself was involved in these negotiations. Six months before the warning was given, on February 2, 1971, he was informed in writing by an HEW official of their requests concerning an impending Columbia review. During those two and a half years, Columbia received a considerable amount of "due process" and prior warning." What was at issue?

Columbia, like other government contractors, is required to undertake an "affirmative action plan". It must (1) compile basic employment data relevant to discrimination; (2) identify discrimination in hiring, salary, and promotion; (3) set up a remedial program with goals and time tables. In two and a half years, Columbia failed to take serious steps toward getting through phase (1). Without such data on comparative salaries, job duties, etc., an employer can't identify the discrimination itself (phase 2), and so can't devise remedial programs (phase 3).

Between February, 1969, and June, 1971, Columbia promised HEW the employment data, then stalled, made fresh promises, and stalled some more. At the end of 1969 Columbia submitted a plan lacking basic data and it was still lacking in June, 1971, HEW again and again requested this information from Columbia officials (e.g., Presidents Cordier and McGill, Vice President Goodell, Dean Merritt) by letters, telephone, interviews, special delivery mail. What McGill conveyed to *Life's* two million readers—that HEW's June, 1971, warning was HEW's first communication with Columbia—was false.

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[30] *Freedom at Issue*, July, 1972 (hereafter, FAI), a bi-monthly paper published by Freedom House.

Sidney Hook, applauding McGill's *Life* editorial as a resopnse to HEW's "poisoned" reasoning, suggested that "even alleged criminals" are assured more procedural protection than HEW gave Columbia.[40] What alleged criminal is given two and a half years to examine his own record and make plans for doing better?

Columbia's second plan was submitted, again without basic data, on July 30, 1971. In this plan, Columbia anticipated that by December, 1973, *five years after negotiations began*, it could complete an analysis of faculty salaries. HEW's civil rights director, J. Stanley Pottinger, told Columbia why the plan was rejected:

> . . . it fails to identify and analyze . . . basic employment patterns necessary for the identification of problems, and the development of . . . remedies . . . it fails to commit the University to gather and analyze this information so that it can itself . . . identify and eliminate . . . problems. . . . Instead despite a considerable passage of time . . . the University proposes to make analyses . . . only after additional unexplained exorbitant delays . . . I should emphasize that . . . hiring criteria . . . [are] appropriately left to University officials. Our sole interest is to ensure that . . . employment criteria are not invidiously discriminatory on their face, and are implemented in a nondiscriminatory manner.

Of Pottinger's recommendation to terminate Columbia's contracts Seabury wrote:

> In November, 1971, HEW's Office for Civil Rights anounced its intent to institute proceedings for Columbia's permanent debarment—*even though no charges or findings of discrimination had been made.* Columbia simply had not come up with an acceptable affirmative-action program to redress inequities which had not even been found to exist. [HU, *Commentary*, February, 1972, p. 39, emphasis in original]

It is astonishing that although at another point in his article Seabury refers to McGill's claim that Columbia found it difficult to collect data for HEW, *he never mentions HEW's charges that Columbia failed to supply information for two and a half years.* He thus conveys the impression of tyrannical, irrational bureaucrats threatening to "wholly wreck" a university. The truth is that nonenforcement in cases like Columbia's would "wholly wreck" chances of women and minorities for justice on their jobs.

It is highly unlikely that Seabury was ignorant of HEW's charges against Columbia. Those charges were published in the same *New York Times* story (November 5, 1971) that reported HEW's announcement of its enforcement action at Columbia—the same announcement Seabury referred to in *Commentary*. HEW's "thirty month delay" charge was repeated in the next day's *Times*, in the same column containing a statement by McGill that Seabury cities.[41] Hence it is hard not to conclude that Seabury is guilty, not of mere negligence (i.e., not troubling to ascertain the whole truth), but of a more serious moral offense, attempting to create a false belief by deliberately ommitting relevant facts.

Another exposé of HEW, this time from Sidney Hook, about Brooklyn College:

> On April 30, 1971, . . . [the] President of Brooklyn College . . . received a letter from the HEW, *making not a "complaint" alleging sex discrimination [against a woman associate professor]* . . . but declaring that "findings" had been reached that the college was guilty of sex discrimination and ordering that [she] . . . be forthwith promoted . . . with . . . several years pay differential. *All this set forth as a "finding" without even a hearing!* Failure to act on the finding, it was threatened, would lead to cancellation of all federal grants. [*Freedom at Issue*, March, 1972, emphasis added]

But HEW investigators had met with the college president and dean of administration on March 18, 1971. Moreover, not one word about canceling federal grants appears in this HEW letter. Nor was the president "ordered," as Hook claims, to promote the woman in question and pay her back salary. The HEW letter states:

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[40] FAI, November, 1971.

[41] HU, p. 42.

> We are *recommending* that . . . she be immediately promoted . . . we are *recommending* that . . . [her] salary be immediately raised . . . and back salary [granted]. . . . [Emphasis added]

Three years later, Brooklyn College, its federal grants untouched, has yet to accept these recommendations.

More from Hook: "HEW did not ask why the promotion in question had been turned down for twenty years by this woman's colleagues. . . ." But in fact, her promotion was denied, not by her department colleagues, but by a committee appointed by the administration. Indeed, the very HEW letter Hook cites reports that her department colleagues recommended her promotion ten times between 1957 and 1967, and "in five separate years . . . [she] was *the department's first ranked choice for promotion*" (emphasis added).

Turned down by her colleagues indeed!

Had Sidney Hook honestly investigated these HEW findings he might have found that men whose academic qualifications were inferior were given the promotion she was denied. He might also have found evidence that Brooklyn College (like other CUNY colleges) has consistently practiced discrimination against women instructors.[42] Instead, he published a plainly distorted account of this woman's case, an account she must have read with considerable pain. (I have cited here only the most flagrant of Hook's distortions.) On a most generous interpretation, Hook's report is hearsay, originating from a hostile source. However, this moral philosopher is certainly guilty of culpable negligence with respect to the truth.

HEW investigators, enforcing the Executive Order, are required in their campus reviews to investigate patterns of job discrimination and to ensure that action to remedy it is taken (e.g., setting numerical hiring goals and time tables). Critics argue that HEW's rules for universities put unfair emphasis on numerical criteria. First, absurd arithmetical standards are allegedly used to detect hiring discrimination (i.e., "underutilization"). Second, in their enforcement of the numerical hiring goal requirements, HEW investigators are said to be imposing a quota system, which yields reverse discrimination against white men.

HEW investigators have frequently interpreted discrimination against women instructors as a disparity between the ratio of women who are on the faculty and those who are PhDs.[43]

Daniel Bell questions HEW's "logic."

> . . . the government's test became . . . if women earned 30 percent of the PhDs, are 30 percent of the faculty women . . . what is the logic of extending the "representation" principle only to women . . . [and minorities named] in the HEW guideline? . . . why not religion or political beliefs as the criterion of balanced representation . . . [should] conservatives, . . . highly underrepresented in [California] state [faculties], . . . be given preference in hiring. . . ? [*The Public Interest*, February 1972, pp. 37–38]

Thus, according to Bell, the logic of HEW rules is absurd because any group could demand faculty representation. But, in fact, the absurd demands Bell fears are excluded by HEW practice. This is why: Suppose a group constitutes 30 percent of the candidates for employment, but only 10 percent of those actually hired. We presume that "underutilization" has taken place when we know there has been a clear pattern of discrimination against the group in question. Consider the following hypothetical case: Suppose that women and Republicans each constitute 5 percent of the sociology faculty in a typical major university, the U of X. Such statistics taken alone may be grounds for a suspicion of discrimination. But interpret these statistics in the light of what we know about the hiring of women and the possibility that the U of X discriminates against women becomes likely, while the same possibility concerning Republicans declines.

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[42] "Women as a group are not treated equitably throughout the CUNY system (p. 6). However the CUNY system is analyzed . . . the lower faculty rank standing of women prevails (p. 50). Women were *not* receiving equal pay for equal work (p. 59). . . . Brooklyn . . . diverge(s) in no significant way from the . . . CUNY . . . pattern (p. 54)." The argument that the lower status of women faculty members is based on their lack of professional achievments is inapplicable at CUNY (p. 66). *The Status of Women at the City University of New York, A Report to the Chancellor*, prepared by the Chancellor's Advisory Committee on the Status of Women, December, 1972 (emphasis in original).

[43] " 'Underutilization' [of women] is defined as having fewer women in a particular job classification than would reasonably be expected by their availability . . . the contractor will consider the availability of women having requisite skills in an area from which the contractor can reasonably recruit" (Revised Order No. 4).

Remember that the gap between women trained and women hired holds generally for major universities, in most departments, while in society at large, as well as universities, women are concentrated at the bottom in salary, position, power, etc. Sixteen percent of sociology PhDs are women, while 5 percent of the U of X sociologists are women. In view of this pervasive background of sex prejudice, it is quite likely that the 95 percent male U of X sociology department "underutilizes" women.

Nothing like this general pattern could be shown for Republicans, or for most other political or religious groups. So the argument that any group whatever could demand faculty representation is without merit. But suppose that the U of X sociology department does *quite likely* discriminate against women. Is this sufficient for conviction? A jury should convict only if the defendant is not merely likely guilty, but guilty beyond a shadow of a doubt.

True. But remember, in a courtroom the consequence of erroneous conviction is unjust imprisonment, while under HEW's rules the university is "sentenced" to aim at recruiting and promoting qualified women. Some of course would regard having women in their department as a painful penalty, and giving women equal rank a still greater misery. But would such suffering be undeserved?

QUOTAS

Employers who fail to meet their hiring goals for women instructors are not penalized by HEW if they can show they are trying in "good faith" to find qualified women (e.g., by soliciting applications from women's professional organizations, by advertising vacancies, and by abandoning the "old boy" system of faculty recruitment). However, it is widely believed that HEW, by requiring such goals, is really imposing a quota system. According to such belief, the university is compelled to hire a specified number of women or lose their federal contracts. Under threat of such sanction, the university has no alternative but to reject more qualified male candidates, i.e., practice reverse discrimination.

The "quota" charge was, to my knowledge, first made in the March 1972, *Freedom at Issue* article by Sidney Hook. His article appeared with the following bold headline: "Force Faculty 'Quotas'—HEW." The unwary reader would think that an HEW official had in fact instructed HEW representatives to "force faculty 'quotas.'" Yet nowhere in Hook's article is any such HEW statement displayed, and Hook cites no source for this headline. The "quota" charge continues to thrive, in spite of HEW's denial. "Goals," writes Seabury, are the "twin sister" of "formal quotas." [44] Daniel Bell claims:

> The government assumes that "educated labor" is "homogeneous. . . ." One can "logically" insist on quotas where the skill is homogeneous . . . set[ting] *"target"* figures for women . . . has . . . [in] practice . . . meant quotas, or priorities in hiring, for . . . [women]. [*Public Interests*, Fall, pp. 36–37, 1972]

The fact is that rules for applying the Executive Order specifically state that "goals must not be rigid and inflexible quotas which must be met." [45] Hence, if the quotas charge is true, HEW officials are illegally imposing quotas, by threatening sanctions when a university, in spite of "good faith efforts," fails to meet its hiring goals. Some HEW investigators, carried away by their power, might, on some occasions, have so exceeded their legal authority. But if there are such cases, when apparently neither Hook, Seabury, nor Bell has been able to find them. For all their "quota" mongering they have failed to show a single case where HEW has, in fact, imposed a quota on a university, i.e., refused to accept "good faith efforts" in lieu of a goal unfulfilled.

On the other hand, HEW has accepted good faith efforts from universities (e.g., MIT, University of Vermont, Princeton, Rutgers, and Tiffts) who fell short of their hiring goals. Moreover, none other than President McGill of Columbia University has stated that:

> In the [1972] agreements which we reached with the government . . . we were not required to engage in preferential hiring of minorities and women. We are also not required to inject any considerations beyond merit and excellence into our appointment process. . . . Thus the fact that we have stated our long-range objectives numerically . . . (under existing federal

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[44] IM, p. 45.

[45] Revised Order No. 4.

> regulations) . . . does not seem to me to have forced reverse discrimination upon us. . . .
>
> I have never encountered such views [favoring preferential hiring] in any of my dealings with public officials. [Address read B'nai B'rith Anti-Defamation League, Palm Beach, Florida, January 20, 1973] [46]

The claim that HEW is forcing faculty quotas turns out to be unsupported. Moreover, if the Executive Order is weakened by eliminating hiring goals, then as far as women are concerned the future will resemble the past. Hundreds of academic departments have yet to make even a token repudiation of that past, i.e., to promote or give tenure to a single woman, or to hire one women as an assistant, associate, or full professor. Remember that the men who expressed contempt for women graduate students are for the most part still around. Is it plausible that they want *women* in their departments? The typical male academic has been inclined to believe for most of his life that, with rare exception, women's minds are not to be taken seriously. Should he trust himself to judge a woman's intellect impartially? [47]

Finally, it has been objected that there is a tendency in the hiring process for goals to become quotas. After all, the easiest way to meet a goal is by preferential hiring, e.g., to reserve a current vacancy for a women, whenever possible.

Yes, it is the easiest way, and it is posible that some of the administrators who *say* (illegally) that they are holding a post for a women actually end up hiring one. Any man who as a consequence is unjustly denied the job he merits is perfectly entitled to do what a great many women are still doing: to file a sex discrimination grievance with agovernment agency. Of course, if these administrators had seriously been searching for the best candidates, they wouldn't have taken the easy way of preferential hiring. But had they followed a merit system, academic women wouldn't have found it necessary to call in the law.

PREPARED STATEMENT OF HELENE N. GUTTMAN, PROFESSOR OF BIOLOGICAL SCIENCES, UNIVERSITY OF ILLINOIS AT CHICAGO CIRCLE

This is the testimony of Helene N. Guttman, Ph.D., Professor of Biological Sciences, University of Illinois at Chicago Circle (UICC). At that institution, she is also an elected member of the University Senate, of the Faculty Advisory Committee and of the Executive Committee of the UICC Women's Caucus. Nationally she is chairperson of the Taskforce on Liaison with Government of the Federation of Organizations for Professional Women and of the Status of Women Committee of the American Institute of Chemists. Professionally she is Fellow of the American Academy for Microbiology, Fellow of the American Institute of Chemists, Fellow of the American Association for the Advancement of

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[46] McGill was describing not merely the situation at Columbia. In fact, HEW generally leaves hiring standards to the university. (See Pottinger's letter cited above.) However, a biased administrator may prevent hiring or promotion of appropriately qualified women by deliberately raising standards for women candidates. This discriminatory double standard was, in fact, widely used against academic women. "Being 'qualified' simply has a different meaning for women than for men" (Sandler, *WRCR*, p. 570). Revised Order No. 4 makes the following "suggestion."

> The contractor should insure that minority and female employees are given equal opportunity for promotion. Suggestions for achieving this result include . . . neither minority or female employees should be required to possess higher qualifications than those of the lowest qualified incumbent (No. 60 :2.24 : fn 5).

Peter Holmes, current HEW civil rights director, reported HEW's interpretation of this section:

> . . . [it] constitutes . . . suggestions [whose] . . . object is to discourage contractors from applying an *abnormally rigorous standard* in order to exclude or limit persons from consideration on a racial or sexual basis. This does not however require the employment or promotion of a person solely because that individual meets the qualifications of the least qualified incumbent. [Read to September, 1973, Political Science Association meetings. Emphasis added]

[47] Currently the situation of black academic job candidates is relevantly different from the position of womn candidates, since the supply of trained academic blacks is much smaller. Less than 1 percent of PhD holders are black. (See data on number of black PhDs, actual and projected, in a 1968 study appearing in *Available Data on Minorities and Women*, US Department of HEW.) Universities are currently competing for token blacks and prdominantly black colleges are experiencing a "brain drain." But if the supply of black candidates were to increase substantially and significant numbers of blacks rose in the academic hierarchy, it is not implausible that academic race bias would reassert itself. Imagine a situation where a black administrator denies promotion to a white instructor on the grounds that the instructor's publications are intellectually inferior. Could any white person, no matter how emancipated, who grew up in this society, be certain that he or she would feel no differently because the adverse judge of his or her intellect was black?

Science, Member of the Executive Committee of the Society for Protozoology, and Member of the Editorial Board of the Journal of Protozoology.

During 1973 and the first half of 1974, I have visited more than two dozen academic institutions throughout the country to give professional lectures in my research specialties and to assess the status and treatment of women in those and neighboring institutions. In addition our UICC Women's Caucus exchanges information on the status and treatment of women with similar groups throughout the country.

Inspection of the number of doctorates awarded to women and percent doctorates awarded to women in many of the diverse fields comprising natural and social sciences was already high in the years 1960–69 when discrimination against women graduate students not only illegal—only unethical. Thus those women can be presumed to be more highly qualified than men who were graduated during that period because women were more rigorously screened. Moreover, significant numbers of these women were awarded degrees from departments and universities which were considered the most selective and/or the most distinguished. However, the number of women who hold senior or administrative posts in prestigious as well as average institutions is low: in several cases the number of women faculty members has declined in the last year.

Examples of practices in prestigious institutions are particularly noteworthy because, by their esteem in the professional and academic community, their graduates are actively sought. Furthermore, because of their prestige and other amenities they are able to capture both junior and senior personnel currently employed by other institutions. Yet investigation shows that these institutions have, in the main, added few if any women to the total in senior staff or to junior positions which are in the line of assent to senior positions. Clearly these institutions take the *de facto* position that all of their doctoral graduates—or they would not have granted them their degree, but they make personal reservations about admitting women—but not men—to the jobs that are the usual reward for this quality.

Current federal regulations (Executive Order 11246 as amended; Revised Order; Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972; the Equal Pay Act of 1963 as amended by the Education Amendments of 1972) and many state regulations prohibit disparate treatment of men and women of equal quality. Yet statistics show that these practices continue because higher administrators do not insist that unit heads participate in these aspects of ethical practices and the governmental agencies whose mandate it is to protect the civil rights of individuals instead protect institutional continuation of discrimination. Meanwhile many individual careers suffer irreparable damage and all of society loses services of useful and even gifted citizens. Annual statistics published by the American Chemical Society in *Chemical and Engineering News* and a similar survey published by the American Society for Microbiology in its *Newsletter* (and reprinted in *Science*) show persistence in both salary and rank discrimination and increase in disparate treatment at the higher ranks.

An indication of the type of problem commonly found in large university chemistry departments can be judged from the example of the one at the University of Minnesota. This department currently consists of 44 male members and has had *no women* on its permanent faculty since its founding in 1917! Women have had post-doctoral, research associate, and *transient* faculty positions. In one recent, notable instance, a woman who had been rated as their top postdoctoral and then as an excellent teacher in her transient assistant professorial position began to be rated inadequate in all categories shortly after she requested consideration for a position in the permanent faculty line of assent. At that time her department was actively recruiting for such a position in her field and hired a man whose qualifications did not surpass the woman they refused to consider.

The scandalous acceptance of the admittedly inadequate Harvard Affirmative Action Plan by the Office for Civil Rights, DHEW, is an example of combined institutional laxity and failure of the federal government to enforce their own regulations. The 13 major points of failure of the Harvard Plan have been published widely in the New England states. The stance of OCR–DHEW has been to reveal these inadequacies and allow the university time to put their house in order. Those are fine sentiments but the actions of Harvard do not bespeak serious efforts. As I mentioned before, the prestige, salary and other amenities offered to men to join the Harvard faculty frequently lure them from other good jobs so it is hard to believe that similar hard sell efforts directed towards women would not also be successful. At Harvard Medical School there have been notable increases in admissions of women medical students yet several departments openly practice discrimination in hiring and/or reward to the few women faculty.

Specific details on these matters will be supplied *in camera* to protect the women involved from harassment and retaliation. An example of an open sexist advertisement (men only apply) from another unit of Harvard has been pointed out in the testimony of Dr. Julia Lear. Thus we see that Harvard has given removal of sexist practices a very low priority and our government agencies mandated to protect the civil rights of individuals to ensure FAIR treatment also have not made surveillance of Harvard a matter worthy of high priority action.

The situation at Princeton University, a relatively small but highly-prestigious institution, deserves some attention because one of its faculty members Dr. Richard A. Lester recently published a report under the auspices of the Carnegie Commission on Higher Education which appears to be in conflict with my own experience as well as the experience of other colleagues. Since I am particularly concerned with entrance of our distinguished women scientists into the higher ranking university positions, I am giving as background some examples of the percentage women doctorates awarded between 1960–69 (data from DHEW). If one adds doctorates awarded before that time and in addition remembers that criteria for admission to graduate school and award of doctorates to women during that period were higher for women than for their male peers, one then understands that a disproportionately large number of women (but not men) were better than average and, *if fair play* ruled then a number in excess of the percent doctorates to women would be represented in the number of women in university leadership positions. Unfortunately, the number of women in these important and leadership positions is small and has shown little increase. The total number of women on faculties of some large universities (for example my own university) has actually decreased in the last year.

Proportion of doctorates earned by women 1960–69

Field:	*Percent*
Anthropology	22
General biology	20
Anatomy and histology	18
Bacteriology	17
Biochemistry	17
Cytology	30
Embryology	24
Molecular biology (1968–69 only)	19
Nutrition	29
Physiology	15
Public health	15
Clinical dental services	17
General psychology	20
Clinical psychology	25
Social psychology	22
Sociology	17

The Office of the Chancellor, University of Wisconsin, has prepared an even more impressive set of statistics. That is a list of total number of women doctorates in various fields from *top degree granting universities* for the years 1967–69. Those percentages show that there are even more young women doctorates available and they have degrees from the more prestigious institutions. Only a few examples are given here to make the point:

Field	Women doctorates in percent	
	(DHEW) 1960–69	(University of Wisconsin top institutions) 1967–69
Anatomy and histology	18	23
Anthropology	22	25
Bacteriology	17	22
Biochemistry	17	22
Sociology	17	18

Dr. Lester claims that (a) there has been a reduction in quality of university faculty; and (b) that this has been due to affirmative action pressure which has forced universities to hire a disproportionate number of unqualified women. The facts tell quite a different story. 1. The proportion of women faculty members—particularly in high positions is still disproportionately low and, as I indicated even declining in some institutions so that any decrease in quality must be due to the overwhelming influence of the most numerous faculty component—the white males. 2. Affirmative action never has demanded or even suggested that incompetents be hired and we women are on the one hand proud of the large number of above average and distinguished women available in diverse professional areas but we are saddened when we see less competent white males pressed ahead via the old boy muddy system and in direct opposition to the idea that the best quality should receive the highest award.

Now let us look at the roster of women faculty in the natural and social sciences and engineering for Dr. Lester's institution—Princeton, for the academic year 1973–74. It is important for committee members to understand that only the ranks assistant professor, associate professor and professor are considered in the direct line of faculty assent. Other positions are to be considered transient.

Princeton Department:	*Number and rank of women*
Anthropology	1 Associate professor, 1 Visiting professor.
Biology	1 Lecturer.
Chemistry	1 Assistant professor, 1 Instructor.
Chemical engineering	2 Lecturers.
Geology and geography	1 Assistant professor.
Mathematics	1 Visiting lecturer.
Physics	1 Assistant professor.
Psychology	1 Assistant professor, 3 lecturers, 3 visiting lecturers.
Sociology	1 Professor, 1 instructor.

Thus we see that of the 19 women considered faculty by Princeton for the 1973–74 academic year only 6 are in the direct line of faculty assent.

The availability of competent and even distinguished women, in many areas of academe, who are not actively sought after for jobs for which males who are peers—or less than peers—are sought display the casualness with which anti-discrimination regulations are regarded by many institutions and also laxity of enforcement by governmental agencies. For example the Nobel Prize Winner Marie Geoppert Meyer was not offered a proper academic position until just about the time of her award. Fortunately her contribution was not lost to humanity but I would not like to guess how many contributions emanating from female brains have been lost and in those instances all society suffers.

For an institution, the responsibility for ethical behavior really rests in the hands of the chief executive officer. It is unfortunate that we are at a stage of national development in which implementation of such behavior appears to depend upon threats of financial reprisal against the very institutions which purport to train our next generation to operate by standards that they themselves are reluctant to observe. When a chief administrator makes it clear to middle and lower echelon administrators that sex discrimination will not be tolerated, then quite rapidly this form of discrimination ceases.

Why is it good for the individual, the institution and the country to practice a sex-blind policy with respect to hiring, promotion, etc., of all people based upon *identical quality criteria*? One obvious answer is that one can not predict whether important contributions will first emanate from a male or female mind. The practice of open policies with respect to hiring not only benefits women and minorities, it also benefits white males who for one reason or another have not been included in the inner circle of the buddy system. Announcement of professional jobs in national professional journals and similar places is in the best spirit of American competition. Evaluation of candidates and credentials by a committee rather than by one individual not only helps ensure good choices, but helps to train junior committee members for future administrative responsibilities.

Some institutions do evaluate and hire in an open and forthright maner and are models for the rest. Other institutions are more cynical and practice *ex post facto* advertising in order to be able to check off on an affirmative atcion statement that they have done so. I am giving you here an example of such a practice that I have documented and which involves the Biology Department, University of New Mexico. A few weeks after I received a letter informing me that the position of department head was filled, an ad for that same position appeared in the journal *Bioscience*. Clearly ads should indicate filing date and/or application deadline date. It is well worth noting that the Women's Equity Action League (WEAL) has filed a complaint with DHEW charging that the University of New Mexico exhibits a consistent pattern of discrimination against women, particularly in administrative positions.

From my vantage point I see persistence of discrimination practices by universities and failure to utilize properly one of our most precious natural resources—the intellect of women. Until such a time when institutional management realizes that it is in the best interests of us all to judge all people by the same merit standards the whole country loses and so we depend upon our federal legislators to ensure that one set of standards apply to all.

PURDUE UNIVERSITY,
West Lafayette, Ind., September 23, 1974.

Representative JAMES G. O'HARA,
Chairman, Special Subcommittee on Education, Committee on Education and Labor, U.S. House of Representatives, Cannon House Office Building, Washington, D.C.

DEAR REPRESENTATIVE O'HARA: Thank you for your invitation to submit written testimony for your subcommittee's hearings on compliance with civil rights laws and institutional eligibility for federal funds.

I have always been a vigorous opponent for discrimination of any kind against any individual on the grounds of sex or membership in a minority racial, religious, or ethnic group. I first became concerned about the problem of "reverse discrimination" when a student of mine who was searching for an academic job received a letter from the Sociology Department of the University of Colorado indicating that, as a white male, he could not be considered. He was told that "recruiting throughout the university was almost completely limited to certain categories of persons whose employment would enable the university to meet certain equal opportunity requirements."

I learned, from colleagues and reading at about this time, that my own student's experience was far from unique. Universities all around the country felt pressured by HEW to hire minorities and women preferentially in order, paradoxically, not to be penalized for not meeting equal opportunity requirements.

Although the problem cuts across many academic fields, I will address myself especially to the situation in my own field of Sociology. In the August 1973 issue of *The American Sociologist*, Barbara R. Lorch has published an article titled "Reverse Discrimination in Hiring in Sociology Departments: A Preliminary Report". On the basis of a questionnaire sent to 200 chairpersons of Sociology Departments in a random sample of all four years colleges and universities in the U.S., Professor Lorch concludes that widespread reverse discrimination is being practiced. Her comments at the close of her article are, I think, worth quoting:

"The fact that 32 percent of the sociology department chairmen who indicated that they had positions to fill in the past two years felt coerced to practice reverse discrimination, and 16 percent reported that they actually did, is reason for grave concern. Surely no one can deny the importance of improving the opportunities for employment of women and minorities in academic institutions and in doing everything possible to remove whatever discrimination that is presently occurring in the hiring of women and minorities. But discrimination is removed by non-discrimination, not by added illegal discrimination. Under the Supreme Court's consistent interpretation of the equal protection and due process clauses of the U.S. Constitution, and in light of the plain language of the Civil Rights Act of 1964, hiring should be based solely on qualifications disregarding sex, race, color, religion and national origin. The Affirmative Action Programs, as administered at the time of this research, involve a collision of rights and principles, and in a number of cases are a major factor in coercing department chairmen in academic institutions not only to lower their employment standards and to engage in discrimination, but also to break the law.

"If the goal is to reduce discrimination, then we should be as concerned about discrimination against Anglo males, for example, as against women and minority members. Surely ways can be found to increase the employment opportunities for women and minorities without promoting reverse discrimination."

The matter of reverse discrimination is not limited to hiring of faculty members. It also applies to the awarding of fellowships to students. When I was a student in the 1950s, the goal of many of us was to stop universities from administering scholarships and fellowships which discriminated against minorities. In the main, this was successfully accomplished. Now we find a variety of programs which discriminate against anyone but certain minorities. For example, the American Sociological Association recently announced graduate fellowships for minority students, 1974–75. Eligibility is limited to Blacks, Spanish-speaking and Asian-American (announcement attached). At many universities, including my own, there are other followships open only to Black students and/or other minority students.

I believe that it is important to provide financial assistance to those people who are in need of help to continue their educations. This need is especially great among minority students. But there are many whites as well who are in the same boat. One of these is a man named David M. Gray, of the Philadelphia Health Department, who wrote a letter printed in a recent issue of the Newsletter of the Society for the Psychological Study of Social Issues. He wrote, in part:

"As a member of the white proletariat whose efforts to complete his formal education have been repeatedly thwarted, I am infuriated with the Equal Opportunity Committee and its incredibly naive assumption that ethnic minorities are the only victims of discrimination in higher education . . .

"My father, who is a New Jersey truck-driver, encouraged me to complete my education and helped all he could. However, on his limited income he was also supporting my brother, who has since earned an M.S. in bio-chemistry. . .

"In a recent study (Gray, 1970), I found that the overwhelming majority of graduate departments in all fields make graduate education, especially at the doctoral level, financialy inaccessible to large numbers of qualified students. . . "

On the basis of the factual material available, it is beyond doubt that a substantial amount of reverse discrimination in the universities has been practiced in recent years. In a recent letter to the American Sociologist I stated my reasons for opposing this practice in my own field. I would like to draw on this letter to express these reasons to your committee:

"Reverse discrimination is, first, simply unfair. There are those who argue that since whites and males have received the benefit of discrimination for many years, it must be fair to turn things around for a while. This argument ignores the fact that a completely different set of individuals was involved in past situations. In order to believe that discrimination in favor of A over B today will redress the discrimination in favor of C over D yesterday, one must regard the people involved not as individuals but as abstract and interchangeable representatives of categories. We owe more human treatment to any persons, but in particular to our students and colleagues.

"Besides being unfair, a policy of reverse discrimination opens a Pandora's Box from which may flow untold evil and turmoil. If we must select new faculty (or students, or those to be promoted) on the basis of race or sex, why not on religion or ethnic group? Surely Catholics are underrepresented in Sociology. And how about Poles? Those with Spanish surnames? Italians? Are there not too may Jews? How much weight should various ascribed characteristics be given? For what rewards? The list of such questions is almost endless and they are not trivial. This way lies a morass from which we will not extricate ourselves easily. Award of positions within the profession and university will be determined by a never-ending social and political battle in which those groups with greatest power and the strongest allies will win the greatest share. And who can believe that, once begun, the policy of awarding positions on an ascribed basis can be suddenly stopped? When will there be general agreement that the time to stop has come?

"There are likely to be other serious costs stemming from such a policy. Clearly any school which does not draw impartially upon the widest possible pool of applicants will, either in the short or long run, suffer in academic excellence. Moreover, there is bound to be hostility and division within the profession, the universities, and the larger society, among the various groups which are treated differentially.

"Finally, we should remember that job discrimination is illegal, under the Civil Rights Act of 1964. Inronically, reverse discrimination is now being carried out under the guise of conforming to this Act. Thus, the man who wrote to my student said "We have now learned that recruiting throughout the University is almost completely limited to certain categories of persons whose employment would enable the University to meet certain equal opportunity requirements." According to this reasoning, this student could not be considered in order that the university might provide equal opportunity to all!

"Discrimination against blacks, against women, or against any other group, must be fought vigorously. More than this, we should encourage and facilitate the entrance into the profession of more people from those social groups which have been disadvantaged. But there are other ways for us to work toward these goals. We can, for example, provide more financial aid to needy students, who come disproportionately from among blacks and among certain other social groups. With respect to job discrimination, we can require that, from an equally qualified set of applicants during a specified time period, there not be a consistent underselection of those in a given social category. There are other things we can do to advance social justice. We need not embark on a policy which is unfair to many individuals and which, by abandoning the merit principle, is destructive of the very foundation of the profession."

I appreciate the chance to have expresed my views to your committee.

Sincerely yours,

MARTIN PATCHEN,
Professor of Sociology.

COMBATING DISCRIMINATION IN EMPLOYMENT

(*By Stanley H. Masters and Collette H. Moser*)

In recent years, this country has become increasingly concerned with the issue of racial and sexual inequality.[1] While this problem has many dimensions, economic inequality has received increasing attention. Statistically, relative income differentials are probably the most important measure of economic inequality. For example, the median income of black males was 60.5 percent of white males in 1970, compared with 52.5 percent in 1960.[2] Although this represents some improvement, we are still far from achieving complete racial equality. In contrast, among full-time full-year workers, the median income of females declined from 60.8 percent of the median male income in 1960 to 59.5 percent in 1970.

Although differences in amount and kind of education and in labor force continuity account for part of these income differentials, the most important factor appears to be labor market discrimination.[3] In this paper we discuss efforts to combat such discrimination under Title VII of the Civil Rights Act of 1964 and under federal executive orders requiring affirmative action programs of government contractors. As we shall see, labor market discrimination need not be deliberate, but may often occur despite the conscious intentions of employers. As a result, combatting discriminatiion requires considerable sophis-

In discussing legal efforts to combat discriminatory employment activities, we shall look briefly at the issue of enforcement procedures and then turn to substantive issues regarding the legislation. With regard to procedures, the first question is the scale of federal enforcement effort. As of fiscal year 1972, total appropriations for "private sector equal employment opportunities" were only forty-seven million dollars, with administration requests up to eighty-one million for 1974.[4] Although the projected increase is encouraging, this figure is very small in relation to many other government activities.[5] For example, government expenditures on manpower programs totaled over four billion dollars in fiscal 1972.[6]

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[1] Throughout this paper victims of racial and sexual discrimination will be referred to as "minorities," although it is understood that women are not a numeric minority.

[2] Calculated from data in U.S. Bureau of the Census, *Current Population Report,* Series P-60, Nos. 36 and 80.

[3] Labor market discrimination is defined as the lower earnings occurring to some group after standardizing for differences in productivity that are not caused by such discrimination. Although it is not easy to estimate how much of the lower educational attainment of blacks or the discontinuous labor force participation of many women is due to labor market discriminating, such discrimination is significant even if one standardizes for the entire differential in education or labor force continuity. For blacks, see Stanley H. Masters, "The Effect of Educational Differences and Labor Market Discrimination on the Relative Earnings of Black Males," *Journal of Human Resources,* Vol. 9, No. 2 (Spring, 1974). For women, our conclusion is more speculative.

[4] *Special Analysis of the United States Government, Fiscal Year 1975* (a part of *The Budget of the United States Government,* 1974), p. 180.

Current enforcement procedures are weakened not only by limited financial resources. The Equal Employment Opportunity Commission (EEOC) set up under the Civil Rights Act of 1964 has virtually no legal power with regard to employers; it is limited to the role of conciliation and negotiation. Until recently suits could be brought only by private individuals or by the Justice Department. Such suits are expensive for private parties, while the activities of the Justice Department in this area have been limited by a small staff and lack of coordination with the EECO.[7]

In 1972 Congress amended the Civil Rights Act of 1964 to enable the EEOC to sue in the courts whenever it believes a violation of Title VII has occurred. While this legislation represents a significant improvement, stronger procedures would have been possible and were seriously considered in the Senate. Under this alternative proposal, the EEOC would have been given the power to issue cease and desist orders. Thus, once the EEOC judged that discrimination had occurred, the firm would not have been allowed to continue that discrimination pending trial. This defeated proposal would have been more equitable since it would give minorities the benefit of the doubt *once* the EEOC ruled that discrimination did exist. Even if enforcement procedures were grealty strengthened, however, important substantive issues would still remain.

SUBSTANTIVE ISSUES IN ENFORCING EQUAL OPPORTUNITY LEGISLATION

Title VII of the Civil Rights Act of 1964 states:

"It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."[8]

While this legislation was designed to improve the economic position of minority groups, it explicitly disavows a number of actions that might be taken to improve the labor market status of blacks, women, and other disadvantaged groups. These restrictions are concisely summarized in a recent article in the *Harvard Law Review*, dealing with the effect of Title VII on racial discrimination.

"The Act's effectiveness in promoting minority employment was limited by the principle of color-blindness. Just as the employer was not to discriminate against minority groups, he was also proscribed from showing preference to them. Employers could continue to set rigorous qualifications for their job openings and test for worker productivity, as long as they did so fairly. The Act thus includes an antipreferential provision (e.g., no quotas are to be necessary), affirms the legality of professionally developed ability tests, and protects bona fide seniority systems. Help was to come to the black community, Congress reasoned, by a newfound opportunity to be judged by objective standards."[9]

Restrictions on preferential treatment might be a small price for minority groups to pay in exchange for objective standards that prohibit discrimination against minority group members; but it is not easy to establish such standards.

Let us start with the issue of discrimination in hiring. We define such discrimination in the following way: Assume that two identical jobs are available in a given company and that there are two equally qualified applicants. If one applicant is a black female and the other a white male, then discrimination would occur if the firm hired the white man but not the black woman.[10]

Now let us examine some of the problems that occur when we try to apply this definition to specific cases. Initially we shall concentrate on questions relating primarily to racial discrimination. The first difficulty is in determining when two applicants are equally qualified. In this area, the most controversial issue has been the role of educational requirements, either amount of schooling (e.g., a high school diploma) or scores on various kinds of tests. Recent studies have indicated that schooling is a very crude measure of one's productivity.[11] While tests might provide a better measure, it is probably impossible to develop tests that are perfect measures of job performance. Moreover, it is expensive to develop tests that are even moderately accurate; the net costs are likely to be high even after taking account of resulting improvements in worker performances. On the other hand, it may also be costly for the firm to ignore potential differences in productivity among its applicants.

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[5] Note that the actual increase may be much smaller due to Congressional action.

[6] *Special Analysis, op. cit.*, p. 120.

[7] See the discussion in *Federal Civil Rights Enforcement Effort*, a Report of the United States Commission on Civil Rights, 1970, especially Chapter 2, Sections V and VI.

[8] Civil Rights Act of 1964, Section 703.

[9] Employmnt Discrimination and Title VII of the Civil Rights Act of 1964, an unsigned note in the *Harvard Law Review*, Vol. 84, No. 5 (March, 1971), p. 1114.

[10] If there were only one job available and the white male were hired, it would be impossible to know whether this represented discrimination or a random event—unless we had some additional knowledge of the employer's intentions (*e.g.*, qualified applicants were usually hired on a first-come basis and the black woman had applied first).

The Supreme Court has ruled requiring completion of high school or passage of a general intelligence test can be illegal if these requirements operate to disqualify Negroes at a substantially higher rate than white applicants and if the requirements are not shown to be significantly related to successful job performance.[12] Although it is not yet clear what standards of proof the courts will require in order for a firm to demonstrate that its requirements are job related, it appears that the courts will have to become involved in some very difficult issues involving trade-offs between efficiency and equity. As we shall argue later, there may be ways to avoid some of those difficulties by judging equity in terms of results as well as procedures.

Even if we can clearly determine when two applicants are equally qualified, there are other difficulties in determining whether or not an employer is discriminating in the overall hiring process. Specifically, an employer's recruitment policies must be considered along with his hiring requrements. For example, many firms recruit primarily through current employees. Such recruitment procedures have significant benefits for both the employer and those considering employment with the firm.[13] If the present work force, however, is virtually all white male, important issues of discrimination occur.

The courts have generally ruled that such recruitment procedures are illegal if they result in a work force whose racial composition is significantly different from that of the community.[14] The natural remedy is for the employer to begin advertising his job vacancies in media which serves the black community and/or with civil rights organizations. Similar problems arise with the recruitment of women who frequently have limited access to information on job openings. In recent years, women's caucuses in professional organizations are frequently contacted by employers seeking women trained in particular disciplines. However, the question raises: How much new recruitment must be undertaken, especially since quotas in employment are specifically disavowed under Title VII?

Women are subjected to additional discrimination in the hiring process through the concept of men's and women's jobs and the concomitant separate job listings in help-wanted ads. Although such separate listings violate Title VII guidelines, EEOC has had difficulty convincing the courts that "a newspaper which maintains classified advertising columns violates Title VII when it segregates such columns on the basis of sex." [15] However, "due to the Commission's position, and similar positions taken by city and state fair employment practice commissions, newspapers across the country, including the New York City newspapers and the three major newspapers in the District of Columbia, have discontinued the maintenance of sex-segregated columns." [16]

A discrimination issue which affects both women's hiring and work assignment is that of sex segregation of jobs. Under Title VII, the EEOC has ruled that only in exceptional jobs in which sex is a bona fide occupational qualification (bfoq) can jobs be restricted to either sex. The burden of proof of the exception is on the employers. Recent court decisions have viewed bfoq as follows: "A determination that sex is a bfoq for a job cannot be made on the basis of general assumptions regarding the physical capabilities of men and women. In order for sex to be a bfoq for a job, it must be established that the sexual characteristics of the employee are crucial to the successful performance of the job, as they would be for the position of wet-nurse; or that there is a need for authenticity or genuineness, as is the case for the position of actor or actress. In other words, discrimination based on sex is valid only when the *essence* of the business enterprise would be undermined by not hiring members of one sex exclusively." [17] Even some state laws which prohibit the employment of women in certain occupations have been held invalid by Title VII.[18]

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[11] For example, see Ivar Berg, *The Great Training Robbery* (New York: Praeger Publishers, 1970).

[12] See Willie S. Griggs vs. Duke Power Company (U.S. Supreme Court, No. 124, March 9, 1971).

[13] For example, see "Information Networks in Labor Markets".

[14] See *Harvard Law Review, op. cit.*, pp. 1153–55. As that discussion indicates, however, if an employer's recruitment policies appear to be discriminatory on this basis, it seems reasonable to give the employer a chance to demonstrate that blacks have less interest or skill than whites in his line of work.

[15] Sonia Pressman Fuentes, "The Law Against Sex Discrimination in Employment" (paper presented at the MDK Associates Seminar on Affirmative Action, Dallas, Texas May 16, 1972), pp. 12–13. The EEOC position was not sustained by the District Court in the case of Brush v. San Francisco Newspaper Company. The case was pending on appeal as of 1972.

[16] *Ibid.*, pp. 5–6, 13. For example, in 1971, courts rule sex-segregated columns held in violation of the state fair employment practices laws in Pennsylvania and New Jersey.

Next let us turn from the issue of discrimination in hiring to other issues of discrimination in employment. Perhaps the most important of these issues are promotions, layoffs, and discharges. Promotions and discharges are based partly on ability (or lack thereof) and thus qualification standards in these areas are subject to many of the same issues as hiring standards.[19] However, seniority also plays an important role in most promotions and almost all layoffs. If there is no history of discrimination in hiring, then seniority rules pose little difficulty since seniority is easier to measure objectively than most other potential criteria. However, if there has been past discrimination, then seniority rules may help to perpetuate this discrimination far into the future.

Let us assume that, prior to the Civil Rights Act of 1964, a firm employed blacks and women only in certain unskilled, low-paying positions, and that, for white males, there was a well-defined ladder for advancement, with promotions going to the person with the most seniority among those in the next lowest job who are considered qualified.[20] Let us consider how blacks are to be integrated into this seniority system after passage of the Civil Rights Act. Three main possibilities which have been advanced are:

"(a) 'freedom now,' requiring displacement of white incumbents by blacks who, without discrimination in the past, would have had their places; (b) 'rightful place,' allowing a black to compete for a position on the basis of his total company service (without having to advance through each step of the ladder); and (c) 'status quo,' preserving intact the rights of white incumbents (blacks must start at the bottom of the white ladder and advance through each step on the same basis as newly entering whites)." [21]

Congress clearly indicated that it was not reqiuring the freedom-now approach when it protected bona fide seniority systems.[22] Of the two alternatives, the rightful place test has been generally acepted by the courts.[23] Of course, there may be little practical difference between the "rightful place" and "status quo" approach if skills must be learned during each job on the ladder. Consequently, even if all discrimination in hiring and recruiting should cease, it could still take a long time to eliminate all the effects of past labor market discrimination.

Discrimination charges have been levied against a number of firms because of their employment policies toward pregnant employees. The major issues involve the requiring of leaves of absence or the termination of employment contrary to the wishes of the employee. In general, the decisions of the courts and the EEOC hold that it constitutes sex discrimination for an employer:

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[17] Fuentes, *op. cit.*, p. 5. A few of the significant court cases on bfoq are as follows: *Dias v. Pan American World Airways, Inc.*, 3EPD para. 8166 (5 Cir. 1971); *Weeks v. Southern Bell Telephone Co.*, 408 F. 2d 228 (C.A. 5, 1969); *Cheatwood v. South Central Bell Telephone and Telegraph Co.*, 303 F. Supp. 754 (M.D. Ala., 1969).

[18] See Sec. 1604.2, EEOC Rules and Regulations, 37 Fed. Reg. 6835 (April 5, 1972); *Rosenfield v. Southern Pacific Co.*, 3 EPD para. 8247 (C.A. 9, 1971).

[19] Although differences in pay based on sex or race are a critical discrimination issue, such distinctions are usually engineered through the job title or seniority system. Where pay differences for some job status have been investigated, they have been ruled illegal.

[20] If the firm (or union) is all white, a more extreme possibility is to apply the following analysis based on blacks in the community rather than on blacks in low-paying jobs within the company. See *United States v. Sheetmetal Workers Local 36*, 416 F. 2d 123 (8th Cir., 1969).

[21] *Harvard Law Review, op. cit.*, p. 1159. Separate seniority lists based on sex differences have also been ruled in violation of Title VII. A classic case of such separate seniority lines for men and women is that of Libbey-Owens Ford.In 1970 case, the Justice Department suit against the company was terminated by a consent decree in which the company was required to give the women two opportunities to bid into another department and to provide extensive education and training in advance of transfer. Local 9 of Glass and Ceramic Workers v. Libbey-Owens Ford (U.S. District Court in Ohio).

[22] However, this approach may be an appropriate remedy for a discriminatory system in effect after the Civil Rights Act of 1964 became effective. See Alfred W. Blumrosen, *Black Employment and the Law* (New Brunswick, New Jersey: Rutgers University Press, 1971), pp. 202–205.

[23] *Harvard Law Review, op. cit.*, p. 1159.

(1) To fail to accord a pregnant employee the right to work as long as she was not physically disabled;

(2) To cause a female employee to lose seniority because of absence for pregnancy, miscarriage or childbirth;

(3) To fail to provide female employees the same hospitalization and medical benefits as are provided for wives of male employees;

(4) To fail to provide the same sicknes and disability benefits for absence when disabled because of pregnancy, miscarriage, or childbirth as are provided when an employee is absent on account of other nonoccupational disability.[24]

So far we have argued that it is going to be very difficult to eliminate all discrimination in employment simply by trying to apply the "color-blind" and "sex-neutral" standards of Title VII. Moreover, even if such discrimination could be eliminated, the effects of past discrimination would persist far into the future. Thus we need to consider alternative approaches to combatting discrimination.

AFFIRMATIVE ACTION REQUIREMENTS

The major alternative to the present legal concept of color-sex blindness is the imposition of some kind of quota system. At least two variations of the quota approach are available. The first, which might be called inflexible quotas, means that firms must employ at least a certain percentage of minorities and that no exceptions will be allowed. The second, which might be called target quotas, means that the burden of proof is on the employer to show that he has not discriminated (or has fulfilled his contract commitment to take "affirmative action") if he does not employ as many minorities as stipulated by the quota. To avoid confusing inflexible and target quotas, the latter are usually referred to as goals rather than quotas. While Congress clearly indicated that Title VII was not to be interpreted as requiring any quota system, the executive branch has established a system of "goals" with regard to government contractors.[25] Moreover, this system has been upheld in the courts and has been tacitly accepted by Congress.

The government began its present affirmative action program with the Philadelphia Plan, instituted in 1967. Under this plan, contractors for government construction projects in the Philadelphia area must make "good faith" efforts to meet certain goals with regard to the hiring of minority workers. These goals are determined by the Office of Federal Contract Compliance (OFCC) on the basis of such factors as the new hiring predicted for the contractors, the number of minority-group members having the necessary skills, and, if this number is limited, the length of time necessary for training. Then these goals, indicating the number of minority employees to be hired in specified trades by specified times, are included as part of the job specifications on which the contractor bids. Although the Philadelphia Plan does set up very specific goals, these goals originally applied only to the actual government contracts and did not apply to the contractor's employment on other projects. Since firms could meet these requirements by switching black workers from their private projects rather than by hiring more black workers, the program has recently been changed to cover a contractor's total employment.

Failure to meet the specified goals does not necessarily imply that the contractor has failed to comply with the terms of the contract. In the words of the *Harvard Law Review*:

"A contractor can escape sanctions by providing that he made 'every good faith effort' to meet the requirements. Signs of a good faith effort are: (1) communications of employment needs to certain minority community organizations; (2) maintenance of records showing disposition of minority job applications; (3) participation in community minority training programs; and (4) notification of the OFCC area coordinator whenever the employer's efforts to meet his goal have been impeded by union referral practices. It is specifically noted that failure of a union with which the contractor has a collective bargaining agreement to send minority applicants is not a sufficient excuse for noncompliance. Though the precise procedural consequences of failure to meet goals are not outlined in the Philadelphia Plan, it has been assumed that failure to meet specific goals forces the contractor to assume the burden of producing evidence of his good faith effort to meet his goals while the government has the ultimate burden of persuasion on the issue of noncompliance with the Executive Order program." [26]

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[24] "Keeping Up With the Law," Summary, Legal Dept., Int'l. Union of Elec., Radio, & Machine Workers, January, 1972. A large portion of the cases have concerned teachers where leaves of absence have been required after the fifth month of pregnancy. In most but not all of the cases, courts have ruled that the requirement is arbitrary and violates the equal protection clause of the 14th Amendment since it treats pregnancy different from other medical disabilities and without regard to the differences in individual abilities. See, for example, 1972 cases of Bravo v. Board of Education, City of Chicago (Northern District of Illinois); Le Fleur v. Cleveland Board of Education (6th Circuit, Cincinnati).

[25] See James E. Jones, Jr., "The Bugaboo of Employment Quotas," *Wisconsin Law Review*, Vol. 70, No. 2, for a discussion of the legal aspects of the quota issue.

Originally the Philadelphia Plan was developed as a model to apply to other cities. However, the government's current approach is to encourage the development of "hometown plans," agreements negotiated among unions, contractors and minority-group representatives to increase the employment of the minority-group on all construction projects in the area. If no satisfactory hometown agreement is negotiated, then the government can fall back on the Philadelphia Plan approach.

The government began its affirmative action program on construction, possibly because: Urban renewal and government building tend to take place in areas of high minority concentration. In many kinds of work, discrimination can be concealed behind closed doors. But the presence of an all-white construction crew working outdoors in plain sight in a black community is a 'blatant insult.' [27]

Although union jobs in the skilled construction trades pay very well, they are only a very small percentage of total jobs in this country. Consequently, it was important for the OFCC to develop an affirmative action program for federal contractors in areas outside of construction. Such a program has been developed and is currently expressed in Revised Order No. 4. This order, which was formulated in December, 1971, requires nonconstruction contractors with 50 or more employees on contracts of at least $50,000 to have affirmative action programs that include:

(1) A self-analysis to determine whether women and minorities are being underutilized in one or more job classifications.

(2) Corrective action, including goals and timetables, to remedy any deficiencies.

(3) Development or reaffirmation of an equal opportunity policy and dissemination of this policy both internally and externally.

(4) Establishment of a director or manager of Equal Opportunity Programs with many detailed responsibilities in identifying problem areas and developing appropriate programs.

(5) Implementation of internal reporting systems to measure the effectiveness of the affirmative action program.

(6) Support for community and national programs that are designed to improve the educational opportunities available to women and minorities.

One of the most controversial uses of Revised Order No. 4 has been the application of affirmative action requirements to universities, requirements applying to the employment of women as well as blacks. Although educational institutions had been exempt from Title VII until the 1972 amendments to the Equal Employment Opportunity Act, application of Executive Orders 11246 and 11375 had placed the federal government in the position of overseeing the internal operations of the universities. Backed by Revised Order No. 4, the Department of Health, Education and Welfare and the Office of Civil Rights have heard charges of sex discrimination levied against hundreds of universities. In some cases, HEW has threatened to withhold funding because charges of discrimination have been intense (e.g., at the University of Michigan where federal funding amounts to about $60 million). Just as visibility in the black community had made construction work a target for combatting discrimination in the employment of black males, the visibility in the employment and production of educated women gives the university the responsibility for changing patterns of sex-stereotyping and discrimination.

Revised Order No. 4 applies to women as well as blacks. Nash summarizes the other main differences between this program and the Philadelphia Plan:

"The primary difference between the two programs is that the OFCC or an appropriate regional organization analyzes the factors leading to appropriate goal formulation in the construction program, while under Order No. 4 each nonconstruction contractor must make his own analysis. This difference is dictated by the need for a uniform affirmative action approach by each employing entity. Most nonconstruction contractors maintain a relatively constant work force and can establish their own consistent program. But since the construction work force in any locality is in reality employed by all of the construction contractors in the area, goals and timetables for the latter, in order to have a meaningful application to employment, must be developed for the single-employer entity (all contractors) and their employees (all construction employees who move from job to job). The essential requirement of coordinated goal setting is obtained under both programs.[28]

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[26] *Harvard Law Review, op. cit.*, p. 1298.
[27] *Ibid.*, p. 1294.

While the goals and timetables are initially set by the nonconstruction contractor, these goals and timetables can be revised by the OFCC under Revised Order No. 4. For the programs under Revised Order No. 4, as for those in construction, goals and timetables are to be based on objective factors, such as the availability of minority workers at different skill levels, the existence of training opportunities, the expected turnover of present employees, and expected changes in the size of the work force. In the construction industry, specific goals and timetables are included in the contract and are subject to the same enforcement procedures as would apply to any other specifications in the contract. While contracts can be terminated under Revised Order No. 4, this process is often too time-consuming to be very effective. However, the threat of losing future government contracts as a result of inadequate affirmative action programs can be very effective under this order.[29]

THE ADVANTAGES AND DISADVANTAGES OF AFFIRMATIVE ACTION REQUIREMENT

Now that we have summarized the current status of affirmative action requirements, let us discuss more carefully the advantages and disadvantages of this approach. The advantages of the affirmative action requirements compared with the color-blind sex-neutral standards of Title VII are that such requirements are more oriented toward positive actions to help minorities and place a clearer burden of proof on employers with few minority workers.

Despite these advantages, the present affirmative action programs have been fairly controversial. On the one hand, the programs have been criticized for not being tough enough. Proponents of a tougher approach sometimes advocate a system of inflexible quotas. However, this approach does not appear feasible politically and might reinforce racist and sexist stereotypes if minority group members were placed in jobs for which they were not qualified. If inflexible quotas are repealed in favor of the present emphasis on goals, timetables, and good faith efforts, then the crucial issues are: (1) how ambitious the goals and timetables should be, and (2) how vigorous the government will be in going after firms that make only a minimal effort to meet their goals.

While many feel that present governmental enforcement efforts are too weak, on the other hand others feel that the whole affirmative action approach is too stringent on anti-discrimination strategy. Advocates of this view have generally focused on three objections to the affirmative action requirements—an efficiency argument, and equity argument, and a political argument. The efficiency argument maintains that any affirmative action program will increase a firm's costs since it would be under pressure to hire blacks and women when it would otherwise have been free to hire more highly skilled white males. While this argument might have some validity for a system of inflexible quotas, the present affirmative action programs only require an employer to make a good faith effort to meet his target for minority employment. If he has made every reasonable effort to recruit (and/or train) qualified minority workers, then he would not be subject to any sanctions. While an employer might be required to undergo some extra expenses for recruiting and training minority workers, it is not clear that such costs will necessarily exceed the costs that a firm might incur by ignoring the potential availability of such workers. (cf. Becker's view of discrimination)

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[28] Peter G. Nash, "Affirmative Action Under Executive Order 11246," *New York Law Review* (April, 1971), p. 235.

[29] *Ibid.*, p. 255. Ashenfelter and Heckman find some evidence that affirmative action requirements have been effective in increasing black employment. More specifically they conclude (p. 11), "First we find that the relative employment of black male workers increased by 3.3 percent more over the period 1966 to 1970 in firms with government contracts than in firms without government contracts, and that this difference is statistically significant. Second, we find that the relative occupational position of black male workers increased by .2 percent more in firms with government contracts than in firms without contracts, but that this difference is not statistically significant." See an unpublished report by Orley Ashenfelter and James Heckman entitled, "Changes in Minority Employment Patterns, 1966 to 1970."

The equity argument maintains that if the individual workers or employer has not discriminated against blacks or women, then he should not have to bear the major burden of any costs involved in improving their economic position. Instead the cost should be borne by society as a whole (e.g., through general taxation). Of course, this argument assumes affirmative action programs do involve important costs to firms and to white male workers. As we have just seen, this argument is somewhat questionable in the case of firms. On the other hand, some white males certainly are hurt by affirmative action programs. The greatest costs in this regard would occur if present employees were laid off so that additional blacks and women could be hired. Such an extreme proposal has been ruled out on equity (and political) grounds. However, white males seeking new jobs will be hurt by affirmative action programs. Two points need to be raised in this regard. First, the cost to such white workers can be minimized if the government pursues fiscal, monetary, and manpower policies to ensure full employment. Second, since the government affirmative action requirement demands only a good faith effort by government contractors and since discrimination does still exist in the labor market, any harm suffered by white males as a result of affirmative action programs should be viewed primarily as a cost of reducing discrimination against minority groups rather than as an example of discrimination against white males. While we believe that these arguments make it difficult to attack the present affirmative action programs on equity grounds, these equity considerations do suggest that such programs are likely to face political difficulties.

Numerous political arguments have been advanced against affirmative action programs. First, such programs have been criticized for dividing the working class politically and thereby hurting the economic position of all workers.[30] While this argument may have some validity, the lack of any significant action against discrimination may also lead to tension between workers of different race or sex. A closely related argument maintains that minority workers may be helped more (and at less political cost) if political efforts are concentrated on establishing and *maintaining* tight labor markets.[31] But this is simply an argument for putting top priority on tight labor markets and not an argument for abandoning affirmative action requirements.

Next, some argue affirmative action programs may reinforce racist and sexist stereotypes since giving some referential treatment to minorities suggests they are unable to compete successfully on the basis of their own ability.[32] While this argument might have merit if employers were forced to hire unqualified applicants, there is no such requirement in the present affirmative action programs. By putting employers under more pressure to hire qualified minority workers, the present programs may actually help break down present stereotypes by providing more examples of successful performance by minority workers.[33]

Another criticism which has been raised by the affirmative action "backlash" is one of excessive government intervention, particularly with regard to the educational process. For example, in a speech reprinted in *U.S. News and World Report*, Dr. George Roche, President of Hillsdale College in Michigan, maintains present affirmative action programs put "at stake the institutional integrity of higher education":

> "The present situation can be summarized as an assault upon the standards and integrity of the institutions involves. . . Already numerous individual injustices, assaults upon the dignity and integrity of our educational institutions, and bureaucratic interferences with the educational process have accumulated so rapidly that it will take book-length treatment to examine all the practical and philosophic implications raised by affirmative action"[34]

Such a criticism combines our earlier economic-efficiency argument with a political argument concerning government intervention. With regard to the efficiency argument we need only emphasize that affirmative action programs no more require the hiring of unqualified Ph.D.s than they do the hiring of unqualified plumbers. The government-intervention aspect of the argument is also unpersuasive. Affirmative action programs are not placing controls on what is to be taught or what is to be researched—issues which are truly at the heart of academic freedom. Moreover, these programs do not require that individual A be hired rather than individual B. The federal government is simply saying that as a *quid pro quo* for using federal contract funds, the university must subscribe to a program of affirmative action toward minority employees and students.

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[30] For example, see Bayard Rustin, "The Blacks and the Unions," *Harper's Magazine* (May, 1971). This line of reasoning is also consistent with the radical analysis.

[31] Such costs would include: (1) the possibility of not having any positive impact on government policy, (2) trade-offs between present and future gains for minority groups, and (3) labor market gains versus gains in other areas such as educational opportunities.

[32] For example, see *Harvard Law Review, op. cit.*, p. 1166.

[33] In addition, employers are under pressure to see that minority members get better training.

[34] *U.S. News and World Report*, January 1, 1973, p. 52.

In summary, we believe that the present affirmative action programs are an important policy device for reducing discrimination in the labor market. While they have been attacked on several grounds, we do not find these attacks very convincing. In fact, we believe that these programs should be strengthened—especially with regard to their enforcement procedures since the mere existence of an affirmative action plan does not assure implementation and results. As in labor relations generally, distinguishable between "good and bad faith" efforts is difficult.[35]

On the other hand, affirmative action is not the sole answer to the discrimination problem. Changing people's attitudes, improving the marketable skill of minority group members, and maintaining tight labor markets are also important. Rather than viewing such alternative policies as potential substitutes, it appears best to view them as complements since each is likely to be more effective if the others are being pursued with some success.

UNIVERSITY OF CALIFORNIA, BERKELEY,
Berkeley, Calif., September 24, 1974.

Hon. JAMES G. O'HARA,
Chairman, Special Subcommittee on Education, Committee on Education and Labor, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN O'HARA: I am pleased to respond to your suggestion that I submit a statement to your subcommittee for inclusion in the committee's hearings on the nature and operations of so-called affirmative action programs in universities. I am also taking the liberty of sending you copies of two articles on this subject which I wrote two years ago for *Commentary* magazine.

These articles continue to represent the views which I now hold. The following remarks are in the way of amplifying them. I believe now, as then, that in practice quota-hiring violates the essential principle of merit, and is unfair in that it introduces invidious criteria of race into a profession which, one would think, had sought to abandon such practices. I also believe that such practice is unlawful, in that it violates the Civil Rights Act of 1964. While the Supreme Court has yet to address the question of the constitutionality of these particular practices in colleges and universities, I think a strong case can be made that, regardless of the Civil Rights Act, they are, in any event, unconstitutional. The effects of such practices cannot fail to lower the quality of academic faculty. This in turn will inevitably lower the quality of instruction which students receive.

These points are spelled out in some detail in my article, "HEW and the Universities," in *Commentary*, February 1972. A more general case, for the supremacy of merit as criterion of personnel evaluation, can be found in my article, "The Idea of Merit," in *Commentary*, December 1972.

At the present juncture, I would now like to highlight four aspects of the administration of affirmative action.

The first of these is the question of government control over internal practices of universities having contractual relations with it.

The use of federal contract compliance as a lever for control over the internal operations of universities will be with us for a long time. There are few major universities which are independent of such contractual ties. Some are so dependent that the withdrawal of federal contracts could shut them down. The eargerness to comply with federal directives may be explained in large measure by this fact. This lever, or weapon, in the hands of the federal government is, in the abstract, neutral as to the objects it directs itself toward. I think that a case can be made that it should be used with the greatest of care, and in fact limited to those units of a university directly engaged in the performance of contractual obligations. As you know, this has not been the case in HEW's unauthorized use of it as a lever to alter and to superintend academic hiring practices. For example, it is my understanding that the great bulk of Columbia University's federal contracts go to its Medical School. Yet contract-cancellation was there threatened, as elsewhere, unless Columbia agreed to a hiring policy applicable to the entire University.

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[35] Some have accused employers of engaging in "bad faith search" efforts, particularly at the university level. Employers obtain names of women, blacks, and other minorities, and make only vague attempts at recruitment. They then use these names to "pad" their affirmative action "good faith" effort recruitment list.

The contract weapon is not confined to hiring practices alone. Other agencies of HEW have used the weapon and threat of grant cancellation to obtain other goals. For example, it is used as a lever to regulate the nature of research projects. Recently, under considerable protest, HEW rescinded a proposed censorious directive which would have required universities to purge so-called "sexist" materials from classroom instruction. So also, HEW has insisted that universities establish review committees whose task is to inquire into problems of "social risk" entailed in research on human subjects and to disallow research deemed in violation of HEW standards. In both of these cases, the actual administration of such federal policies (based, incidentally, on no law) is delegated to university officials; but they are nevertheless under constraint to abide by norms devised by government bureaucrats.

The knife can cut both ways. In his *amicus curiae* brief to the Supreme Court in connection with the DeFunis case last spring, Professor Archibald Cox (in my view correctly) pointed out the implications of federal intervention in the admissions policies of private colleges and universities. The right of Harvard University, and Harvard College in particular, to employ criteria other than scholastic merit exclusively, in shaping the social and cultural composition of its student body, is a matter, he argued, for Harvard to determine and not for the government. I did not agree with Professor Cox' further contention that this was also true for publicly supported state colleges and universities. But the point must be made that it is extremely unwise for the federal government's power—that of its sprawling bureaucracy—to continue to expand into the operations of higher education. We know enough by now, having seen the clumsy and often contradictory operations of HEW in affirmative action, to know that low- and middle-level government officials are hardly qualified to determine how quality education should be administered. This is especially so when government policies, in executive orders, are devised and promulgated by bureaucracies in the absence of any legislation from Congress authorizing them. In the case of affirmative action policies, as I noted above, in fact the executive orders stand in direct conflict with existing law.

My second point addresses itself to the vast costs which the administration of affirmative action programs now imposes upon universities and colleges. It is hardly a secret by now that compliance procedures inside universities are extraordinarily cumbersome.

The hiring of new personnel, and their advancement, are initiated at the Department level. Departments typically are now required to undertake elaborate ritualistic modes of search, which in their rigidity make it difficult for them to operate with the flexibility they should possess. Extensive proof that no discrimination has been entailed in each choice is required of them. In my Department at the Berkeley campus of the University of California last spring, for instance, two weeks of the time of the Department's chief administrative deputy and a full-time secretary was taken to assemble affirmative action proof material (for submission to the Chancellor), in connection with the hiring of two non-tenured Assistant Professors. In a University campus with more than 80 Departments, the cumulative effect of this may well be imagined. In turn, many administrative personnel on a campus-wide basis are required to scrutinize and evaluate this material. It has been estimated, for example, by a well-qualified student of this subject, Ms. Lucy Sells, that the number of officials on the Berkeley campus required to process all of this paper connected with affirmative action comes to between 18 and 24 FTE's—i.e., the full-time equivalent of 18–24 faculty members. And this at a time when the University in a steady state is not even able to afford to replenish its faculty when retirements, resignations, and deaths occur. It will may be supposed that the *national* costs of this exercise are simply gigantic. If universities were in a condition of prosperity, they might better be able to afford this. But they are not.

In point of fact, of course, this vast, costly activity is based upon what seems to me a fundamental assumption of HEW—namely, that universities and colleges in the matter of discrimination are guilty until proven innocent. *Every* case of hiring must be scrutinized; each must be found clean. It is as though a Department of Motor Vehicles required motorists to take a driver's test every time they stopped for a red light.

But of course we finally come to the point of all this: it is supposed that such practices will have the tangible result of increasing the number of women and minorities employed. The university's agreed "goals" will be expedited. Yet a moment's reflection would show that if there is fairness in such cumbersomeness there is really no way of conceivably knowing how the statistics ultimately will turn out. It is only if criteria essentially unfair are employed that the statistical consequences can be rigged to fulfill the agreed goal.

My third point refers to what may be called "do-it-yourself affirmative action." I find it entirely possible to imagine that within the Department of Health, Education, and Welfare there are officials who are genuinely committed, in principle, to the idea of quality education. In turn, I also assume that few of them would wish to condone many of the egregious practices of blatant discrimination which currently are carried out by others in the name of affirmative action. The problem is that their policies have inspired practices in some colleges and universities going far beyond what they themselves would agree to be "reasonable." It is my view that it is essential for HEW now to make clear that it is *abandoning* quota criteria and statistical tools, since these are improper. It must itself now take the leadership in seeing that such practices are not perceived as lawful, even when engaged in voluntarily. It would not be the first time in recent months that a federal government agency has turned from lawless to lawfull activity.

My fourth and final point is this: Many of us who have opposed HEW's affirmative action policies from the beginning have been subject to considerable criticism and attack from many quarters. Some of the criticism, as might be expected, has been bitter; we have been called racists, sexists, and so forth. But there is one criticism which warrants some thoughtful response. It is that, in our opposition to these blunt and crude measures of social improvement, we offer no alternative means of melioration. The implied assumption of this charge is that reverse discrimination is necessary since "nothing else works."

Now one can make an abrupt response to this charge. Briefly, it is this: that reverse discrimination acts as unfairly on *individuals* as does front-drive discrimination. If we assume reverse discrimination to be necessary as an agreed *social* policy, as a means by which Society repays victims of previous discrimination, *Society* in fact does not repay. Innocent individuals do. The costs are borne by those individuals who are unfairly, and illegally, displaced because they, as individuals, are not of the right sex or race. If it were determined by Society, through proper legislation, that the social good would be served by hiring more persons in disadvantaged classes, then Society should pony up the resources to do so, in a way which would not have the effect of displacing or excluding qualified persons. Even then, of course, important questions of equity would remain. The matter of "disadvantagedness" in society can hardly be accounted for in terms of sex and race. The bulk of America's poor today are white. I suspect that many of those now officially classified as disadvantaged, and eligible for preferential treatment, are not, as individuals, disadvantaged.

Yet the charge still remains: many of us have said little which is positive. That has certainly been true in my case. The main reason for my silence in this matter is that I am genuinely baffled. What actually is it that is wanted in affirmative action? How would we know an authentic condition of social equity in higher education when we saw it? What would be the kinds of methods and strategies which could achieve such equity without significant sacrifice of quality? How would one devise a federal strategy so to influence the habits, interests, and wishes of a nation of individuals as to guarantee proportional representation of social categories in higher education faculties? In general, it would seem to be wise social policy to address ourselves to questions of quality of performance rather than statistics of results. It would be a supreme irony if proportional representation were achieved in higher education only at the price of leveling it. A bad university is worse than no university. Federal and state authorities, having the resources with which to *endow* and to encourage quality, do not themselves have the ability to create it. The implications of this point in the following direction: the universities themselves must remain committed to known standards of quality as the central justification of their existence.

Sincerely yours,

PAUL SEABURY,
Professor of Political Science.

THE IDEA OF MERIT

(By Paul Seabury)[1]

Our Honours, and our Commendations be Due to the Merits, not Authoritie.
—ROBERT HERRICK,
"Merits make the Man," *1648.*

The current American social squall has caused a number of logistical difficulties for beleagured liberals. How do we protect certain long-taken-for-granted liberal virtues at a time when few things are taken for granted? Going to the closet for some old, trusted weapon, we likely as not find it rusted from disuse, or inappropriate for the occasion, or we find we have forgotten how to use it, if ever we did know.

So it was for me a couple of years ago at Berkeley during the Free Speech Movement convulsion. One afternoon at its furious height, I went off to read and think about the Essential Nature of the University, thus better to grasp what the real issue was. I sought and found Ortega y Gasset's fine book, *The Mission of the University*. But by the end of the afternoon I realized I had wasted my time; the book was useless to me. The circumstances of Spanish universities in the 1930's were wholly alien to the situation I was involved in, and Ortega's prescriptions pointless. What else should I have read? I still am not sure.

In such confusion, we are especially caught off guard when militant enthusiasts use intellectual arguments for profoundly anti-intellectual causes. Normal life seems always to require that its beneficiaries take too much for granted, and thus it is that lazy innocents are not the only ones who are condemned to repeat history because they never learned it.

Much the same intellectual difficulty afflicts us now, in the current onslaught upon the idea and practice of merit and excellence in American occupations and institutional life. Merit, and its twin, equal opportunity, have been thought to be firmly woven into the fabric of American democratic thought. Possibly they still are. But the tension at the seams is rather great.

Let us consider the idea of merit. As a conception of justice, it means "to each according to his abilities," or in another and closely related sense, "to each according to his works." In these two combined senses merit advances and rewards according to ability and accomplishment, rather than according to status, preferment, or chance. But we are now told by the critics of merit that either its standards are themselves unfair and discriminatory, or that the fair and uniform employment of such standards leads to unequal and unjust results. And there are also those who argue that the idea of merit is in any case no more than the means whereby an abhorrent middle-class system coopts its new retainers. (Edgar Z. Friedenberg, who among other things is a consultant to the College Entrance Examination Board, has recently written, for instance: "A people dedicated to competition and manipulation surely find their social preferences sustained by the kind of testing that has evolved. Granted the College [Entrance Examination] Board, Robert McNamara follows.")

In current American circumstances, when the anti-hero cult is very prominent, it is difficult to believe how recently the ethos of merit and achievement was honored in American life, even to excess. Only a decade ago, John Gardner's *Excellence* (1961) achieved best-seller status, a bit perhaps like the glorious appearance of Minerva the Owl at twilight. A little earlier, in the 1950's, there were two quite different but equally formidable figures who argued forcefully for merit and achievement: Adlai Stevenson and Hyman Rickover, both of whom appealed, if for somewhat different reasons, for an improvement in the qualitative performance of American life. Throughout that entire period, in fact, the dominant American emphasis in training and education and advancement was more and more upon improving quality.

But of course the idea of merit goes back beyond the 1950's and has the deepest of roots in American democratic thought. The case for merit in America was most authentically laid out by Jefferson, whose view of an open democratic society depended upon his conception of a natural aristocracy based on "virtue and talents." This he contrasted with what he had noticed in Europe: an "artificial aristocracy founded on wealth and birth without either virtue or talents." The natural aristocracy, he asserted, was "the most precious gift of nature for the instruction, the trusts, and the government of society," and education was needed to foster it. No wonder, then, that Jefferson wished most to be remembered as founder of the University of Virginia; he might have been memorialized also for his establishment of universal primary education in his state. Such acts and others for which he was responsible like the abolition of the right of entail and of primogeniture, "laid the axe to the root of Pseudo-aristocracy." Now, given equal opportunity, talent and merit would naturally arise in great numbers, from among the rich and the poor alike.

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[1] Paul Seabury, professor of political science at the University of California at Berkeley, contributed "HEW & the Universities" to our February number. The present article is adapted from the Samuel Lieber Memorial Lecture which Mr. Seabury delivered at the New School for Social Research last month.

John Adams—more of a realist than Jefferson—raised a special objection to his friend's optimism. "Nobility in Men," he replied, "is worth as much as it is in Horses Asses [*sic*] or Rams, but the meanest blooded puppy in the world, if he gets a little money, is as good a man as the best of them." Subsequent historical experience lent weight to Adams's warnings. In retrospect, we can note the many anti-meritocratic tendencies which crafty Americans devised: elitist, as to be seen in successful attempts of status groups to maintain privilege by denying merit as a means of access to it; populist, as to be seen in Jacksonian democracy's spoils system—which flaunted patronage in the face of skills and qualifications; and meliorative, as to be seen in efforts to check undesired consequences of cutthroat competition. Yet it is safe to say that none of these quite different countervailing tendencies, or all in combination, really succeeded in overwhelming the Jefferson ethic. The generations of American thinkers who succeeded Jefferson were agreed with him on the ethos of equal opportunity: rich and poor alike should be exposed to knowledge and skills; these would both equip and license entry into a broad, if competitive, world of opportunities and choices. The general quality of life would improve; arts and letters would flourish; all men would be evaluated against the common standards of their calling.

In considering the various current arguments against merit, there is one powerful case which Jefferson's contemporaries probably never thought of. It is that merit, as both a right and a standard, is a device to inveigle people into bourgeois society. Both the knowledge purveyed, and the criteria used to discover which persons have best or adequately absorbed it, are now deemed by some as nothing more than techniques by which a technological system perpetuates itself. The anti-skill culture out of which his critique emerges is at the same time an anti-intellectual culture, attacking the authority of knowledge and reasoning processes in general in the name of intuition and creativity. Kingsley Amis and Robert Conquest, in their sardonic *Short Educational Dictionary*, provide an introduction to the attitudes of this culture:

Alphabet, a set of arbitrary . . . signs which children are still often compelled to learn by rote; usually taught, moreover, in an arbitrary order.

Examination, an irrelevant, external test purporting to check a student's knowledge by a set of written questions often repugnant to his personality, and failing to take into account the distractions inevitable in a concerned life.

Standards, irrelevant academic concept designed to exclude or penalize students distinguished for either concern or creativity or both.

Underachieving, coming out at the bottom in tests designed to measure . . . ability to memorize irrelevant facts and accept bourgeois indoctrination.

In addition to attacking knowledge and reason in the name of spontaneity and intuition, this movement also attacks them in the name of equality. According to Edgar Friedenberg, the existing educational system is a process designed to prevent the "underclass" from getting in, and to keep the middle class on top. (Yet he also seems to think that tests and standards are capricious, as when he says that they are "not so much a poker game as a crap game, and some young people have decided not to take any more crap.") Real education, for Friedenberg, is "shared experience, and only that." Its principal object is to establish a sense of "community among students." To that end, he (and many others) would abolish skill and competitive criteria in evaluations, and even rate competitiveness negatively. For, he argues, "tests that select out for a common reward people whose special excellence is in competition and the fragmentation of experience are not going to bring together a group who are likely to enrich one another, or to care for those dependent on their leadership."

A fraternity rush group of yore could not have put the case for discriminatory exclusion of bright and ambitious students more candidly, though they might have been ashamed to put it in writing, or demand that it be codified as college policy. In another respect Friedenberg in fact would go further than the Greek-key anti-intellectuals dared. He would have colleges so devise admissions systems and testing as to exclude persons deemed psychic or motivational deviants. "A liberal and permissive school ought," he writes, "to be able to defend itself against the influx of punitive, authoritarian, or extremely passive-dependent people," though it should not "exclude any social class or ethnic group *as such*" (italics mine). "The psychological instrument, so long as it is permitted to retain its natural cultural contamination, should be quite sufficient." One wonders what Friedenberg would recommend as instruments for authoritarian, nonpermissive schools.

In any event, returning to the main point, Friedenberg is consistent with the radical counter-culture even though that culture is secessionist with respect to American institutions and he is content to work within our institutions: "Informal institutional demands of the schools are usually explicitly dehumanizing. . . . [T]he best protection for the civil liberties of students is to be found in distinguishing sharply between society's right to demand certain skills . . . and its practice of requiring that these be exhibited as aspects of a pedantic and constricted pattern of tastes."[2]

Ideas must fight a grinding battle with circumstance. The idea of merit and that of the natural aristocracy currently are challenged not only by secessionists and those within institutions who are under their influence, but also by many who would like either to save or to improve the quality of society. In her recent book *On Violence*, Hannah Arendt has revived interest in the dangers of meritocracy—a problem raised over ten years ago by Michael Young. "What grounds are there," Miss Arendt asks, "for supposing that the resentment against a meritocracy, whose rule is exclusively based on 'natural' gifts, that is, on brain power, will be no more dangerous, no more violent than the resentment of earlier oppressed groups who at least had the consolation that their condition was caused by no 'fault' of their own?"

While it is hard to reply to a rhetorical question, I think it possible to detect a certain narcissism and at the same time a certain self-flagellation at work among those intellectuals who equate merit with superior brain power like their own. The domain of merit is not exclusively that of the highest mental achievers, nor is it exclusively confined to qualities of mind. Dictionaries say that merit signifies reward (or punishment) due; qualities or actions constituting the basis of one's deserts; character or conduct deserving reward, honor, or esteem. In addition, our commonsensical view of it combines the notion that effort plus better performance represent good grounds for reward and advancement; and that it is possible to employ objective criteria of various sorts which, however crude, will enable us to make such distinctions reasonably fairly.

This has nothing special to do with the *layering* of society. Any occupation or profession, however inefficient or corrupt, at least must make a pretense of equitably rewarding, honoring, and advancing its members on some grounds other than caprice, favoritism, lottery, or automatic tenure principles; for were it otherwise, it is hard to imagine how it could even claim to be just or fair in its practices, or exempt from harsh complaints from victims of its shoddy practices. Indeed, it is hard to imagine that the merit principle was wholly absent in static, traditionalist status societies.

Finally, I think Jefferson to have been essentially correct when he stressed the need to "diffuse" knowledge. It could hardly be said that the logical consequence of this would be to construct a new status-pyramid of excellence, to replace the status pyramid of a pseudo-aristocracy of prescriptive rights. The diffusion of talents throughout society, already observed in Tocqueville's time, guaranteed checks against this.

Still, there are important truths in some critiques of the merit system as we have recently used it. There is good reason to suppose that some standardized tests, taken too seriously or too often employed, can stultify authentic creativity or create the impression that achievement is simply the act of test-passing. Evaluation can become an end in itself; it may favor test drudges; standards may invidiously contain cultural values irrelevant to the skill being tested; psychic injury may result from the anxieties entailed in anticipating or taking tests. To modify a proverb of the late Dean Acheson, a farmer does not pull up his carrots every night to see how they are growing, nor would a carrot benefit from such benign surveillance. Tocqueville long ago pointed to one unintended byproduct of a social system which abandons prescriptive rights for rights of achievement: namely, the constant uncertainty as to where one stood, and the anxious need constantly to reaffirm one's competence in order to reaffirm one's tenuous status. And then there is also the moral effect of replacing prescriptive aristocracy with performance democracy, which is to elevate the principle of interest over that of duty.

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[2] *Report of the Commission on Tests*, College Entrance Board, Briefs (1970), pp. 34–6.

Yet none of these special arguments against the practice of merit and equal opportunity denies the principle. Rather, they expose its imperfections, and some suggest ways of dealing with the defects. This is not, however, the case with the principle of equality of results, which does thrust at the heart of the principle of equal opportunity and merit. To that challenge I now turn.

A commendable but innocent habit of some optimists, until recently at least, has been to assume that in the land of opportunity the just society and the meritocratic society would be one and the same. Now we are abundantly told otherwise. It is not simply, of course, that in the real world equal justice is never wholly consummated, nor that it is a foolish aspiration. (Paul Valery once wrote that if all men were equally enlightened, equally critical, and equally courageous, no society would be possible.) The problem is that the ideal of equal opportunity has some harsh impediments (some of which can be eliminated) to its attainment in the real world, while the closer we come to its attainment, the more we become aware of disparities of result. Some of these disparities in fact become more starkly visible the fairer the procedures employed; and some show up more visibly in certain sociological categories and groups than in others. Equality of opportunity sets the fair rules of the running; but the new ethic of equality of results would investigate the winning, on behalf of disadvantaged constituencies.

It is clear that the ideal of merit, like justice, should be blind to irrelevant distractions. But it may be that its companion ideal of equal opportunity can never be wholly free from discriminatory impediments. In America, very real, though often concealed, barriers to access have always existed. Jefferson had slaves, and Abraham Lincoln had a wife who could not vote, much less run for office. Certain minority groups have either been denied access to employment, or rendered incapable of benefiting from jobs or training because of past social evils. All this suggests the need for redress, if not retribution.

Yet even in the fairest of all procedures, where arbitrariness has been banished, and where steps have been taken to overcome the effects of inherited disadvantage of every kind, equal opportunity to all too often fail to produce the equality of results which some would wish. The consequence is that those who value equality of results over equal opportunity, and over the principle that all men should be judged and treated according to their individual merits, are attempting to lead us into a new era of discrimination on the basis of race, creed, and color.

Is discrimination as objectionable when pressed on behalf of previously disadvantaged minority groups as when pressed on behalf of advantaged ones? There is now, as well we know, a strong push for proportionality of group representation not simply in schools and universities, but in the professions, business, and industry.[3] The principal device is the quota, although the new discrimination can operate without specific quotas as well. Beaumarchais's point in *The Marriage of Figaro* was that exclusionary practices in 18-century aristocratic France were repugnant precisely because they had nothing to do with a person's individual qualities and skills, but everything to do with his arbitrarily assigned status. Is the situation any different where reverse discrimination is concerned? The gravity of the current situation in America can be seen in the fact that what began several years ago as a method of alleviating the black man's condition has since spread like wildfire to other groups and categories—ethnic, sexual, or chronological— each claiming the right to preferential treatment. In India when a system of reverse discrimination was established, the stigmata of deprivation were mysteriously transformed into signs of grace. Much the same seems to be happening here as one group after another proclaims its handicaps and oppressions in the hope of becoming eligible for compensatory advantages.

There are those who advocate reverse discrimination as a temporary measure, but as the experience of India has also shown, the beneficiaries of quotas or other forms of preferential treatment come to look upon them as prescriptive rights. Quotas, once established as institutional practice, prove as vigorously able to perpetuate themselves to do Texas oil-depletion allowances, and for the very same reason.[4]

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[3] See Elliott Abrams, "The Quota Commission," Commentary, October 1972.

Race, sex, and age: these are our most elementary human attributes, in the possession of which we have absolutely no choice. We have them regardless of wheat we seek to become, or what we actually become. They are qualities with which we commence and end life. But with respect to what as individuals we may hope to gain from or contribute to a common culture, they have very little to say. One does not aspire to be a male or middle-aged or old. These are facts of existence. To imagine that one can or should realize or establish one's identity upon them is to debase one's humanity, which consists in possibilities. Yet in the strange winds of American change, these categories are now to be seen emblazoned on the gonfalons of reform and liberation. In the current view, equal opportunity can only be deemed truly equal if in its results it places a proportional representation of each biological category in the positions of effective status within every major institution.

As observers of the Indian scene noted decades ago, the quest for equality of results does no justice to criteria of excellence; what is less noticed is that it does no justice to authentic human need either. In the current affirmative-action crusade in America, one wonders whatever happened, for example, to the poor. A logician unfamiliar with the nuances of the American cultural revolution but knowledgeable about the vagaries of human statistical classification systems might well note the obvious difficulty which the poor as such have in becoming eligible for affirmative-action handouts.

For while the proportion of poor blacks to blacks-as-a-whole clearly is greater than the proportion of poor whites to whites-as-a-whole, the total number of poor whites is considerably greater than the total number of poor blacks. Yet under the categories of the disadvantaged on which affirmative-action programs are based, the only poor people eligible for reverse discrimination are those fortunate, or unfortunate, enough to be both poor *and* disadvantaged. (Many in the disadvantaged categories, needless to say, have never known poverty.)

Were the American reformist assault on the merit system simply expedited by means of formal quotas, and their twin sister, goals, the condition would at least have the unusual advantage of being open and above-board: one would know what was going on by reading the vast computer print-outs which, presumably, the authorities would collect and disseminate. (By way of contrast, in the old bad days of bad quotas, the data most likely were banked in the back of a prudent Dean's mind; they certainly were not published in college catalogues.) But this is not the case today when quotas are supplemented and sometimes replaced by other devices. Examinations may be abolished; tests of skill eliminated or downgraded; IQ tests eliminated—the argument being that if the tests do not produce the required sociological results they are defective and should go. In my home city, Berkeley, affirmative-action programs now call for precisely such abandonment of certifications. One proposal goes so far as to advocate that previous felony convictions not be considered in the employment of civil servants. Why, one wonders, do we not simply have recourse to a lottery? It may not be meritorious but at least, like justice, it is blind.

It was said of the American spoils system, which had its own informal rules of favoritism before testing came in (i.e., party loyalty and patronage), that the influence of its example corrupted the whole body politic. But that system was at least not codified or *required* by law. The patently discriminatory implications of affirmative action, however, have all the force of law behind them and are likely to be all the more corrupting both to the body politic and to the life of the society in general. For a complex society like our own, after all, depends on the skills of the individuals composing it. Concerns of human safety, convenience, and the quality of our collective life are of as great consequence as our concern for equal protection of the laws. We *do* want a qualified surgeon when we need an operation. We assume a skilled pilot, especially when it is we who are on the plane. We want a clever lawyer when we are in trouble. We want the telephone to work, and our mail to come to us, and to someone down the street. We want competent teachers for our children. In universities we want high standards of scholarship and research and we want them visible also as exemplars of excellence. In short, we want the entire complex of amenities and necessities in a condition which we can reasonably trust.

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[4] I am indebted to Professor Donald E. Smith's important study, *India as a Secular State*, for his account and analysis of this sad experiment, which bears many drab parallels to the current American situation. It is somewhat out of date, however, in its remarks about the relevance of the Indian situation to possible American developments. Smith wrote, in 1963, that in the United States it would be regarded as "patently unfair" to favor race groups with state aid. "[S]ome Negroes are professional people with high incomes, and there are many white tenant farmers . . . whose standard of living is not much above that of bare subsistence. But apart from the unfairness of such a system, it would meet with strong objections from the Negro community itself, which would resent the official label of social or economic backwardness."

Our existence places us at the mercy of persons, often invisible to us, who are certified for their qualities. While we may argue about the manner in which, in real life, skill and competence are elicited and ascertained, we can hardly argue that there are no such things as skill and competence or that there is no way of measuring them. But there are those among us who do make this argument and those who also accept it, and its spreading influence may well constitute the single greatest threat to the quality of our lives today.

HEW AND THE UNIVERSITIES

(By Paul Seabury)[1]

Old Howard Smith, Virginia swamp fox of the House Rules Committee, was a clever tactical fighter. When Dixiecrats in 1964 unsuccessfully tried to obstruct passage of the Civil Rights bill, Smith in a fit of inspired raillery devised a perverse stratagem. He proposed an amendment to the bill, to include women as an object of federal protection in employment, by adding sex to the other criteria or race, color, national origin, and religion as illegitimate grounds for discrimination in hiring. This tactical maneuver had far-reaching effects; calculated to rouse at least some Northern masculine ire against the whole bill, it backfired by eliciting a chivalrous rather than (as we now call it) sexist response: the amendment actually passed!

Smith, however, had greater things in mind for women's rights. As a fall-back strategy, they would distract federal bureaucrats from the principal object of the bill, namely, to rectify employment inequities for Negroes. In this, at least in higher education, Smith's stratagem is paying off according to expectations. The middle-range bureaucrats staffing the HEW Civil Rights office, under its Director, J. Stanley Pottinger, now scent sexism more easily than racism in the crusade to purify university hiring practices. Minority-group spokesmen grumble when this powerful feminine competitor appears, to horn in. In the dynamics of competition between race and sex for scarce places on university faculties, a new hidden crisis of higher education is brewing. As universities climb out of the rubble of campus disorders of the 1960's beset by harsh budgetary reverses, they now are required to redress national social injustices within their walls at their own expense. Compliance with demands from the federal government to do this would compel a stark remodeling of their criteria of recruitment, their ethos of professionalism, and their standards of excellence. Refusal to comply satisfactorily would risk their destruction.

The story of how this came about, and what it portends, is a complex one, so complex that it is hard to know where to begin. It is also an unpleasant tale. Only its first chapters can be written.

I

Let us begin the story, then, with a brief history of the Civil Rights Act of 1964. This act, in the view of its principal sponsors, purposed (among other things) to engage the force of the federal government in battle to diminish or to rectify discriminatory hiring practices in firms and institutions having or seeking contracts with the federal government. Title VII of the act expressly forbids discrimination by employers on grounds of race, color, religion, and national origin, either in the form of preferential hiring or advancement, or in the form of differential compensation. Contracting institutions deemed negligent in complying with these provisions could be deemed ineligible for such contracts, or their contracts could be suspended, terminated, or not renewed.

When Title VII was debated in the Senate, some opponents of it, asserting (in the words of a Washington *Star* editorial) that it was a "draftsman's nightmare," voiced alarm that it might be used for discriminatory purposes, and employers might be coerced into hiring practices which might, in fact, violate the equal-protection poctrine of the Constitution, thus perversely reversing the stated purposes of the bill. In one significant interchange, this alarm, raised by Florida's Senator Smathers, was genially dismissed by Senator Humphrey, in words which bear recalling:

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> Mr. HUMPHREY. [T]he Senator from Florida is so convincing that when he speaks, as he does, with the ring of sincerity in his voice and heart, and says that an employee should be hired on the basis of his ability—
>
> Mr. SMATHERS. Correct.
>
> Mr. HUMPHREY. And that an employer should not be denied the right to hire on the basis of ability and should not take into consideration race—how right the Senator is. . . .
>
> But the trouble is that these idealistic pleadings are not followed by some sinful mortals. There are some who do not hire solely on the basis of ability. Doors are closed; positions are closed; unions are closed to people of color. That situation does not help America. . . .
>
> I know that the Senator from Florida desires to help America, industry and enterprise. We ought to adopt the Smathers doctrine, which is contained in Title VII. I never realized that I would hear such an appropriate description of the philosophy behind Title VII as I have heard today.
>
> Mr. SMATHERS. Mr. President, the Senator from Minnesota has expressed my doctrine completely. . . .

The first steps in implementing the new act were based on executive orders of the President corresponding to Humphrey's Smathers Doctrine. President Johnson's Executive Order No. 11375 (1967) stated that

> The contractor will not discriminate against any employee or applicant because of race, color, religion, sex, or national origin. The contractor *will take affirmative action* [italics added] to ensure that employees are treated during employment, without regard to their race, color, religion, sex, or national origin,

Under such plausible auspices, "affirmative action" was born, and with a huge federal endowment to guarantee its success in life. Since 1967, however, this child prodigy—like Charles Addams's famous nursery boy with the test tubes—has been experimenting with novel brews, so as to change both his appearance and his behavior. And it is curious to see how the singleminded pursuers of an ideal of equity can overrun and trample the ideal itself, while injuring innocent bystanders as well.

II

Affirmative action was altered by a Labor Department order (based not on the Civil Rights Act but on revised Presidential directives) only months after the Johnson order was announced. This order reshaped it into a weapon for discriminatory hiring practices. If the reader will bear with a further recitation of federal prose, let me introduce Order No. 4, Department of Labor:

> An affirmative-action program is a set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith effort. The objective of these procedures plus such efforts is equal employment opportunity. Procedures without effort to make them work are meaningless; and effort, undirected by specific and meaningful procedures, is inadequate. An acceptable affirmative-action program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, *goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and thus, to increase materially the utilization of minorities and women, at all levels and in all segments of his work force where deficiencies exist.*

This directive is now applicable through HEW enforcement procedures to universities by delegation of authority from the Labor Department. By late 1971, something of a brushfire, fanned by hard-working HEW compliance officers, had spread through American higher education, the cause of it being the demand that universities, as a condition of obtaining or retaining their federal contracts, establish hiring goals based upon race and sex.

III

Universities, for a variety of singular reasons, are extremely vulnerable to this novel attack. As President McGill of Columbia remarked recently, "We are no longer in all respects an independent private university." As early as 1967, the federal government was annually disbursing contract funds to universities at the rate of three-and-a-half billion dollars a year; recently the Carnegie Commission suggested that federal contract funding be increased by 1978 to thirteen billion dollars, if universities are to meet their educational objectives. Individual institutions, notably great and distinguished ones, already are extraordinarily dependent on continuing receipt of federal support. The University of California, for instance, currently (1970–71) depends upon federal contract funds for approximately $72 million. The University of Michigan, periodically harassed by HEW threats of contract suspension, cancellation, or nonrenewal would stand to lose as much as $60 million per annum. The threat of permanent disqualification, if consummated, could wholly wreck a university's prospects for the future.

In November 1971, HEW's Office for Civil Rights announced its intent to institute proceedings for Columbia's permanent debarment—*even though no charges or findings of discrimination had been made*: Columbia had simply not come up with an acceptable affirmative-action program to redress inequities which had not even been found to exist. When minor officials act like Alice in Wonderland's Red Queen, using threats of decapitation for frivolous purposes; when they act as investigator, prosecutor, and judge rolled into one, there may be no cause for surprise. But one can certainly wonder how even they would dare pronounce sentence—and a sentence of death at that—even before completion of the investigatory phase. Such, however, appears to be the deadly logic of HEW procedures. As J. Stanley Pottinger, chief of HEW's office, said at a West Coast press conference recently, "We have a whale of a lot of power and we're prepared to use it if necessary." In known circumstances of its recent use, the threat resembles the deployment of MIRV missiles to apprehend a suspected embezzler.

IV

As the federal government of the United States moves uncertainly to establish equitable racial patterns in universities and colleges, it does so with few guidelines from historical experience. The management, manipulation, and evaluation of quotas, targets, and goals for preferential hiring are certainly matters as complex as are the unusual politics which such announced policies inspire. How equitably to assuage the many group claimants for preference, context-by-context, occasion-by-occasion, and year-by-year, as these press and jostle among themselves for prior attention in preference, must by now occasion some puzzlement even among HEW bureaucrats. On a recent Inspector General's tour of California, J. Stanley Pottinger found himself giving comfort to militant women at Boalt Hall Law School of the University of California; yet at Hayward State College, he was attacked by Chicanos for giving preference to blacks! Leaders of militant groups, needless to say, are less interested in the acute dilemmas posed to administrators by this adventure than in what they actually want for themselves. (When at Michigan I raised with a Women's Commission lady the question of whether an actual conflict-of-interest might exist between blacks and women, she simply dismissed the matter: that's for an administrator to figure out.) How to arrive at some distant utopian day, when "underutilization" of minorities or women has "disappeared," is as difficult to imagine as the nature of the ratios that will apply on that day.[2]

V

Fifteen years ago, David Riesman in his *Constraint and Variety in American Education* pointed to certain qualities which distinctively characterzed avant-garde institutions of higher learning in this country. The world of scholarship, he said, "is democratic rather than aristocratic in tone, and scholars are made, not born." A "certain universalizing quality in academic life" resulted from the existence of disciplines which "can lift us out of our attachments to home and mother, to our undergraduate alma mater, too, and attach us instead to the new country of Biophysics or the old of Medieval History." In America, the relative decline of ethnic and social-class snobberies and discrimination, combined with immense expansion of the colleges, drew into scholarship a great majority whose backgrounds were distinctly unscholarly. "The advancing inner frontier of science," he wrote, had for many taken the place which the Western frontier served for earlier pioneers. The loyalty which the new democratic scholar showed to his discipline signalled a kind of "non-territorial nationalism." In contrast to his European counterparts, the American scholar found few colleagues among the mass of undergraduates on the basis either of "a common culture or a common ideology in the political or eschatological sense." Paradoxically this democratization of the university (with its stress not on status but upon excellence in performance) had not begun in rank-and-file small colleges of the nation, which were examplars of America's ethnic, religious, and cultural diversity. Rather it had come out of those innovating institutions which, in quest of excellence, either abandoned or transcended much of their discriminatory sociological parochialism. It was the denominational college, where deliberate discrimination according to sex, religion, color, and culture continued to be practiced in admissions and faculty recruitment, which made up the rear of the snake-like academic procession. The egalitarianism of excellence, a democracy of performance, was an ethos consummated by the avant-garde. Riesman labelled the disciplines of the great universities the "race-courses of the mind."

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[2] When I asked an administrator at San Francisco State College what "underutilization" of minorities meant, he simply replied, "Experience will let us know."

Felix Frankfurter, who went from CCNY to Harvard Law School, was equally impressed with how the system worked. "What mattered," he wrote, "was excellence in your profession to which your father or your face was equally irrelevant. And so rich man, poor man were just irrelevant titles to the equation of human relations. The thing that mattered was what you did professionally. . . ." As he saw the merit system, the alternative to it had to be "personal likes and dislikes, or class, or color, or religious partialities or antipathies. . . . These incommensurable things give too much room for personal preferences and on the whole make room for unworthy and irrelevant biases."

The greatest boost to America's universities came in the 1930's from European emigré scholars whose powerful influence (notable in the sciences and social sciences) is still felt even today. As exemplars of learning, their impact upon young and parochial American students was profound.[8] Thanks in part to them, by the 1950's the great American universities attained an authentic cosmopolitanism of scholarship matched by no other university system in the world. And the outward reach of American higher education toward the best the world of scholarship could offer generated an inward magnetism, attracting to itself the most qualified students who could be found to study with these newly renowned faculties.

This system of recruitment also left a myriad of American sociological categories statistically underrepresented in the highest precincts of American higher education. Today, with respect to race and ethnicity, blacks, Irish, Italians, Greeks, Poles, and all other Slavic groups (including Slovaks, Slovenes, Serbs, Czechs, and Croatians) are underrepresented. On faculties, at least, women are underrepresented. Important religious categories are underrepresented. The great Catholic universities, until recently, have stood aside from the mainstream of secular higher education; they have been enclaves of a separated scholarship. Thus few Catholics are to be found in the roster of distinguished faculties of America's great secular universities, even though Catholics comprise perhaps 30 percent of the population. And it is interesting to note that the quest for professional excellence in some respects has militated against the achievement of group parities: among those women's colleges which had obtained by the 1950's an enviable academic status as being more than *apartheid* seminaries, one apparent "price" or scholarly excellence was the rapid infusion of male faculty.

And then, on the other hand, there are the Jews. For a long time, administrators of some of America's universities, aware of the powerful scholarly competition which Jewish students and scholars posed, and the social "inequities" which their admission or recruitment might pose, established protective quotas—the famous *numerus clausus*—to keep their numbers down. Yale Law School, for example, abandoned its Jewish quota for incoming students only in the 1950's. With the triumph of equal opportunity over quotas, the bastions of discrimination collapsed. It is estimated that Jews make up about 3 percent of the population. Clearly they constitute a vastly greater proportion than that on the faculties of America's greatest universities, especially in the social sciences, mathematics, and the humanities.

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[8] It is now sometimes said, on behalf of preferential recruitment of less-qualified minority faculty, that minority students require *examples* whom "their community" can respect. Whether in practice this would, as claimed, stimulate their performance, is hard to say. The most stimulating exemplary professors I encountered as a student had quite different "socio-economic" backgrounds from mine. Many were even foreigners. It seems almost foolish to have to mention this.

One could enlarge this catalogue of statistical disparities indefinitely. Yet I must also mention the political, although it is seldom touched upon. The partisan complexion of universities is a matter which HEW does not, and cannot, attend to. Still, I would point out that the faculty of my department at Berkeley, for example, very large by any standards, had to the best of my knowledge three Republicans on it a few years ago; two have since left, one by retirement and one by resignation. There is one new convert, who switched registration to vote for Senator Kuchel in the GOP primary and against Max Rafferty and found, after conversion, that he enjoyed the notoriety which his deviance produced. So, currently we have two Republicans in a department of thirty-eight. This situation is in no way unique. Yet I doubt that even Nixon's HEW crusaders for equality of results would tread into this minefield of blatant inequity. On the other hand, one wonders whether, in White House garrets, there are not some among the President's Republican equerry who take perverse pleasure in watching academic liberals, crusaders for social justice for others, now hoist by their own petard on home territory.

VI

The ironic potentials in affirmative action might have been foreseen had American lawmakers and administrators known the results which in recent years have plagued the government of India's pursuit of a quite similar goal. Here, perhaps more clearly than in any other contemporary culture, the idea that social justice can be reached via quotas and preferences has led almost inexorably to extremes of absurdity.

Before independence, under British rule, special privileges to communities and castes were given or withheld under the British *raj* both to rectify inequities and (as in the instance of the Muslims) to punish disloyalty or reward support. Commencing in legislatures as the establishment of reserved seats for privileged groups—first for Muslims, then for Anglo-Indians, then for Indian Christians—the principle of privileged representation soon spread into other sectors of public life.

When in the early 1930's B. R. Ambedkar, leader of the Untouchables, demanded that the British establish preferential electoral quotas for them, Gandhi objected, arguing that the interests of the Untouchables would better be advanced by integrating them into society than by protecting them with preferential treatment. Gandhi believed that preference would heighten identity of caste rather than diminsh it, and that it further risked creating vested-interest minorities. Yet in negotiations with the British, Ambedkar won and Gandhi lost. After independence, the government of India backtracked, abolishing preferential treatment for all groups except tribal peoples and scheduled castes (i.e., Untouchables) who were accorded certain preferences in government recruitment and in access to educational institutions, fellowships, and admissions. Such preferences, originally instituted as temporary devices, soon became institutionalized, and again they spread. So-called "backward classes" proliferated to the point where it became necessary to be designated as "backward" in order to become privileged. And, indeed, in 1964, a "Backwardness Commission" recommended in the state of Mysore that every group except two (the Brahmins and the Lingayats) be officially designated as backward!

The Indian experience clearly shows that when access to privilege is defined on ethnic-community lines, the basic issue of individual rights is evaded; new privileges arise; caste privilege sabotages the principle of equality; the polity further fragments; and the test of performance is replaced by the test of previous status. (In Kanpur, recently, the son of a wealthy Jat family applied for admission to the Indian Institute of Technology and was rejected on objective criteria; then he reapplied as a member of an ethnically-schedled caste, and on this basis was admitted.)

VII

To remain eligible for federal contracts under the new procedures, universities must devise package proposals, containing stated targets for preferential hiring on grounds of race and sex. HEW may reject these goals, giving the university thirty-day notice for swift rectification, even though no charges of discrimination have been brought. Innocence must either be quickly proved, or acceptable means of rectification devised. But how does one *prove* innocence?

"Hiring practices" (i.e., faculty recruitment procedures) are decentralized; they devolve chiefly upon departments. At Columbia, for instance, 77 units generate proposals for recruitment. Faculties resent (most of the time quite properly) attempts of administrators to tell them whom to hire, and whom not. Departments rarely keep records of the communications and transactions which precede the making of an employment offer, except as these records pertain to the individual finally selected. Still, the procedure is time-consuming and expensive. The Department of Economics of the San Diego campus of the University of California estimates that it costs twenty to forty man hours, plus three to five hundred dollars to screen *one* candidate sufficiently to make an offer. Typically, dozens of candidates are reviewed in earlier stages.

Compliance data thus tend to be scanty and incomplete. "Columbia's problem," President McGill recently observed, "is that it is difficult to prove what we do because it is exceedingly difficult to develop that data base on which to show, in the depth and detail demanded [by HEW], what the University's personnel activities in fact are." Yet HEW demands such data from universities on thirty-day deadlines, with contract suspension threatened. Moreover, on its finding of discrimination (usually based on statistical, not qualitative, evidence), it may demand plans for rectification which oblige the university to commit itself to abstract preferential goals without regard to the issue of individual merit.

The best universities, which also happen to be those upon which HEW has chiefly worked its knout, habitually and commonsensically recruit from other best institutions. The top universities hire the top 5 percent of graduate students in the top ten universities. This is the "skill pool" they rely upon. Some may now deem such practices archaic but they have definitely served to maintain quality. Just as definitely they have not served to obtain "equality of results" in terms of the proportional representation of sociological categories. Such equality assumes that faculties somehow must "represent" designated categories of people on grounds other than those of professional qualification. As Labor Department Order No. 4 states, special attention "should be given to academic, experiece and skill requirements, to ensure that the requirements in themselves do not constitute inadvertent discrimination." Indeed, according to four professors at Cornell writing in the Times (Letters to the Editor, January 6), deans and department chairmen have been informed by that university's president that HEW policy means the " 'hiring of additional minority persons and females' even if 'in many instances it may be necessary to hire unqualified or marginally qualified people.' "

If departments abandon the practice of looking to the best pools from which they can hope to draw, then quality must in fact be jeopardized. To comply with HEW orders, every department must come up not with the *best* candidate, but with the best qualified *woman* or *non-white* candidate. For when a male or a white candidate is actually selected or recommended, it is now incumbent on both department and university to *prove* that no qualified woman or non-white was found available. Some universities already have gone so far in emulating the federal bureaucracy as to have installed their own bureaucratic monitors, in the form of affirmative-action coordinators, to screen recommendations for faculty appointments before final action is taken.

A striking contradiction exists between HEW's insistence that faculties prove they do not discriminate and its demand for goals and timetables which require discrimination to occur. For there is no reason to suppose that equitable processes in individual cases will automatically produce results which are set in the timetables and statistical goals universities are now required to develop. If all that HEW wishes is evidence that universities are bending over backward to be fair, why should it require them to have statistical goals at all? Do they know something no one else knows, about where fairness inevitably leads?

Yet another facet of HEW's procedures goes to the very heart of faculty due process: its demand of the right of access to faculty files, when searching for evidence of discrimination. Such files have always been the most sacrosanct documents of academia, and for good reason: it has been assumed that candor in the evaluation of candidates and personnel is best guaranteed by confidentiality of comment; and that evasiveness, caution, smoke-screening, and grandstanding—which would be the principal consequences of open files—would debase standards of judgment. In the past, universities have denied federal authorities—the FBI for instance—access to these files. Now HEW demands access. And it is the recent reluctance of the Berkeley campus of the University of California to render unto this agent of Caesar what was denied to previous agents, which occasioned the HEW ultimatum of possible contract suspension: $72 million. One might imagine the faculty would be in an uproar, what with Nixon's men ransacking the inner temple. But no. In this as in other aspects of this curious story, the faculty is silent.

VIII

"In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. . . . Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." This is Justice Harlan, dissenting in *Plessy* v. *Ferguson* in 1896, when the Supreme Court endorsed the "separate but equal" doctrine.

Some of us in the league of lost liberals are still wont to say that the Constitution is color-blind. Yet now under the watchful eye of federal functionaries, academic administrators are compelled to be as acutely sensitive as Kodachrome to the outward physical appearance of their faculty members and of proposed candidates for employment. Forms supplying such information are now fed into data-processing machines; print-outs supply ethnic profiles of departments, colleges, and schools, from which compliance reports may be sent to HEW, and university affirmative-action goals are approved or rejected.[4]

All of this is done in some uneasiness of mind, to put it mildly. In many states, Harlan-like blue-laws of a recent innocent epoch still expressly prohibit employers from collecting and maintaining data on prospective employees with respect to race, religion, and national origin. The crafty practices contrived to elude the intention of such laws while at the same time complying with HEW, vary from campus to campus. At the University of Michigan, the procedure entails what is known as "self-designation"—the employee indicates on a form the race or ethnic group of which he considers himself a part.[5] These forms are collected and grouped according to job-classifications, departments, etc., and then they are burned, so as to disappear without a trace. Other universities, less anxious to cover their traces, simply file the forms separately from regular personnel files, without the names of the individuals concerned. In New York, the CUNY system resorts to a quite different practice invented and perfected by South African Boers: "visual identification." Affirmative-action coordinators are told to proceed as follows: "The affirmative-action inventory is to be done by a *visual* survey [italics in original]. There *should not be a notation of any kind* as to ethnic background in either personnel records or permanent files. This is against the law. . . . Identification of Italian Americans will be done visually and by name. . . . Please remember, however, that each individual is to be listed in only one ethnic group."

The number of categories established on behalf of affirmative action, though at present finite, already betrays accordion-like expansibility. The affirmative-action program at San Francisco State College, typical of most, is now confined to six racial groups: Negroes; Orientals; other Non-White; persons of Mexican, Central or South American ancestry ("except those who have physical characteristics of Negro, Oriental, or other Non-White races"); Native American (American Indian); and All Others, ". . . including those commonly designated as Caucasian or White." All but the last category are eligible for discriminatory preference.[6]

As the above CUNY memorandum signals, however, this last category of "those commonly designated as Caucasian or White" is a Pandora's box inside a Pandora's box. Now that the Italians have escaped from it in New York, the lid is open for others—all the many different groups now fashionably known as "ethnics"—to do likewise. A far-seeing administrator, even as under HEW's gun he hastily devises future-oriented hiring quotas ("goals") to muffle the noise of one or two squeaky wheels, might wonder how he will be able to gratify subsequent claimants on the dwindling capital of reserved quotas still at his disposal.

Yet the administrator in practice has no choice but to act on the "sufficient unto the day is the evil thereof" principle. HEW ultimata, when they come, are imperious and immediate. Thirty-day rectifications are in order. At Johns Hopkins, MIT, Columbia, Michigan, and the University of California, an acute agony arises from no such philosophical long-range speculations, but from how to put together attractive compliance reports fast enough to avoid the threatened withholding of vast funds, the closing-down of whole facilities, the dismissal of thousands of staff workers, and the irreparable damage done to important ongoing research, epsecially to laboratory experiments. Crocodile tears do flow, from the gimlet-eyes of HEW investigators, who observe these sufferings from distant federal offices. Even J. Stanley Pottinger recently noted, in appropriate Pentagonese, that the act of contract suspension at Berkeley, for instance, might constitute "overkill." Yet no sooner had he voiced this note of sadness than his regional compliance director recommended to Washington precisely such action.

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[4] Since HEW has divulged no reliable standards of its own, the well-intentioned administrator is like a worshiper of Baal, propitiating a god who may punish or reward, but who is silent.

[5] Self-designation is not always reliable. At Michigan the amused or disgusted members of one of the university's maintenance crews all self-designated themselves as American Indians (bureaucratese: Native American); their supervisor was quietly asked to redesignate them accurately.

[6] One object of current discriminatory hiring practices at San Francisco State is to make the institution's nonacademic personnel ethnically mirror the population of the Bay Area.

IX

While deans, chancellors, and personnel officials struggle with these momentous matters, faculties and gradute students with few exceptions are silent. HEW is acting in the name of social justice. Who in the prevailing campus atmosphere would openly challenge anything done in that name? Tenured faculty perhaps consult their private interests and conclude that whatever damage the storm may do to less-protected colleagues or to their job-seeking students, prudence suggests a posture of silence. Others perhaps, refusing to admit that contending interests are involved, believe that affirmative action is cost-free, and that all will benefit from it in the Keynesian long run. But someone *will* pay: namely very large numbers of white males who are among those distinguishable as "best qualified" and who will be shunted aside in the frantic quest for "disadvantaged qualifiables."

The inequities implied in affirmative action, and the concealed but real costs to individuals, would probably have had less damaging effects upon such highly-skilled graduate students had they been imposed in the early 1960's. Then, the sky was the limit on the growth and the affluence of higher education. If a pie gets bigger, so may its slices enlarge; nobody *seems* to lose. Such is today not the case. The pie now shrinks. One West Coast state college for example, last year alone lost nearly 70 budgeted faculty positions due to financial stringency. Yet this same college has just announced the boldest affirmative-action program in California higher education. "Decided educational advantages can accrue to the college," it said, "by having its faculty as well as its student body be more representative of the minority population of the area. *It is therefore expected that a substantial majority of all new faculty appointments during the immediate academic years will be from minorities, including women, until the underutilization no longer exists.*" (Italics added.) Departments which refuse to play the game will have their budgets reviewed by university officials.

It is hard to say how widely such pernicious practices have been institutionalized in other colleges and universities. But were they to be generalized across the nation, one thing is certain: either large numbers of highly-qualified scholars will pay with their careers simply because they are male and white, *or*, affirmative action will have failed in its benevolent purposes.

X

It seems superfluous to end this chronicle of woe with mention of another heavy cost—one not so immediately visible—in the forceful administration of affirmative-action hiring goals. This is that men will be less able to know, much less sustain, the professional standards by which they and others judge and are judged. An enthusiastic affirmative-action administrator recently in argument with a skeptical college president said, "Let's face it—you and I know there are a lot of lousy programs and a lot of shoddiness around here. Why object to this?" By such logic, one bad turn deserves another. Since more and more less and less qualified students may enter universities, why bother too much about the quality of the new faculty hired to teach them? It is an interesting reflex habit of some federal bureaucrats and politicians (when confronted with objections that affirmative action might, for instance, discriminate against well- or better-qualified persons) to draw rhetorical analogies to confute their critics on this score. Told that affirmative action might actually discriminate against white males, J. Stanley Pottinger of HEW simply replied, "That is balderdash. That is the biggest crock I have ever heard. It is the kind of argument one expects to hear from a backwoods cracker farmer."

Indeed, backwoods cracker farmers *are* making this argument—though for reasons other than those Pottinger had in mind, and which have much to do with the things great universities require in order to survive in their greatness. Consider what a white third-year law student at a Southern university (self-designating himself disadvantaged but according to no currently approved norms) had to say with respect to his personal situation:

> The ability to think in the abstract is hard for a person with my cultural background and economic background. My parents were WASPS whose income barely exceeded the poverty level. My father is a Southern Baptist with a third-grade education. . . . My mother is a Southern Baptist also. . . . She can read and write but my father is illiterate.
>
> In the public schools I attended, memorization was always emphasized. At ——— University . . . during my first eight quarters at this law school no one has emphasized the ability to think in abstract terms. . . . I do not know if this type of education is good or bad, but I do know that all your time is spent taking notes and that there is no time for thought. . . . Regardless, the course has made me acutely aware of how fortunate I am to be an American. In no other country would I have been able to complete the requirements for a J.D. degree. My cultural and economic background would have prevented it. . . . My background also prevents me from answering a test like this in the manner you desire. But if I must answer, then I will. . . .
>
> There is another form of discrimination of which, I believe, I am a victim. As a non-member of a minority group I feel that I . . . [am] discriminated against constantly. The same admissions standards are not applied because a certain percentage of minority students must be admitted in each class regardless of their qualifications. My test score, undergraduate record, and my family (poor white) deny me admittance to Harvard because I am white. I do not say this in bitterness, but in observation of the current status of admission practices as I perceive them. . . .

Somebody, then, has to pay, when the principle of merit is compromised or replaced by preferential ethnic and sex criteria.

Who then wins? The beneficiaries of preference? The particular institution involved? Society as a whole? One may debate the answer to each of those questions, but one thing is certain: HEW wins. It wins, as Aaron Wildavsky has pointed out, because winning can be defined by internal norms. The box-score is of its own devising. To the extent that its goals are met, and the body-count proves this, it wins. But then, where have we heard *that* before?

UNIVERSITY OF CALIFORNIA, LOS ANGELES,
September 30, 1974.

Congressman JAMES G. O'HARA,
Chairman, Special Subcommittee on Education,
Committee on Education and Labor,
House of Representatives, Washington, D.C.

DEAR CONGRESSMAN O'HARA: Thank you for your invitation to submit written testimony to the Subcommittee in connection with the hearings on compliance with civil rights laws and institutional eligibility for federal funds.

The text and spirit of the civil rights laws clearly forbid discrimination against *individuals* by reason of their race or sex. But it is universal knowledge that the agencies responsible for the enforcement and implementation of those laws, primarily HEW in the case of education, have been demanding precisely such discrimination. The agencies do not seem to want to locate and remedy instances of present discrimination but rather to achieve *proportionate representation*—minimum targets or quotas—for certain (not all) groups who have been victims of discrimination in the past. "Group justice" has been substituted for individual justice, as if discriminaton against a white or a male today somehow makes up for discrimination against a black or a female in earlier years.

You will undoubtedly be receiving many fine letters analyzing the process whereby group justice, the quota system, has become institutionalized into the practices of the agencies; explaining how group justice is foreign to the letter and spirit of our laws, if it involves injury to and discrimination against individuals by reason of race or sex; and detailing the abuses that have coerced colleges and universities around the country into adopting systems of "reverse" or "benevolent" discrimination. I wish only to make a brief comment explaining how I became concerned with this issue.

For the academic year 1971–72, I was the Placement Officer of the UCLA Economics Department. My task was to assist recipients of graduate degrees in finding suitable employment—an issue of anxious concern to fine young men and women of many different ethnic groups who had invested years of their lives and made great financial sacrifices to attain high professional competence in their field, as evidenced by the award of graduate degrees. As far back as I have knowledge, it has always been the policy of our Department not to discriminate on the basis of race, sex, color or creed in its placement service.

I can still recall my astonishment as letters began to cross my desk: (1) making it clear that prospective employing colleges and universities intended to give preference to, or even sole consideration to, certain designated "minorities" (or to females). Furthermore, (2) I was asked as Placement Officer to classify our candidates by race and sex in order to facilitate this discrimination. Not only was the employer discriminating, but I was asked to participate in the process. Nor was this demand easy to refuse, since failure on my part to cooperate might well mean that *no* candidate from UCLA would receive consideration for employment.

I followed the general practice of writing a letter of remonstrance and complaint to the pospective employer in such circumstances. In one or two cases I received heart-warming assurance that there would in fact be no discrimination against candidates on grounds of race or sex. More frequently, my remonstrance was simply ignored—from which it is reasonable to infer that all our candidates, being racially "impure" (i.e., unclassified), were failing to receive fair consideration. But generally, I would receive an apologetic letter in reply, in which the employing department excused its action by citing the pressures placed upon it from above.

I gradually learned that the system generally worked as follows. HEW would place pressure on top levels of the institution to produce a plan containing race and sex employment "targets" or "goals" with "timetables". The institutions would then place pressure upon its component departments or hiring units to come up with a suitable "body count" in its employment decisions. Thus, the higher-level decisions forced discrimination—hiring or refusing to hire on grounds of race or sex—on the part of the lower-level hiring units. And, as I have already indicated, the hiring units were then impelled to demand race and sex classification of candidates, thus implicating placement officers in this web of illegal discrimination.

On the basis of this experience, I would like to make the following recommendations. (1) Government agencies should be *forbidden* to demand of any institution the adoption of an employment plan with numerical "targets" or "goals", as such a plan inevitably forces hiring units into a pattern of discrimination by quota. (2) No finding of discrimination should be made on the basis of merely statistical race or sex classification, without specific evidence of actual discrimination against individual persons. (3) Given a finding of discrimination, no "group justice" remedy should be adopted. Compensation must be to individual victims of past suffering, rather than taking the form of preference for non-victims who happen to share the same group attributes like skin color.

The main thrust of my suggestions is that harm is always to individuals, and compensation must be to individuals. Racism, even "benevolent" racism, is foreign to our laws; racial classification of individuals, and racial criteria for employment, have come about not by legislation but by bureaucratic implementation. The experience of other countries should alert us to the menace of this preoccupation with racial or other concepts of "group justice" over-riding individual rights and individual justice.

Sincerely,

JACK HIRSHLEIFER,
Professor, Department of Economics.

LEWIS AND CLARK COLLEGE,
Portland, Oreg., September 25, 1974.

Representative JAMES G. O'HARA,
House Office Building,
Washington, D.C.

DEAR REPRESENTATIVE O'HARA: Individually and collectively, the 15 members of the Oregon independent colleges have long been committed to the concept of non-discrimination and affirmative action. In fact, we were actively involved in such endeavors, both in regard to student recruitment as well as faculty and staff, long before the federal government became interested.

We cannot help being concerned, however, by some of the guidelines and requirements that are emanating at least from the Region X office of HEW. Although some of the activities of HEW have touched almost all of the institutions, we are especially concerned by the presently ongoing case of Reed College.

If there is any school anywhere in the northwest that has for its entire history practiced non-discrimination, it is certainly Reed. That is still the stance of the college, the president, the trustees, and all other persons in any position of responsibility. It is also true, however, that Reed College, like every other independent college in Oregon, is relatively small and in order to stay alive has made certain that their non-academic staff and expenditures are kept as small as possible.

All of us in the area of higher education in Oregon are concerned by the August 16 report from the Region X office of HEW to Reed College. Quite literally, it is physically and financially impossible for Reed, or any of our other colleges, to meet the paper work requirement demanded in this report. On page 7 of the report, for instance, they are demanding that Reed College supply "statistical data by department for faculty and job classification for staff showing the total number of applicants for the past year by race, sex, source of referral and disposition (including reasons for non-employment)".

In today's tight faculty market, any of our schools can reasonably expect to receive anywhere from 1,000 to 3,000 unsolicited applicants for employment in any year. To demand that some of our schools, which include total staff of no more than 10 or 15, produce the reports and analyses demanded by HEW is ludicrous at best. The president of Reed College informs me that it would demand at least the time of three full time staff people to handle the paper work required by this one report alone.

Let me repeat; everyone of Oregon's independent colleges wants to cooperate with the concept of non-discrimination and affirmative action, we are doing the best that we can, and we are constantly striving to do even better. We do protest, however, the unreasonable expectations and demands of Region X of HEW which seems to blithely assume that all of our institutions have the staff of either a major corporation or a multi-university.

All of us are certained that this sort of bureaucratic requirements and endless paper work was not the intention of Congress when they passed the law, nor of the national HEW when they promulgated the guidelines. We would appreciate whatever support you could give us in attempting to bring some sort of reality to this very important subject.

When you can see that the guidelines and requirements are a problem to a school the size of the University of Michigan, I am sure you can understand the impossibility of our meeting these unreasonable demands.

Thank you for your cooperation.

Sincerely yours,

JIM SULLIVAN, *Executive Director.*

CALIFORNIA STATE EMPLOYEES' ASSOCIATION,
Sacramento, Calif., October 2, 1974.

Hon. EDWARD R. ROYBAL,
The U.S. House of Representatives, Washington, D.C.

DEAR MR. ROYBAL: It has been brought to CSEA's attention that you have asked for a congressional investigation of charges that federal agencies have allowed the University of California at Berkeley to continue discriminatory hiring practices.

CSEA represents over 100,000 employees in three major jurisdictions, state civil service, California State University and Colleges, and the University of California.

In our dealings with the University of California, it is our opinion that UC Berkeley is *not* the only UC campus that has discriminatory hiring practices. As an example of this, enclosed you will find a report prepared by the Minority Affairs Committee at UC Irvine.

The majority of CSEA representatives, at all major UC locations, have complained about discriminatory hiring practices.

Individual grievances have been filed at certain UC campuses with little or no results.

Therefore, CSEA requests that the investigation be broadened to include all the major locations of the University, including UC hospitals and medical centers plus the two AEC laboratories at Berkeley and Livermore.

Any information regarding this matter can be directed to Walter Taylor, CSEA General Manager.

Sincerely,

JOHN B. MATHENY, *President.*

[Note: Enclosure appears in Part 2A, p. 266.]

EAST LANSING, MICH., *October 2, 1974.*

Representative JAMES G. O'HARA,
Special Subcommittee on Education,
Washington, D.C.

DEAR REPRESENTATIVE O'HARA: I have been told that your subcommittee has been holding hearings on the extent to which universities are to be held responsible for compliance with Federal anti-discrimination laws and guidelines. As a woman faculty member at a large state university, I urge you and the members of your committee to insist that university administrators comply with all aspects of the law. In the department where I work the salaries of a number of the women faculty are significantly lower than the salaries of men with the same responsibility and experience. This difference has been brought to the attention of the administrators and faculty committees that discuss salary, and no changes or satisfactory explanations have been given.

Two clippings from local newspapers on a university council that is supposed to deal with discrimination and women at the university, are attached. It is an understatement to say that this council is ineffective.

When I asked the chief administrator in the college where I work why there are so few women administrators in the college, his reply was that he didn't expect to see a woman president of the United States in his lifetime either.

Discrimination against women is so common at the university, that it is the accepted pattern. It is going to take close outside review for many years to alter this pattern. Any relaxation of Federal guidelines and enforcement will just prolong the discrimination. The University could be one source of future State and National women leaders if discriminatory patterns in hiring, pay and promotion are changed. It is going to take strict law enforcement to bring about these changes.

Sincerely,

DOROTHY MCMEEKIN.

Enclosure.

[From the State News, Sept. 30, 1974]

WOMEN WANT COUNCIL'S END

The Women's Advisory Council has recommended unanimously to President Wharton that it be dissolved as of Sept. 30, citing ineffectiveness due to its structure, and a lack of credibility on campus.

In a companion motion at its Sept. 16 meeting, the council said, "We further recommend to the president that he consider the establishment of a series of appropriate homogeneous interest groups to advise each of the major administrative divisions of the University, and that concurrent to establishing these groups, a review of the structure of the Department of Human Relations be carried out in order to insure the most effective mechanisms for affirmative action for women at this University."

The council met again Sept. 23 to formulate recommendations for alternative structures. It will finalize those recommendations at a potluck dinner Oct. 7, and then meet with President Wharton sometime that week. No other meetings are scheduled.

The moves comes 19 months after the council was named in February 1973. The structure had been created in September 1972, when the Board of Trustees established a Department of Human Relations, including an Office of Women's Programs and an Office of Minority Programs.

Through the vice president for university relations, the council is to advise the University on its policies, programs and procedures as they affect women in the University community.

Because the council was created by the trustees, the council can only recommend that it be dissolved. If their recommendation is not accepted, each member will have to decide personally whether to resign.

The motion to discontinue was made by Ruth Useem, the Committee on Committees representative, and professor sociology and the Institute for International Studies in Education.

She said the council has never had a clear purpose, that it has not confronted the issues, that its channels for giving advice had never been clearly outlined and that its advice was often sought too late.

Gwen Andrew, director of the School of Social Work, and the administration representative, seconded the motion. She too criticized the structure, adding,

"I do believe that there is a need for strong, forceful input and advice to the central administration on affirmative action for women. I think that it is a serious matter and . . . that for us to perpetuate this hoax is not helping the situation any."

The council has voted to retain its representatives on the search and selection committee for a new director of women's programs.

WOMEN AWAIT DECISION

(By Gary Hoffman)

Today is the deadline set by the Women's Advisory Council for President Wharton to dissolve the council—a gambit the women hope will bring better representation for student, staff and faculty women within the University.

Council members, in a 7–0 vote, recommended the dissolution of the body on September 16 and set today as the deadline for Wharton's decision. The council has also canceled all formal meetings.

The women say their action is necessary to force a reevaluation of the vague purposes and faulty structure of the nine-member council.

Wharton will not accept the recommendation until the administration and the council discuss the problems, Robert Perrin, vice president for University relations, said. A meeting between Wharton and the council is being set for the week of Oct. 7.

Ruth Useem, council member who made the motion, told the members Sept. 16 that the main purpose of the council has been to postpone controversial matters so they would not have to be faced by the University administration.

"My best assessment of the council's purpose is that it has the hidden purposes of 'cooling,' the reasonable, but often unpalatable-to-the-administration demands of women," she said.

Useem, a professor of sociology, said during an interview Thursday that the members could not directly confront problems and the University administration did not ask very often for advice.

"It's been an uneasy, unworkable committee," she said. "There was a feeling that we were not being in on the things that we should have."

Useem had reminded council members in making the dissolution motion that their advice was not sought on the projected affirmative action goals for employment of women at MSU until after the recommendations were made public by MSU officials.

Useem also said the council has never been sure about who it is supposed to advise.

Mary Kay Scullion, the Council of Graduate Students representative on the council, said the women's council could have been stronger and more effective.

"Communication has not been a two-way street," she said.

Useem and councilmember Gwen Andrew, who seconded the motion for dissolution, explain that action was necessary to bring about an evaluation of goals and purposes of the council.

They explained that an evaluation in August had to be postponed because of the difficulty in seating a quorum.

But the administration planned to start work on filling the new council appointments, and it appeared the needed evaluation and reforms would be postponed indefinitely, they explained.

"The action is a mechanism to bring a re-evaluation before a series of appointments are made," Andrew explained. "We tried to make it a visible decision.

"The members are trying to bring an end to the limbo kind of status that we find ourselves in, "she said. "My impression is that we have never been able to address significant matters."

Andrew, the director of the School of Social Work, said the problem is due to the structure of the council, not the University administrators or council members.

"I have never believed that the University would not listen," she said.

The real problem is that one council simply cannot represent the diverse groups of women in the University, who range from clerical-technical employees to tenured faculty, she said.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY,
Cambridge, Mass., October 9, 1974.

Hon. JAMES G. O'HARA,
U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN O'HARA: I am submitting the enclosed testimony for the consideration of the Subcommittee on Education in the hearings which it is conducting on affirmative action. Although I am an experimental elementary particle physicist rather than a social scientist, I am knowledgable concerning the availability of women scientists and engineers because of the studies which I have carried out for the American Physical Society as Chairwoman of the Committee on Women in Physics (1971) and for the Workshop on Women in Science and Engineering sponsored by the National Academies of Sciences and Engineering (1973). I am also currently engaged in analyzing data acquired by the National Research Council in their 1973 survey of doctorate scientists. Furthermore, I am acquainted with the practical aspects of affirmative action, since I am the affirmative action officer for the physics department at MIT.

I hope that this document will be useful to the subcommittee and I would be happy to answer any questions which it may raise. I also enclose a copy of a demographic report written last year, not as part of the testimony but for use as a reference document.

Sincerely yours,

VERA KISTIAKOWSKY,
Professor of Physics.

Enclosure.

PREPARED STATEMENT OF VERA KISTIAKOWSKY, PROFESSOR OF PHYSICS, MIT

I. INTRODUCTION

One of the central issues of affirmative action is the identification of a pool of of "qualified candidates" and use of the number of individuals in the given pool to set goals. A criticism leveled against affirmative action has been that the number of qualified women is so small that setting goals will lead inevitably to hiring women who are less well qualified than the available men. Similar arguments are made with respect to minority group members, but since I have demographic data for women and not for minorities, I will restrict this paper to a discussion of the situation for women.

Before presenting the data, it is important to clarify the issue of qualifications. First, one must be careful to specify the type of position under consideration. It seems obvious that the qualifications for a tenure position at an elite research oriented university are very different from those for an assistant professorship at a college where a major emphasis is on teaching. However, the opponents of affirmative action frequently discuss the former case and ignore the latter, conveying the impression that the small number of women qualified for the former is the "realistic" pool for all positions. Thus the subsequent discussion will be divided into a section on high prestige institutions and another on other institutions, in both cases considering both senior and junior appointments.

A third point on which information may be gained from a demographic study what effect, if any, affirmative action has had on the attitudes of women scientists, on their employment and on the academic institutions employing them.

II. HIGH PRESTIGE ACADEMIC INSTITUTIONS

At the high prestige institutions the stated prerequisite for a faculty appointment or promotion is research excellence. In the case of a senior position, this means demonstrated, "first in his field", excellence. In the case of a junior position, this means the promise of excellence. One may question whether in the past there has been universal agreement on and unvarying application of criterion of demonstrated excellence to all promotions, since an examination of any top department will show that there was quite a spread in the abilities of the senior faculty at the time that they received tenure. Many other things contribute to tenure decisions, even if one removes from consideration those individuals who received tenure because of outstanding educational or administrative services to the institution. However, with respect to the appointment of a woman or a minority group member, the criteria of research excellence are frequently applied in an absolute fashion and used to prevent the appointment of individuals of comparable quality with some of those already on the faculty. This procedure is justified by the argument that in a time where openings are very limited, one must only appoint the very best. This is a statement with which one cannot disagree in principle, but one can disagree with the concept of the existence of a unique set of standards defining "the very best" and their universal, equable application.

The women who might be qualified for senior positions at high prestige institutions would be found primarily among the following categories: women in junior positions approaching tenure at these institutions, and women in senior positions at other research oriented universities in government, in industry and at national laboratories. This definition errs in excluding a sizeable group of highly qualified women who have research positions, but not faculty rank, at major universities. However, it permits one to set a demographic lower limit on the pool of women for these positions of 2500 individuals. This figure may be arrived at as follows. There were more than 776 women, constituting 4.3% of the total sample of doctorate physical scientists, bioscientists, social scientists and engineers, on the faculty in all professorial ranks at the more highly rated (Roose-Anderson Rating 2.5–5.0) universities in 1973.[1] Furthermore, 1740 women were full professors in all fields at U.S. universities in 1972–73 constituting 6.7% of this group.[2] Since approximately half of the doctorate women scientists are not in academic institutions,[1] this suggests that there are more than 2500 women in the categories given above.

For the junior positions the pool may be defined by the number of women who have recently received a research doctorate. This number is 19,928 women who constitute 16.3% of all individuals receiving research doctorate degrees in the period 1970–73.[3] [4] Since there is no evidence that indicates that these women are on the average less qualified than their male counterparts and since their distribution among Ph. D. granting institutions is similar to that for men,[5] one may assume that the percentage of women Ph. D.'s who are potential candidates for junior positions at high prestige institutions is approximately the same as for men. Thus, at present women form 16.3% of the pool of candidates for these positions, a percentage which is, however, increasing. The number of women receiving doctorates in all fields increased by 15.1% between 1972 and 1973, and in contrast to the situation for men for whom the percentage went down by 0.3%.[4]

Thus, one concludes that the pools of women relevant to positions at prestige institutions, although small, are not negligible, and affirmative action goals are possible both for senior and junior positions. The question of qualifications of the members of these pools can only be answered on a case by case basis. However, it is worth noting that a criticism which has been made of pools based on percentages, which is that women on the average do less research, does not apply here. At the level of the junior pool men and women are equivalent, having completed graduate work and possibly a post-doctoral appointment. The definition of the senior pool was based not on all doctorate women, but only on those who had achieved recognition.

III. OTHER ACADEMIC INSTITUTIONS

At the other academic institutions research is sometimes a prerequisite for faculty appointment of promotion, but a much heavier and explicit emphasis

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See footnotes at end of statement.

is placed on teaching and administrative abilities. Assuming, therefore, that for these institutions the pool of available candidates may be based on the number and percentage of women who have received doctorates, one arrives at the following results. The pool of women for senior positions may be based on the percentage of doctorates awarded to women in the period 1950–1969, which is 11.1%, and for junior positions, the percentage of doctorates awarded to women in the period 1970–73, which is 16.3%.[3 4] The numbers of women in these pools are 26,938 in the senior and 19,928 in the junior pool.[3 4]

This, however, is an underestimate since only 39.7% of men on faculties of U.S. colleges and universities have doctorates.[8] The percentage of women with doctorates on these faculties is 19.9%, this lower figure arising from the large percentage of women in junior colleges (33%)[3] and in fields where a master's degree is more commonly terminal.[8] Since a doctorate is not always a prerequisite and since a smaller percentage of doctorates are women than is the case for master's degrees, using the doctorates as a basis gives an underestimate by more than a factor of 30%. This may be seen from the following statistics. In 1968–71 the ratio of the doctorates granted to the master's was 1.4:1 for men and 1:2.9 for women.[5] In 1970 the ratio of scientists and engineers with doctorates to those with master's was 1.3:1 for men and 1:1.3 for women.[7]

Although there are differences in the average career patterns of men and women, the effects of this are less than 30% on the pools in question. This may be seen from the following data on the situation with respect to part-time work and career interruption. 91.8% of women faculty members and 96.1% of men faculty members were full time in 1972–73.[8] 19.7% of women faculty members have interrupted their career for more than one year for military or family reasons and 25.0% of men faculty members.[8] The figures for all doctorate scientists in 1973 are summarized below:

TABLE I.—EMPLOYMENT OF DOCTORATES[6]

[In percent]

	Men	Women
Full-time employed	89.3	64.5
Part-time employed	1.9	12.8
Unemployed, seeking employment	.9	3.3
Postdoctoral	2.3	4.2
All other	5.6	15.2

"All other" includes retired and "no report" as well as career interruption. These data indicate that the differences between men and women doctorates introduce at most a 30% difference, since both part-time employment and career interruption are usually temporary.

Thus, one may conclude that the use of doctorate women to define the pool is a conservative estimate since the diminution of the pool predicted by career pattern differences is more than cancelled by the increase due to degree level differences. An observation which indicates further that the estimate of the pool presented here is, in fact, conservative is the reported difference in initial ability between men and women doctorates. As shown by L. R. Harmon,[9] there is a significant difference for doctorates in all scientific fields in ability predictors at high school graduation and the ranking by sex and marital status is as follows: married women (ranked highest), unmarried women, unmarried men, married men (ranked lowest). Therefore, the doctorate women are apparently a more select group than the men.

IV. RECENT DEMOGRAPHIC CHANGES

Let me first present some evidence for a positive effect of affirmative action on the attitudes of women graduate students. Between 1972 and 1973 there was a 15.1% increase in the number of women receiving doctorates, whereas there was an 0.3% decrease in the number of men.[4] This was probably due to a perception of increased opportunity arising from the equalizing pressures of affirmative action.

See footnotes at end of statement.

This may be seen from the following argument. Since the median length of time from bachelor's degree to doctorate was 8.4 years,[4] these individuals received their bachelor's degrees in 1964–66, a period in which there were no marked changes with respect to the participation of women. Thus, this increase is due to a change in attitude during graduate school years. As previously mentioned, in the past women have been approximately twice as likely to leave graduate school with master's as a terminal degree as have men. However, the percentage leaving graduate school without a higher degree has been similar for men and women. Therefore, the growth in women's doctorates appears to arise from a change in attitude on the part of the women with respect to the value of continuing to a doctorate rather than stopping with a master's degree.

With respect to changes in the employment of women there are some small indications that women are in fact receiving somewhat more equitable treatment due to affirmative action. In 1972, 13.4% of the graduating doctorate men received postdoctoral fellowships and research associateships, while women received 9.8%. In 1973 they received 13.5% and 11.0%, respectively.[3,4] With respect to faculty appointments, the overall change has been change. In 1968–69 the percentage of university faculty (including lecturer and instructor) who were women was 14.8%. In 1972–73, it was 16.5%.[6] Since the percentages in two-year and four-year colleges declined slightly in this period, the overall change was less than 1%.[6]

Therefore, there are still major differences. As Table I indicates doctoral women still have a three times higher involuntary unemployment rate. The biggest discrepancy with respect to those who are unemployed and seeking employment is between men and women whose ages are less than 35. This contradicts the mythology that reverse discrimination guarantees all new women doctorates a job. In 1973 1.0% of these men were unemployed and seeking employment and 5.5% of the women.[7] Women still are concentrated in the less prestigious academic institutions and in the lower ranks.[6] They still earn lower median salaries irrespective of rank and institution type [3] or age and field.[7] Thus the purposes of affirmative action are far from being achieved.

Affirmative action has not been in effect long enough and has not made enough changes to discover whether it has affected the quality of research as predicted by its opponents. Any statements on this issue are mere speculation. However, the impact of affirmative action on the academic institutions does have one negative aspect, the increased administrative load and the generation of paper work. It seems to some that correct adherence to affirmative action guidelines has become more important than achieving the purposes underlying affirmative action.

There are also consequences for the women, some of whom are invited to apply for numerous positions for which they are not considered seriously. These applications are, however, used in the affirmative action search statistics of the institutions in question. I have myself been invited to apply for an assortment of positions including one in a department of physical education. Presumably someone felt that this was appropriate for a woman on a list of the American Physical Society. However, these negative aspects are insignificant in comparison with the fact that some departments in some institutions are seriously considering women and minority group members for faculty positions. Furthermore, an even larger number are now increasingly willing to offer women and minority graduate students treatment which is equally supportive with that accorded white men.

V. CONCLUSIONS

The numbers and percentages of women qualified for appointments in institutions of higher education are not negligible and it is perfectly reasonable to ask institutions of all varieties to establish affirmative action goals. Affirmative action has apparently had a positive effect in that the perceived broadening of opportunity has coincided with an increase in the percentage of women continuing to a doctorate. The situation of women at academic institutions has improved slightly, but there is still a great deal of room for improvement. Since the percentages of women on the faculties at the prestigious academic institutions are still small and most of the new women faculty have only held their appointments for one or two years, it is not yet possible to assess the impact of affirmative action on the quality of research carried out at these institutions. There are negative aspects

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See footnotes at end of statement.

of affirmative action, administrative burdens for the institutions and the problems that paper compliance cause minorities and women. It would be desirable to find methods of easing these, but not at the cost of abandoning affirmative action and the possibility of eventual equality of opportunity.

WOMEN IN ENGINEERING, MEDICINE, AND SCIENCE—A DEMOGRAPHIC PAPER PREPARED FOR THE CONFERENCE ON WOMEN IN SCIENCE AND ENGINEERING, NATIONAL RESEARCH COUNCIL, JUNE 11-12, 1973

I. INTRODUCTION

As a basis for any discussion of the better utilization of women engineers, doctors or scientists, it is important to have a good understanding of the numbers active in the various fields. A considerable amount of information is now available, from studies carried out by various organizations and by committees on the status of women in various professions. This paper contains a compilation of such data and also presents some thoughts on how it may be interpreted.

The data is not equally good for all areas. In some fields there is quite detailed information, whereas in others, it is sparce. This leads then to the question of how to arrive at the number of women in the pool containing individuals with the general qualifications for some type of position, such as membership on NAS-NAE-IOM/NRC committees. Qualifications are generally not ascertainable in a statistical study unless they are very straightforward, for example, "mathematics professor at a top ranking university." Some numbers for such categories will be presented and the background of these figures will be discussed. However, it is appropriate to comment in advance of presenting data such as numbers of women professors, that they are not necessarily indicative of the number of qualified women, since women have been underrepresented in such categories for reasons other than ability.

The second section of this study presents information on women in engineering; the third, information on women in medicine; and the fourth, information on women in science. The fifth section contains a discussion of how these data should be used to define the size of the pool of women qualified for a particular type of position. In the concluding section the implications of the preceding discussion will be considered with respect to the identification of women for NAS-NAE-IOM/NRC committees:

II. WOMEN IN ENGINEERING

There were approximately 100,000 engineers in the United States in 1971 and of these 0.5% were women. [*1*] Figure 1 shows the percentage of doctorates in engineering granted to women as a function of time, and this is seen to have decreased from 0.9% in the 1920's to a minimum of 0.3%, in 1950's. Table I gives the number and percentage of women currently available in the pool of doctorate level engineers with at least four years of experience categorized by sub-field of engineering. Table II gives the number and percentage of degrees awarded to women in engineering by degree level for the period 1962–71. The same information is also given for the fields of architecture and computer science which are frequently grouped together with engineering in demographic studies. Table II also gives a projection for the period 1972–81, indicating a four-fold increase in the pool of doctorate level engineers. It should be noted

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[1] "Women in Engineering, Medicine and Science," V. Kistiakowsky (1973), available from NRC.

[2] Higher Education and National Affairs XXII 3 (1973), Data from the National Center for Educational Statistics.

[3] Summary Report 1972, Doctorate Recipients from United States Universities, National Research Council.

[4] Summary Report 1973, Doctorate Recipients from United States Universities, National Research Council.

[5] Earned Degrees Conferred 1970–71, National Center for Educational Statistics.

[6] "Teaching Faculty in Academe: 1972–73," Alan E. Bayer, ACE Research Reports 8, No. 2 (1973).

[7] "American Science Manpower 1970," National Science Foundation Report NSF 45 (1970).

[8] "Doctoral Scientists and Engineers in the United States—1973 Profile," Commission on Human Resources, National Academy of Sciences/National Research Council (1973).

[9] "High School Ability Patterns—A Backward Look From the Doctorate," Lindsey R. Harmon, Scientific Manpower Report No. 3, National Academy of Sciences/National Research Council (1956).

that these projections involve a conservative estimate of the rate of increased of the percentage of degrees awarded to women.

Information concerning women engineers with doctorate degrees at educational institutions is presented in Table III. The individuals included in these data appear both in the Doctorate Records File and the National Faculty Directory and therefore persons with foreign degrees and women whose names have changed are excluded. The rated institutions have percentages of women which are lower than those in the total sample. Forty three percent of the women are in these institutions, whereas for the total sample, the percentage is 66%. Due to the very small sample involved this observation is not independently significant. However, it indicates a pattern that becomes statistically significant in the data presented in section IV of this paper.

Figure 1: Percentage of Ph.D. Degrees Received by Women by Field and by Decade
Source: Doctorate Records File, National Research Council[1]

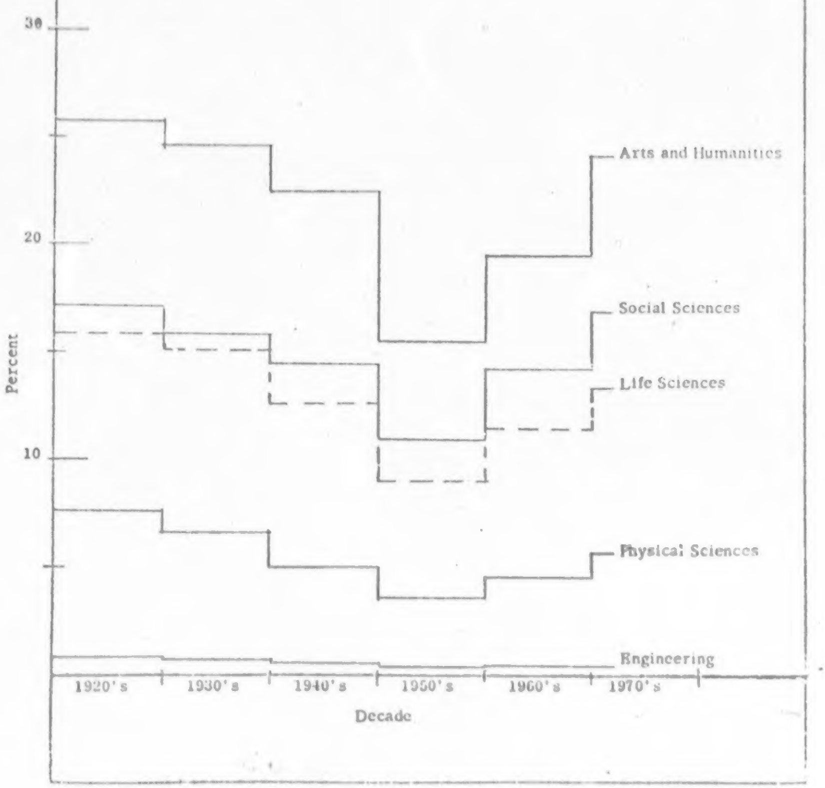


TABLE I.—NUMBER AND PERCENTAGE OF PH. D. DEGREES AWARDED IN ENGINEERING IN THE PERIOD 1930–69, BY SUBFIELD AND SEX, DOCTORATE RECORDS FILE, NATIONAL RESEARCH COUNCIL [2]

Subfield of engineering	Total number awarded	Number awarded to women	Percentage awarded to women
Aeronautical and astronautical	1, 640	13	0. 79
Ceramic	517	4	. 77
Chemical	5, 533	25	. 45
Civil	3, 054	10	33
Electrical	6, 664	18	. 27
Electronics	1, 294	6	. 46
Industrial	772	7	91
Mechanical	3, 865	4	. 10
Metallurgical	2. 773	12	. 43
Nuclear	356	1	. 28
Physics	1, 650	9	. 54
Textile	10	8	80. 00
Other subfields	5, 878	24	. 41
Total	34, 006	141	. 41

References at end of statement.

TABLE II.—NUMBER AND PERCENTAGE OF DEGREES AWARDED IN ARCHITECTURE, COMPUTER SCIENCE, AND ENGINEERING IN THE PERIODS 1962–71 AND 1972–81 (PROJECTED), BY DEGREE LEVEL AND SEX, NATIONAL CENTER FOR EDUCATIONAL STATISTICS, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE [3]

Field and degree level and decade	Number awarded to men	Number awarded to women	Percentage awarded to women
Architecture:			
Bachelors:			
1962–71	28, 483	1, 725	5. 7
1972–81 (projected)	56, 600	8, 610	13. 2
Masters:			
1962–71	7, 488	745	9. 0
1972–81 (projected)	19, 500	4, 050	17. 2
Doctorate:			
1962–71	359	11	3. 0
1972–81 (projected)	460	40	8. 0
Computer science:			
Bachelors:			
1962–71	4, 982	770	13. 4
1972–81 (projected)	42, 000	5 590	11. 7
Masters:			
1962–71	4, 989	451	8. 3
1972–81 (projected)	17, 700	3 800	17. 7
Doctorate:			
1962–71	389	9	2. 3
1972–81 (projected)	2, 690	40	1. 5
Engineering:			
Bachelors:			
1962–71	406, 731	2, 291	. 6
1972–81 (projected)	465, 000	5, 260	1. 1
Masters:			
1962–71	131, 180	877	. 7
1972–81 (projected)	167, 000	2, 250	1. 3
Doctorate:			
1962–71	24, 903	123	. 5
1972–81 (projected)	42, 700	530	1. 2

Reference at end of statement.

TABLE III.—NUMBER AND PERCENT OF PH. D. ENGINEERS IN THE DOCTORATE RECORD FILE (1930-69), FOUND IN THE NATIONAL FACULTY DIRECTORY FOR 1971-72 [4]

Institution of employment	Women		Total	
	Number	Percent	Number	Percent
Roose-Anderson rating 2.5 to 5	4	19.0	2,429	31.3
Roose-Anderson rating 0 to 2.5	5	23.8	2,728	35.1
Unrated Ph. D	6	28.6	1,091	14.0
Unrated M.A	2	9.5	509	6.6
Unrated B.A	3	14.3	532	6.8
Junior college	1	4.8	147	1.9
Other	0	0	331	4.3
Total	21		7,767	
DRF total	110		26,969	

Note: Reference at end of statement.

Table IV gives the number and percentage of women engineers in the federal service in 1969. This information is not broken down by grade or degree level. Table V gives the number and percentage of women in the federal service by grade level in 1972, not separated by field. Since the engineers will generally be grade 9 or higher, the last column probably approximates their distribution by grade level.

The Society of Women Engineers carried out a survey in 1972 which yielded an interesting profile of their members. Table VI gives the number and percent of respondents categorized by curriculum of highest degree and degree level. Comparison with Table I and II indicate that the main difference between this sample and the general population of women engineers is that the percentage at the bachelor's level is smaller in the survey sample. Table VII gives the distribution by present field of employment and Table VIII, by type of employer. Table IX gives the division of the sample into employment function categories and Table X, into levels of supervisory responsibility.

TABLE IV.—NUMBER AND PERCENT OF WOMEN IN SELECTED FEDERAL OCCUPATIONS, 1969 [5]

Occupations	Total number	Women	
		Number	Percent
1. Professional engineering occupations:			
General engineering	13,862	44	.3
Safety engineering	504	10	2.0
Fire prevention engineering	83		
Materials engineering	861	13	1.5
Landscape architecture	544	8	1.5
Architecture	1,515	43	2.8
Civil engineering	17,412	61	.4
Sanitary engineering	957	4	.4
Mechanical engineering	10,646	43	.4
Nuclear engineering	1,358	4	.3
Electrical engineering	4,589	14	.3
Electronic engineering	16,353	64	.4
Aerospace engineering	9,673	83	.9
Naval architecture	1,244	7	.6
Mining engineering	459		
Petroleum engineering	240		
Agricultural engineering	500	2	.3
Ceramic engineering	36	1	2.8
Chemical engineering	1,390	12	.9
Welding engineering	92		
Industrial engineering	2,274	8	.4
Total	84,692	421	.5
2. Some other professional occupations (for comparison):			
Accountant	20,241	1,409	7.0
Attorney	10,172	634	6.2
Chemist	8,248	1,249	15.1
Computer specialist	18,596	4,044	21.7
Librarian	3,447	2,427	70.4
Mathematician	3,553	789	22.2
Physicist	5,700	159	2.8
Social worker	2,362	1,129	47.8
Statistician	2,248	456	20.3

Note: Reference at end of statement.

TABLE V.—NUMBER AND PERCENT OF WOMEN IN THE FEDERAL SERVICE BY EQUIVALENT GRADE, OCTOBER 1972 [6]

Grades	Total number	Number of women	Women, percent of total	Percent of women, grade ≥ 9
1 to 2	34, 796	25, 303	72. 7	
3 to 4	[illegible] 884	207, 980	75. 1	
5 to 6	[illegible]	171, 733	65. 6	
7 to 8	15[illegible]	64, 213	42. 6	
9 to 10	18[illegible]	47, 904	26. 5	55. 7
11 to 12	[illegible], 93[illegible]	30, 408	10. 8	35. 3
13 to 14	153, 20[illegible]	6, 721	4. 4	7. 8
15 to 16	32, 729	981	3. 0	1. 1
17 to 18	3, 203	44	1. 4	. 05
Above 18	299	6	2. 0	. 01

Note: Reference at end of statement.

TABLE VII.—PERCENT OF WOMEN ENGINEERS [illegible] FIELD OF EMPLOYMENT. DATA FROM A SURVEY OF 346 WOMEN ENGINEERS CONDUCTED BY THE SOCIETY OF WOMEN ENGINEERS, JUNE 1972 [7]

Field of employment	Percent
Aerospace engineering	11
Computing	9
Mechanical engineering	9
Electrical engineering	8
Civil engineering	6
Chemical engineering	6
Communications	6
Management and business administration	4
Electronics engineering	4
Engineering (general)	3
Engineering sciences	3
Industrial engineering	3
Science (basic)	3
Transportation engineering	2

TABLE VIII.—PERCENT OF WOMEN ENGINEERS BY TYPE OF EMPLOYER. DATA FROM A SURVEY OF 346 WOMEN ENGINEERS CONDUCTED BY THE SOCIETY OF WOMEN ENGINEERS, JUNE, 1972 [7]

Type of employer	Percent
Private industry or business	62. 0
Federal Government, civilian employee	14. 0
College or university	10. 0
Self-employed	4. 0
State government	3. 0
Nonprofit organization other than a school	2. 0
Military service or USPHS—Active duty	2. 0
Local government	1. 0
Junior college or technical institute	1. 0
Secondary, elementary, or other school	. 3
Other	3. 0

TABLE IX.—PERCENT OF WOMEN ENGINEERS BY EMPLOYMENT FUNCTION. DATA FROM A SURVEY OF 346 WOMEN ENGINEERS CONDUCTED BY THE SOCIETY OF WOMEN ENGINEERS, JUNE, 1972 [7]

Employment function	Percent
Design	20
Analysis	16
Research	12
Development	11
Administration	9
Consultation	7
Teaching	7
Planning	6
Production	4
Sales and service	2
Other	7

TABLE X.—PERCENT OF WOMEN ENGINEERS BY LEVEL OF SUPERVISORY RESPONSIBILITY. DATA FROM A SURVEY OF 346 WOMEN ENGINEERS CONDUCTED BY THE SOCIETY OF WOMEN ENGINEERS, JUNE, 1972 [7]

Supervisory responsibility	Percent
General management of organization	5
Management of major department, division or program	10
Supervision of project or section	11
Supervision of team or unit	14
Indirect or staff supervision	21
No regular supervision given	39

III. WOMEN IN MEDICINE

The percentage of active physicians who are women was 6.7% in 1969. [8] A survey made in 1970 indicated that approximately one third of these women were educated outside the United States, whereas less than one sixth of the male physicians were foreign educated. [9] This difference arises from the fact that the percentage of physicians who are women is much higher in some other countries. In the United States the percentage of M.D. recipients who were women remained approximately constant ~5% for the period 1920–60 and then began to increase, reaching 8.4% in 1970. [9] This upward trend appears to be continuing as is seen in the data given in Tables XI and XII.

Table XIII gives the number and percentage of physicians who are women by specialty. The medical specialty with the largest representation is pediatrics. The surgical specialties in general have fewer women with only obstetrics/gynecology having a percentage approximately equal to that of women in the profession. Table XIV gives the percentage of women in the specialties by type of practice and they are seen to be represented in larger percentages in hospital based practice than in office based practice.

Table XV gives the composition of medical school faculties in 1971 by sex and the percentage of women who are full professors is less than both the percentage of M.D.'s and the percentage of Ph.D.'s in the sciences who are women (respectively 6.7% [8] and 9.1% [12]). The lower professional ranks are seen to have a larger representation of women. Table XVI which gives the percent of first appointments to medical school faculties by sex and year of first appointment indicates that this is probably due to a recent increase in such appointments. It should be remarked that this increase can not be solely due to an increase in the numbers of women available since the majority of the individuals represented in the 1968–72 faculty increase received their degrees in the same period, a period when 8% of those receiving M.D. degrees were women (Table XII). Thus this recent increase is probably due to affirmative action programs at these medical schools. Further increases may be expected as the percentage of women in the field grows larger, providing that equal employment opportunity becomes a reality.

TABLE XI.—WOMAN APPLICANTS TO U.S. MEDICAL SCHOOLS AND ENTERING STUDENTS FOR SELECTED YEARS FROM 1929–30 TO 1972–73 [10]

1st-year entering class	Total applicants	Woman applicants: Number	Woman applicants: Percent of total applicants	Total entering students	Woman entering students: Number	Woman entering students: Percent of entering class
1929–30	13,655	481	3.5	[1] 6,457	[1] 291	4.2
1959–60	14,952	1,026	6.9	8,173	[2] 504	6.5
1970–71	24,987	2,734	10.9	11,348	1,256	11.1
1972–73	[3] 37,000	[3] 5,920	[3] 16.0	[4] 13,570	[4] 2,284	16.8

[1] Potthoff, E. E. the future supply of medical students in the United States, "Journal of Medical Education," 35: 223–237, 1960.

[2] Estimate from annual "AAMC Medical School Admission requirements, United States, and Canada."

[3] Estimate from preliminary AAMC applicant data.

[4] AAMC 1972 fall enrollment questionnaire.

Source (except where noted): AAMC Annual Studies of U.S. Medical School applicants.

TABLE XII.—WOMAN STUDENTS AND WOMAN M.D. GRADUATES IN U.S. MEDICAL SCHOOLS FOR SELECTED YEARS [10]

Year	Number of U.S. Medical schools	Total enrollment	Woman students: Number	Woman students: Percent of total	Total M.D. graduates	Woman graduates: Number	Woman graduates: Percent of total
1914–15	96	14,891	592	4.0	3,536	92	2.6
1924–25	80	18,200	910	5.0	3,974	20[illegible]	5.1
1934–35	77	22,888	1,077	[illegible].7	5,101	20[illegible]	4.1
1944–45	77	24,028	1,352	[illegible].6	5,236	2[illegible]2	5.1
1954–55	81	28,583	1,537	5.4	6,977	345	4.9
1964–65	88	32,428	2,503	7.[illegible]	7,409	503	6.8
1968–69	99	35,833	3,136	8.8	8,059	607	7.5
1972–73 [1]	114	47,259	6,066	12.8	[2] 10,000	[2] 910	9.1

[1] Data derived from 1972 AAMC fall enrollment questionnaire.

[2] Estimated M.D. graduates, June 1973.

Source (except where noted): Annual education numbers of the "Journal of the American Medical Association."

TABLE XIII.—NUMBER AND PERCENT OF PHYSICIANS BY SEX AND SPECIALTY [8]

Speciality	Total number	Number of women	Percent women
Medical (total)	71, 886	6, 479	9. 0
Allergy	1, 706	113	6. 6
Cardiovascular	5, 970	169	2. 8
Dermatology	3, 870	273	7. 0
Gastroenterology	1, 916	44	2. 3
Internal medicine	38, 258	2, 068	5. 4
Pediatrics	17, 926	3, 632	20. 3
Pulmonary	2, 240	180	8. 0
General practice	58, 919	2, 456	4. 2
Surgical (total)	82, 912	2, 015	2. 4
General Surgery	28, 603	283	1. 0
Obstetrics and gynecology	18, 084	1, 255	6. 9
Ophthalmology	9, 578	305	3. 2
Orthopedic	9, 227	43	. 5
Otolaryngology	5, 272	51	1. 0
Plastic	1, 503	40	2. 7
Other surgery	10, 645	38	. 4
Other (total)	89, 249	7, 917	8. 9
Anesthesiology	10, 434	1, 451	14. 0
Neurology	2, 850	198	6. 9
Occupational medicine	2, 746	86	3. 1
Pathology	10, 023	1, 164	11. 6
Psychiatry	22, 226	2, 788	12. 5
Physical medicine	1, 415	215	15. 2
Preventive medicine	819	99	12. 1
Public health	3, 075	568	18. 5
Radiology	12, 367	593	4. 8
Other	10, 072	745	7. 4
Unspecified	13, 222	1, 439	10. 9
Total	302, 966	20, 304	6. 7

TABLE XIV.—PERCENT OF PHYSICIANS WHO ARE WOMEN BY SPECIALTY AND TYPE OF PRACTICE [8]

Speciality	All	Office-based practice	Hospital-based practice	Other activity
General practice	4. 2	3. 6	9. 6	7. 7
Medical specialities	9. 0	6. 4	13. 5	10. 9
Surgical specialities	2. 4	2. 0	3. 4	3. 8
Other specialties	8. 9	8. 1	9. 7	8. 9
Total	6. 7	4. 6	10. 5	9. 0

TABLE XV.—EMPLOYMENT CHARACTERISTICS OF MEDICAL SCHOOL FACULTY, BY SEX AND CITIZENSHIP FOR 1971, OFFICE OF RESOURCES ANALYSIS. [11]

[Total faculty equals 28, 452]

Employment characteristics	Personal characteristics—percentage distribution					
	Total [1]		Sex		Citizenship	
	Vertical	Horizontal	Men	Women	United States	Foreign
Total	100	100	86	14	91	9
Institutional control:						
Public	51	100	86	14	92	8
Private	49	100	85	15	89	11
Type of school:						
Medical schools	96	100	86	14	91	9
Schools of basic medical science	2	100	86	14	87	13
Developing medical schools	2	100	91	9	93	7
Academic rank:						
Professors	23	100	96	4	96	4
Associate professors	23	100	91	9	93	7
Assistant professors	34	100	84	16	88	12
Instructors	14	100	69	31	85	15
Associates	3	100	68	32	84	16
Assistants	(2)	100	61	39	80	20
Lecturers	(3)	100	63	37	96	4
No academic rank	1	100	88	12	98	2
Employment status:						
Full time, total	90	100	86	14	90	10
Strict full time	62	100	85	15	89	11
Strict full time affiliated	7	100	85	15	89	11
Geographic full time	14	100	90	10	93	7
Geographic full-time affiliated	3	100	85	15	91	9
Full time (type not known)	4	100	87	13	88	12
Part time	10	100	83	17	96	4
Basic specialty:						
Biological sciences	25	100	88	12	88	12
Clinical specialties	60	100	90	10	90	10
Mathematics physical science, and engineering	2	100	91	9	90	10
Behavioral sciences	5	100	64	36	98	2
Allied health	3	100	45	55	96	4
All other	4	100	83	17	92	8

[1] Percentages may not add to 100 due to rounding.
[2] Less than 0.5 percent.

TABLE XVI.—DISTRIBUTION OF U.S. MEDICAL SCHOOL 1971-72 FACULTY BY YEAR OF 1ST APPOINTMENT AND BY SEX [10]

Sex	Year of first appointment					Total appointments
	Pre-1953	1953-57	1958-62	1963-67	1968-72	
Male	3, 298	2, 703	5, 270	7, 052	8, 776	28, 355
Female	323	381	778	1, 166	1, 887	4, 748
Percent female	(8. 9)	(12. 4)	(12. 9)	(14. 2)	(17. 7)	(14. 3)
Total appointees	3, 633	3, 091	6, 069	8, 259	10, 755	33, 323

Tables XVII and XVIII complete the picture of medical school faculties in 1971 by giving the percent by basic specialty and earned degree. A noticeably smaller percentage of the women are in clinical specialties (55% vs. 80% for the men) and a larger percentage are in behavioral sciences and allied health (respectively 16% and 17% vs. 7% and 5%). Since the percentage of Ph.D.'s who are women is higher in behavioral science (19.3 in psychology [2]) and medical science (9.1% [12]) than the percentage of M.D.'s, this pattern is readily understood.

TABLE XVII.—BASIC SPECIALTIES OF MEDICAL SCHOOL FACULTIES, BY SEX FOR 1971, OFFICE OF RESOURCES ANALYSIS. [11]

[Total faculty=28,452]

Basic specialties	Number			Horizontal percentages		Vertical percentages		
	Total	Men	Women	Men	Women	Total	Men	Women
Number of faculty	[1] 28,218	24,204	4,014	86	14	[2] 100	[2] 100	100
Number of specialties	37,492	32,439	5,053	87	13			
Basic sciences	9,555	8,383	1,172	88	12	34	35	29
Anatomy	1,406	1,212	194	86	14	5	5	5
Biochemistry	2,526	2,251	275	89	11	9	9	7
Biology, general	90	72	18	80	20	(3)	(3)	(3)
Biophysics	230	220	10	96	4	1	1	(3)
Cell biology	116	101	15	87	13	(3)	(3)	(3)
Zoology	57	49	8	86	14	(3)	(3)	(3)
Genetics	484	393	91	81	19	2	2	2
Immunology	423	373	50	88	12	1	2	1
Microbiology	1,271	1,067	204	84	16	4	4	5
Nutrition	104	57	47	55	45	(3)	(3)	(1)
Pharmacology	1,104	1,012	92	92	8	4	4	2
Physiology	1,687	1,526	161	90	10	6	6	4
All other	57	50	7	88	12	(3)	(3)	(3)
Clinical specialties	22,488	20,291	2,197	90	10	80	80	55
Anesthesiology	792	666	126	84	16	3	3	3
Dermatology	238	218	20	92	8	1	1	(3)
Endocrinology	639	575	64	90	10	2	2	2
Internal medicine	3,446	3,248	198	94	6	12	13	5
Medicine, general	2,385	2,219	166	93	7	8	9	4
Nuclear medicine	278	254	24	91	9	1	1	1
Neurology	611	574	37	94	6	2	2	1
Obstetrics and gynecology	898	831	67	93	7	3	3	2
Oncology	182	171	11	94	6	1	1	(3)
Pathology	2,559	2,247	312	88	12	9	9	8
Pediatrics	2,263	1,699	564	75	25	8	7	14
Physical med. and rehabilitation	308	238	70	77	23	1	1	2
Public health and preventive medicine	578	493	85	85	15	2	2	2
Psychiatry	2,271	2,032	239	89	11	8	8	6
Radiology	1,428	1,304	124	91	9	5	5	3
Surgery	3,465	3,391	74	98	2	12	14	2
All other	147	131	16	89	11	1	1	(3)
Mathematics, physical science, and engineering	849	772	77	91	9	3	3	2
Behavioral Sciences	1,841	1,185	656	64	36	7	5	16
Psychology	1,127	894	237	79	21	4	4	6
Social work	507	136	371	27	73	2	1	9
Other behavioral sciences	203	155	48	75	25	1	1	1
Allied health	1,285	584	701	45	55	5	2	17
Administration	363	331	32	91	9	1	1	1
Other specialties	297	238	59	80	20	1	1	1
Not Known	814	655	159	80	20	3	3	4

[1] Excludes 234 faculty, or 1 percent, whose sex was not reported.

[2] Subtotals exceed 100 percent because some faculty have more than one basic specialty.

[3] Less than 0.5 percent.

TABLE XVIII.—EMPLOYMENT CHARACTERISTICS OF MEDICAL SCHOOL FACULTY, BY TYPE OF EARNED DEGREE FOR 1971, OFFICE OF RESOURCES ANALYSIS [11]

[Total faculty—28,452]

Employment characteristics	Type of degree—percentage distribution						
	Total [1]						
	Vertical	Horizontal	M.D.	Ph.D.	M.D. plus plus Ph.D.	Other degree	None reported
Total	100	100	59	25	5	10	1
Institutional control:							
Public	51	100	56	27	5	11	1
Private	49	100	63	23	5	8	1
Type of school:							
Medical schools	96	100	60	24	5	10	1
Schools of basic medical science	2	100	38	45	7	9	(2)
Developing medical schools	2	100	46	37	9	4	4
Academic rank:							
Professors	23	100	62	26	10	2	(2)
Associate professors	23	100	63	27	6	3	(2)
Assistant professors	34	100	60	28	4	7	1
Instructors	14	100	55	13	2	28	2
Associates	3	100	36	28	3	30	3
Assistants	(2)	100	25	28	2	42	3
Lecturers	(2)	100	22	30	4	42	2
No academic rank	1	100	60	14	5	21	(2)
Employment status:							
Full-time, total	90	100	57	27	6	9	1
Strict full-time	62	100	50	32	6	11	1
Strict full-time affiliated	7	100	72	15	5	7	1
Geographic full-time	14	100	75	14	5	5	(2)
Geographic full-time affiliated	3	100	74	14	5	6	1
Full-time (type not known)	4	100	61	21	6	9	2
Part-time	10	100	79	10	3	7	1
Basic specialty:							
Biological sciences	25	100	17	70	9	3	(2)
Clinical specialties	60	100	86	5	6	3	(2)
Math., phy. sci., and engineering	2	100	5	60	4	29	2
Behavioral sciences	5	100	2	63	1	34	(2)
Allied health	3	100	3	21	1	71	4
All other	4	100	40	24	3	28	4

[1] Percentages may not add to 100 due to rounding.
[2] Less than 0.5 percent.

IV. WOMEN IN SCIENCE

The discussion in this section will mainly concern itself with doctorate level scientists, but other data will be presented where relevant. Figure 1 shows how the percentage of doctoral degrees awarded to women has varied as a function of time. In all of the fields, the same general features are observed decrease in percentage from the value in the twenties to a minimum in the fifties followed by an increase in the sixties and early seventies. This trend has been pointed out in numerous studies of professional women and is usually attributed to the changes in attitude to the role of women in our society. However, the features relevant to the present discussion is the size of the percentages and the encouraging trend in the last decade.

Table XIX gives the numbers and percentages of Ph.D's awarded to women in the period 1930–70 from which come the professionally active women scientists who have at least a few years of post-doctoral experience. Table XX gives the numbers and percentages of women in the 1970 National Register of Scientific and Technical Manpower by field and degree level. These data are indicative of the number of professionally active women, but are not quantitatively accurate.

Included in the samples are some women who were unemployed and not seeking employment at the time of the survey. On the other hand, the method of collection of the data was through the professional societies and therefore, not all scientists were reached. For example, the anthropologists were surveyed through the American Anthropological Association which essentially has a prerequisite of a doctorate for membership and thus the data on other degree levels is necessarily incomplete. Another example is the physicists, surveyed by the American Institute of Physics. This group should be quite complete, since the AIP contacted individuals through institutions as well as through its membership list. The result of this survey was 347 women Ph.D.'s in physics, and 77 in astronomy. In 1971 the Committee on Women in Physics of the American Physical Society sent out questionnaires to the 1354 women physicists listed in the National Register, and an additional but possibly overlapping group of 533 individuals. The response included 295 of the 347 Ph.D.'s on the Register plus an additional 150 Ph.D. women.[13] Eleven percent of these were unemployment and seeking employment, 2% were unemployed and not seeking employment, and 2% were retired. The result is that there were apparently 500 Ph. D. women physicists and astronomers in 1971, and 424 in the Register sample in 1970. Since 45 Ph. D. degrees were awarded in these fields in 1970,[2] this still implies that at least 7% of the Ph.D. women were not in the Register sample. This is a lower limit because the Committee on Women in Physics did not deliberately survey the astronomers and therefore, probably did not have a complete sample.

TABLE XIX.—NUMBER AND PERCENT OF Ph.D. DEGREES AWARDED IN THE PERIOD, 1930–69 BY FIELD AND SEX, DOCTORATE RECORD FILE, NATIONAL RESEARCH COUNCIL [2]

Field and subfield	Total number awarded	Number awarded to women	Percentage awarded to women
Astronomy and astrophysics	787	81	9.3
Chemistry	31,958	1,851	5.5
Earth sciences	6,214	154	2.4
Mathematics	9,582	681	6.6
Physics	16,290	343	2.1
Physical sciences	67,941	3,110	4.57
Biological sciences	31,199	5,310	14.5
Agricultural sciences	10,169	132	1.3
Medical sciences	4,556	457	9.1
Life sciences	45,924	5,899	11.38
Anthropology	1,750	358	20.4
Economics and statistics	10,978	547	5.0
Psychology	19,474	3,767	19.3
Political science and international relations	6,988	550	7.9
Sociology	5,112	851	16.6
Other social science areas	2,067	183	8.8
Social sciences	46,369	6,256	13.49
Total	162,301	15,448	9.52

TABLE XX.—NUMBER AND PERCENT OF WOMEN SCIENTISTS BY FIELD AND HIGHEST DEGREE, NATIONAL REGISTER OF SCIENTIFIC AND TECHNICAL PERSONNEL, 1970 [12]

Scientific field	Ph. D./D.Sc.		M.A./M.Sc.		All degrees	
	Number	Percent	Number	Percent	Number	Percent
Chemistry	1,241	4.1	1,899	9.9	6,201	7.1
Earth and marine sciences	145	2.6	184	2.3	852	3.6
Atmospheric and space sciences	12	1.7	38	2.0	102	1.5
Physics	347	2.1	642	5.3	1,354	3.7
Mathematics	476	5.9	1,822	15.2	2,790	11.4
Computer sciences	12	1.2	446	9.2	1,261	11.2
Agricultural sciences	10	.3	23	.6	52	.3
Biological sciences	2,404	9.9	2,042	19.8	6,114	12.9
Psychology	3,168	18.0	3,097	36.7	6,327	24.1
Statistics	63	5.4	198	15.8	337	11.4
Economics	315	4.4	382	7.6	812	6.1
Sociology	521	14.1	764	30.3	1,720	22.6
Political science	277	6.9	347	14.2	611	9.7
Anthropology	241	19.1	8	22.2	257	19.4
Linguistics	211	18.6	184	31.4	447	23.5
Total	9,441	7.6	12,476	13.3	29,293	9.4

Table XXI gives the percentages of women in the various categories of employer type and, for comparison, the corresponding percentages for the total sample, both by field. The category "Educational" includes universities, colleges, junior colleges, and secondary schools. Table XXII gives the same information for physicists by highest degree and Table XXIII gives the number of women immunologists by highest degree and type of employer. From these tables it is evident that in almost all fields the employer type with the largest percentages of women scientists is the educational institution (exceptions: computer science and statistics), irrespective of degree level.

The information available on women in educational institutions is not complete. The data on women scientists in faculty positions at universities and colleges is generally good, but the information concerning women in non-faculty positions and those in junior colleges and secondary schools is much less reliable.

TABLE XXI.—PERCENT OF SCIENTISTS BY FIELD, SEX, AND TYPE OF EMPLOYER, NATIONAL REGISTER OF SCIENTIFIC AND TECHNICAL PERSONNEL, 1970 [12]

	Educational		Government		Nonprofit		Industry		Total number	
	Total	Women	Total	Women	Total	Women	Total	Women	Total	Women
Chemistry	22.0	40.2	7.2	10.2	2.4	6.3	56.6	30.0	89.980	6,201
Earth sciences	27.5	46.5	17.6	20.4	1.0	3.4	42.0	10.0	23,756	852
Space sciences	15.3	35.3	32.7	30.4	1.4	2.0	11.6	8.8	6,637	102
Physics	49,8	57.7	11.0	8.2	2.5	2.9	27.0	9.0	18,085	1,354
Mathematics	57,4	69.2	6.1	4.9	2.0	1.0	26.1	7.3	24,400	2,790
Computer	14,2	15.4	9.2	10.6	3.5	4.4	65.9	53.4	11,324	1,263
Agricultural sciences	22.6	28.1	53.1	26.3	1.3	7.0	16.4	8.8	15,730	57
Biological sciences	60.6	64.7	14.4	10.5	6.2	8.2	10.2	5.2	47,493	6,134
Psychology	56.6	55.7	15.6	14.1	15.3	8.9	6.8	3.2	26,271	6,327
Statistics	67.1	30.0	9.9	31.2	3.3	7.1	15.6	16.9	2,953	337
Economics	58.6	49.9	16.4	20.2	4.0	4.3	13.6	9.7	13,386	812
Sociology	74.1	62.4	6.8	8.7	4.5	5.9	1.7	1.6	7,658	1,729
Political sciences	77.0	69.4	8.9	10.0	3.4	3.5	1.8	2.1	6,493	631
Anthropology	80.8	74.7	3.2	3.5	2.8	3.1	.8	.4	1,325	257
Linguistics	74.5	64.9	3.2	2.9	6.7	8.3	2.8	2.5	1,902	447
Total	41.7	54.1	13.7	11.2	3.5	6.3	31.2	12.5	12,644	29,293

TABLE XXII.—PHYSICISTS BY SEX, HIGHEST DEGREE AND TYPE OF EMPLOYER, NATIONAL REGISTER OF SCIENTIFIC AND TECHNICAL PERSONNEL, 1970 [12]

Type of employer	Ph.D.		M.A./M.S.c		All other		Total	
	Women	Total	Women	Total	Women	Total	Women	Total
Educational institutions (percent)	69	59	61	48	41	32	58	50
Government (percent)	8	9	6	10	12	17	8	11
Nonprofit organization (percent)	3	3	3	2	4	2	3	2
Industry (percent)	8	25	9	25	10	34	9	27
Total number	347	16, 631	642	12, 215	365	7, 392	1, 354	36, 336

TABLE XXIII.—NUMBER AND PERCENT OF WOMEN IMMUNOLOGISTS, BY HIGHEST DEGREE AND TYPE OF EMPLOYER, NATIONAL REGISTER OF SCIENTIFIC AND TECHNICAL PERSONNEL, 1968. [14]

Type of employer	Total number	Ph. D. (percent)	M.D. (percent)	M.A./M. Sc. (percent)	Other (percent)
Total	178	36	17	19	28
Educational institutions	101	41	28	12	19
Medical schools	74	35	35	9	21
Universities and colleges	26	54	8	19	19
Junior colleges	1	100			
Federal Government	23	35		22	43
Military	1			100	
Other government	12	42	8	25	25
Industry and business	6	17		33	50
Nonprofit organizations	17	41	6	18	35
Other	2	100			
Not employed	10			60	40
No report	6		17	33	50

Table XXIV gives the percentage of the faculty at universities and colleges that are women and Table XXV gives the numbers. The pattern visible in these data is characteristic; women are least represented in the higher ranks and in institutions of higher prestige. However, in 1972–73 there was a total of 10,982 women professors (assistant, associate, and full) in universities and 20,327 in four-year colleges. Table XXVI gives percent and number for women faculty members in departments of psychology with no distinction between types of institutions. The total number of women professors of psychology in the 170 departments represented in these data in 1971–72 was 435. The percentages should be compared with the number of Ph. D.'s in psychology who are women (19.3% in Table XIX and 18.0 in Table XX). Table XXVII gives the percentage and number of women faculty for sociology as a function of the prestige standing of the institution. From this table, it is seen that in 1968–69 there were 38 women sociology professors in the top and above average departments and 217 in all departments. The percentages should be compared with the percentage of Ph.D.'s in sociology who are women (16.6%, Table XIX and 14.1%, Table XX). Table XXVIII shows how these percentages have changed in the period 1970 to 1972 and increases are mainly in the lower ranks and less prestigious institutions. Table XXIX gives the number and percentage of women faculty in departments of political science in 1969 by rank. The percentages should be compared with the percentage of Ph.D.'s in political science who are women (7.9%, Table XIX and 6.9%, Table XX). Table XXXA gives the number of women with faculty appointments in 397 departments of economics by degree level and date of appointment. More than 50% of these women have been appointed since 1970, an increase which can only be due to the impact of affirmative action programs. Table XXXB gives the number and percent of women faculty by rank as well as the number and percent of women graduate students. The percentages should be compared with the percentage of Ph.D.'s in economics who are women (5.0%, Table XIX and 4.4%, Table XX).

TABLE XXIV.—WOMEN AS PERCENT OF TOTAL FULL-TIME INSTRUCTIONAL FACULTY ON 9-, 10-MONTH CONTRACTS IN INSTITUTIONS OF HIGHER EDUCATION, BY ACADEMIC RANK AND CONTROL AND LEVEL OF INSTITUTION: 50 STATES AND DISTRICT OF COLUMBIA, 1972-73 [15]

Control and level of institution	Total, all ranks	Professors	Associate professors	Assistant professors	Instructors
All institutions	22.3	9.8	16.3	23.8	39.9
Publicly controlled, total	22.7	10.0	15.8	23.7	39.2
Universities	17.1	6.7	12.3	20.0	44.4
Other 4-year	23.2	12.7	17.4	24.7	44.0
2-year	32.3	21.2	24.3	31.3	35.1
Privately controlled, total	21.2	9.5	17.2	24.1	42.5
Universities	14.5	5.4	12.9	19.0	41.0
Other 4-year	23.6	12.3	19.1	25.7	41.5
2-year	45.4	31.5	34.3	41.3	53.8

TABLE XXV.—NUMBER AND AVERAGE SALARY OF FULL-TIME INSTRUCTIONAL FACULTY ON 9-, 10-MONTH CONTRACTS IN INSTITUTIONS OF HIGHER EDUCATION, BY LEVEL OF INSTITUTION, RANK, AND SEX, 1972-73: ALL INSTITUTIONS, 50 STATES AND THE DISTRICT OF COLUMBIA [15]

Rank and sex	Total		Universities		Other 4-year		2-year	
	Number of faculty	Average salary	Number of faculty	Average salary	Number of faculty	Average salary	Number of faculty	Average salary
Total	251,897	$13,813	93,334	$15,301	120,192	$13,059	38,371	$12,553
Men	195,843	14,360	78,008	15,869	92,106	13,493	25,729	12,890
Women	56,054	11,901	15,326	12,410	28,086	11,638	12,642	11,868
Professors	55,424	18,916	27,616	20,792	25,378	17,131	2,430	16,231
Men	49,968	19,127	25,876	20,967	22,198	17,203	1,894	16,544
Women	5,456	16,978	1,740	18,199	3,180	16,622	536	15,122
Associate professors	58,755	14,354	24,409	14,983	30,044	13,833	4,302	14,426
Men	49,205	14,472	21,366	15,072	24,613	13,953	3,226	14,459
Women	9,550	13,748	3,043	14,359	5,431	13,291	1,076	14,327
Assistant professors	86,234	12,046	31,371	12,464	46,697	11,741	8,166	12,181
Men	65,710	12,232	25,172	12,602	34,981	11,960	5,557	12,259
Women	20,524	11,450	6,199	11,901	11,716	11,086	2,609	12,015
Instructors	51,484	10,662	9,938	9,779	18,073	9,462	23,473	11,959
Men	30,960	11,005	5,594	10,031	10,314	9,605	15,052	12,327
Women	20,524	10,143	4,344	9,454	7,759	9,273	8,421	11,301

TABLE XXVI —NUMBER AND PERCENT OF WOMEN FACULTY IN DEPARTMENTS OF PSYCHOLOGY FROM A SURVEY OF 170 DEPARTMENTS, 1971-72, AMERICAN PSYCHOLOGICAL ASSOCIATION [16]

Status	Men		Women	
	Number	Percent	Number	Percent
Full time	2,934	87	445	13
Instructor, lecturer, etc	91	63	53	37
Assistant professor	912	85	158	15
Associate professor	723	90	80	10
Professor	1,116	93	81	7
Research appointment without teaching duties	49	46	58	54
Part time	912	74	325	26
Instructor, lecturer, etc	422	67	204	33
Assistant professor	170	75	56	25
Associate professor	171	83	34	17
Professor	213	89	26	11
Research appointment without teaching duties	46	53	40	47
Tenure:				
Appointed with tenure	1,781	89	213	11
Appointed without tenure	1,208	82	268	18

TABLE XXVII.—NUMBER AND PERCENT OF FULL-TIME FACULTY IN DEPARTMENTS OF SOCIOLOGY BY SEX PRESTIGE STANDING OF DEPARTMENT, AND RANK [17]

Academic rank	Prestige standing							
	Top		Above average		Other		Total	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Professor	158	1	138	4	485	10	781	4
Associate professor	76	5	103	9	394	10	573	9
Assistant professor	136	5	142	8	679	16	957	14
Instructor/lecturer	32	34	44	14	258	28	334	27
Research associate	39	39	32	28	95	22	166	27

TABLE XXVIII-A.—NUMBER AND PERCENT OF FACULTY IN DEPARTMENTS OF SOCIOLOGY BY SEX, RANK AND YEAR [18]

Rank	1970		1971		1972	
	Total faculty	Percent women	Total faculty	Percent women	Total faculty	Percent women
Full professor	900	4	1,079	4	1,035	5
Associate professor	672	10	744	11	686	12
Assistant professor	996	13	1,163	12	1,115	16
Lecturer	76	12	114	21	106	30
Instructor	212	16	106	29	84	29
Total	2,946	9	3,249	10	3,026	12

TABLE XXVIII-B.—NUMBER AND PERCENT OF FACULTY IN DEPARTMENTS OF SOCIOLOGY BY SEX, QUALITY OF DEPARTMENT AND YEAR [18]

Year	Distinguished		Strong		Good		Adequate		Unranked	
	Percent women	Total faculty	Percent women	Total faculty	Percent women	Total faculty	Percent women	Total faculty	Percent women	Total faculty
1970	5	186	5	379	7	179	7	366	11	2136
1971	5	218	8	395	9	176	7	349	12	2111
1972	5	202	11	339	12	154	10	380	13	1951

TABLE XXIX.—NUMBER AND PERCENT OF FACULTY IN 478 DEPARTMENTS OF POLITICAL SCIENCE BY SEX AND RANK [19]

Rank	Total	Number female	Percent female
Professor	1,685	53	4.1
Associate professor	872	58	6.7
Assistant professor	1,408	121	8.6
Instructor	950	93	16.9
Other	290	46	11.7
Total	4,401	371	8.4

TABLE XXXA.—NUMBER OF WOMEN WITH FACULTY APPOINTMENTS IN 397 DEPARTMENTS OF ECONOMICS DECEMBER 19, 1972, AMERICAN ECONOMIC ASSOCIATION [20]

	All departments	Departments at major universities[1]
Total appointments	355	[2] 80
Part time	71	26
Full time	284	54
Tenured	99	14
Degree, experience, and salary:		
Total appointments	355	73
Degree:		
Ph. D	204	59
Year received:		
Prior to 1970	143	42
1970 to date	61	57
M.A. or M.S	125	10
B.A. or B.S	26	4
Year appointed:		
Prior to 1970	173	38
1970 to date	182	35

[1] This refers to the 43 universities sometimes called "the chairman's group" which award about ⅔ of all Ph. D. degrees in economics. They are Brown University, University of California-Berkeley, University of California-Davis, University of California-Los Angeles, Carnegie-Mellon Institute, University of Chicago, University of Colorado, Columbia University, Cornell University, Duke University, University of Florida, Harvard University, University of Illinois, Indiana University, Iowa State University, Johns Hopkins University, University of Maryland, Massachusetts Institute of Technology, University of Michigan, Michigan State University, University of Minnesota, New York University, State University of New York-Buffalo, University of North Carolina-Chapel Hill, Northwestern University, Ohio State University, University of Pennsylvania, University of Pittsburgh, Princeton University, Purdue University, University of Rochester, University of Southern California, Stanford University, Texas A & M University, University of Texas-Austin, Vanderbilt University University of Virginia, University of Washington-Seattle, Washington State University, Washington University-St. Louis Wayne State University, University of Wisconsin, Yale University.

With the exception of the University of Rochester, these universities provided the information requested.

[2] Information by rank not avialable for 2 full time and 5 part time faculty members.

TABLE XXXB.—NUMBER AND PERCENT OF FACULTY AND STUDENTS BY SEX IN 397 DEPARTMENTS OF ECONOMICS, DEC. 19, 1972, COMMITTEE ON THE STATUS OF WOMEN IN THE ECONOMICS PROFESSION, AMERICAN ECONOMIC ASSOCIATION [20]

	All departments			Departments at major universities[1]		
	Total	Women	Women total (percent)	Total	Women	Women total (percent
Students:						
Candidates for the M. A. degree	3,801	522	14	689	92	13
Candidates for the Ph. D. degree	5,214	623	12	3,507	401	11
Faculty, by rank:						
Professor	1,537	48	3	577	14	2
Associate professor	1,114	59	5	219	8	4
Assistant professor	1,466	116	8	352	31	9
Instructor	269	47	17	24	5	21
Special lecturer	55	14	25	22	15	68
Total	4,441	284	6	1,194	[2] 73	6

[1] This refers to the 43 universities sometimes called "the chairman's group" which award about ⅔ of all Ph. D. degrees in economics. They are Brown University, University of California—Berkeley, University of California—Davis, University of California—Los Angeles, Carnegie-Mellon Institute, University of Chicago, University of Colorado, Columbia University, Cornell University, Duke University, University of Florida, Harvard University, University of Illinois, Indiana University, Iowa State University, Johns Hopkins University, University of Maryland, Massachusetts Institute of Technology, University of Michigan, Michigan State University, University of Minnesota, New York University, State University of New York—Buffalo, University of North Carolina—Chapel Hill, Northwestern University, Ohio State University, University of Pennsylvania, University of Pittsburgh, Princeton University, Purdue University, University of Rochester, University of Southern California, Stanford University, Texas A & M University, University of Texas—Austin, Vanderbilt University, University of Virginia, University of Washington—Seattle, Washington State University, Washington University—St. Louis, Wayne State University, University of Wisconsin, Yale University. With the exception of the University of Rochester, these universities provided the information requested.

[2] Information by rank not available for 2 full time and 5 part time faculty members.

Table XXXI gives the percentage and number of women faculty in departments of physics by rank and type of institution. The percentages should be compared with the percentage of Ph. D.'s in physics who are women (2.1%, Table XIX and XX). In 1971–72 there were 7[illegible] women physics professors in the universities and 172, in the colleges. Table XXXII gives the number of male and female faculty in 19 leading departments of mathematics for four academic years. In these departments which constitute approximately one-eight of the total number of university mathematics departments, there are 15 women professors. The marked increase in the professorial rank from that in 1968–71 to that in 1971–72 is almost certainly attributable to the impact of affirmative action. The percentage should be compared to the percentage of Ph. D.'s in mathematics who are women (6.6%, Table XIX or 5.9%, Table XX).

Tables III and XXXIII give the results of a study carried out by Lindsey Harmon of the National Research Council relating the names of individuals on the Doctorate Records File (1930–69) and the 1971–72 National Faculty Directory. Since this omits individuals whose names changed and since ambiguous names were deleted, this study does not include all Ph. D.'s in the National Faculty Directory. Because of the greater loss of women due to name change by marriage, no comparison of the absolute numbers can be made and the samples of women may actually be incorrect by a factor of as much as 3 (75% of Ph. D. women physicists are married [14]). However, the percent of women by type of institution is probably not affected. RA signifies the Roose-Anderson rating for all departments of the institution of employment. Unrated Ph. D., etc., signifies Ph. D. granting institutions not included in the Roose-Anderson ratings. The Doctorate Records File (1930–69) totals are also given for comparison. As in all of the previous data, the percent of women is higher at the less prestigious institutions.

TABLE XXXI.—NUMBER AND PERCENT OF FACULTY DEPARTMENTS OF PHYSICS BY SEX, RANK AND TYPE OF INSTITUTION. [13]

	Professor	Associate professor	Assistant professor	Lesser rank	Total
A. 4-year colleges with undergraduate program only (743):					
Number women	55	33	56	44	188
Total number	951	668	1, 069	465	3, 153
Percentage of total women	30	18	30	23	
Percentage of given rank	5. 8	4. 9	5. 2	9. 5	6. 0
B. 4-year colleges with MA/MSc program (133):					
Number women	7	9	12	6	34
Total number	366	408	452	131	1, 357
Percentage of total women	21	26	35	18	
Percentage of given rank	1. 9	2. 2	2. 6	4. 6	2. 5
C. Universities (158):					
Number women	23	24	27	17	91
Total number	2, 231	1, 358	1, 351	286	5, 226
Percentage of total women	26	26	29	19	
Percentage of given rank	1. 0	1. 8	2. 0	5. 9	1. 7
D. "Top 10" universities:					
Number women	2	1	1	1	5
Total number	332	89	108	36	565
Percentage of total women	40	20	20	20	
Percentage of given rank	.6	1. 1	.9	2. 8	.9

TABLE XXXII.—NUMBER AND PERCENT OF FACULTY IN 19 LEADING DEPARTMENTS OF MATHEMATICS BY SEX, RANK AND YEAR. [22] FIRST LINE IS TOTAL NUMBER AND SECOND LINE IS PERCENT WOMEN IN EACH CATEGORY. THE NUMBERS IN BRACKETS ARE THE NUMBER OF WOMEN

Rank	Year—			
	1968–69	1969–70	1970–71	1971–72
Professor:				
Number	299	316	339	442
Percent	0.3	0.3	0.3	1.0
Women				[4]
Associate professor:				
Number	107	112	129	150
Percent	4.6	3.6	3.9	6.6
Women				[7]
Assistant professor:				
Number	179	182	144	165
Percent	1.7	1.1	0	2.4
Women				[4]
Instructor or full-time lecturer:				
Number	86	90	79	77
Percent	7.0	5.6	2.5	2.6
Women				[2]
Part-time lecturer:				
Number	46	48	46	50
Percent	6.5	12.5	10.9	14.0
Women				[7]

TABLE XXXIII-A.—NUMBER AND PERCENT OF SCIENTISTS IN THE DOCTORATE RECORDS FILE (1930–69) FOUND IN THE NATIONAL FACULTY DIRECTORY FOR 1971–72.[4] RA SIGNIFIES ROOSE-ANDERSON RATING

Institution of employment	Mathematics		Physics		Chemistry	
	Women	Total	Women	Total	Women	Total
RA 2.5–5:						
Number	43	1,576	13	1,625	36	1,310
Percent	15.9	28.5	15.7	29.6	11.3	18.5
RA 0–2.5:						
Number	48	1,506	15	1,376	38	1,563
Percent	17.7	27.2	18.1	25.1	11.9	21.7
Unrated Ph. D.:						
Number	26	678	7	657	25	917
Percent	9.6	12.2	8.4	12.0	7.8	12.9
Unrated MA:						
Number	78	841	22	855	72	1,434
Percent	28.8	15.2	26.5	15.6	22.6	20.2
Unrated BA:						
Number	56	593	16	674	117	1,324
Percent	20.7	10.7	19.3	12.3	36.7	18.7
Junior College:						
Number	5	55	5	100	17	264
Percent	1.8	1.0	6.0	1.8	5.3	3.7
Other:						
Number	15	282	5	189	14	6,512
Percent	5.5	5.1	6.0	3.6	4.4	9.2
Total	271	5,531	83	5,485	319	7,088
DRF total	681	9,582	343	16,290	1,851	31,958

TABLE XXXIII-B.—NUMBER AND PERCENT OF SCIENTISTS IN THE DOCTORATE RECORDS FILE (1930–69) FOUND IN THE NATIONAL FACULTY DIRECTORY FOR 1971–72[4]. RA SIGNIFIES ROOSE-ANDERSON RATING

Institution of employment	Biology		Other life sciences	
	Women	Total	Women	Total
RA 2.5 to 5:				
Number	280	4, 877	396	5, 683
Percent	19.6	24.9	16.5	21.2
RA 0 to 2.5				
Number	316	6, 003	436	6, 398
Percent	22.1	30.6	18.2	23.8
Unrated Ph. D.:				
Number	218	3, 005	235	3, 159
Percent	15.2	15.3	9.8	11.8
Unrated M.A.:				
Number	255	2, 426	650	5, 512
Percent	17.8	12.4	27.1	20.5
Unrated B.A.:				
Number	208	1, 928	485	3, 933
Percent	14.5	9.8	20.2	14.6
Junior college:				
Number	92	522	92	730
Percent	6.4	2.7	3.8	2.7
Other:				
Number	62	839	105	1, 425
Percent	4.3	4.3	4.4	5.3
Total	1, 431	19, 600	2, 399	20, 840
DRF total	5, 310	31, 199	589	14, 725

TABLE XXXIII-C.—NUMBER AND PERCENT OF SCIENTISTS IN THE DOCTORATE RECORDS FILE (1930–69) FOUND IN THE NATIONAL FACULTY DIRECTORY FOR 1971–72[4]. RA SIGNIFIES ROOSE-ANDERSON RATING

Institution of employment	Psychology		Other social sciences		Science and engineering total	
	Women	Total	Women	Total	Women	Total
RA 2.5–5:						
Number	188	1, 549	208	4, 134	776	18, 038
Percent	20.6	21.7	14.0	21.0	17.0	24.2
RA 0–2.5:						
Number	171	1, 749	265	4, 649	869	20, 179
Percent	18.7	24.5	17.8	23.6	19.1	27.1
Unrated Ph. D.:						
Number	99	929	136	2, 230	522	9, 858
Percent	10.8	13.0	9.2	11.3	11.4	13.2
Unrated M.A.:						
Number	240	1, 453	410	4, 059	1, 084	11, 936
Percent	26.3	20.4	27.6	20.6	23.8	16.0
Unrated B.A.:						
Number	142	879	343	3, 054	888	9, 188
Percent	15.6	12.3	23.1	15.5	19.5	12.3
Junior college:						
Number	35	188	57	542	214	1 877
Percent	3.8	2.6	3.8	2.8	4.7	2.5
Other:						
Number	38	387	67	1, 038	202	3, 471
Percent	4.2	5.4	4.5	5.3	4.4	4.7
Total	913	7, 134	1, 486	19, 706	4, 555	74, 547
DRF total	3, 767	19, 474	183	2, 067	15, 558	189, 27[illegible]

There is much less information available concerning women scientists employed by the government than for those in universities and colleges. Table V gives the distribution by grade of women in the federal service showing the sharp decline in numbers of women at the higher grade levels. Figure 2 gives the distribution by grade and sex of the staff at NIH. Table XXXIV gives the division of Ph.D. Physicists by sex, type of employer and primary work activity. The women physicists employed by the government are seen to constitute a smaller percentage in management than in research. Since the highest grade levels are management positions, this implies that the women are at a lower median grade than the total sample. This has the interesting consequence that the median salary for doctorate physicists in government research positions is higher for women than for men ($17,500 vs. $17,000) [14], probably due to the women remaining at these levels and accumulating seniority and the men being promoted into management (median salary $26,000) [14]. This is the only subcategory where women physicists have higher median salaries then men. Table XXXV gives the number and percent of economists in the federal service by grade and sex. Here again the women are seen to be at a lower median grade.

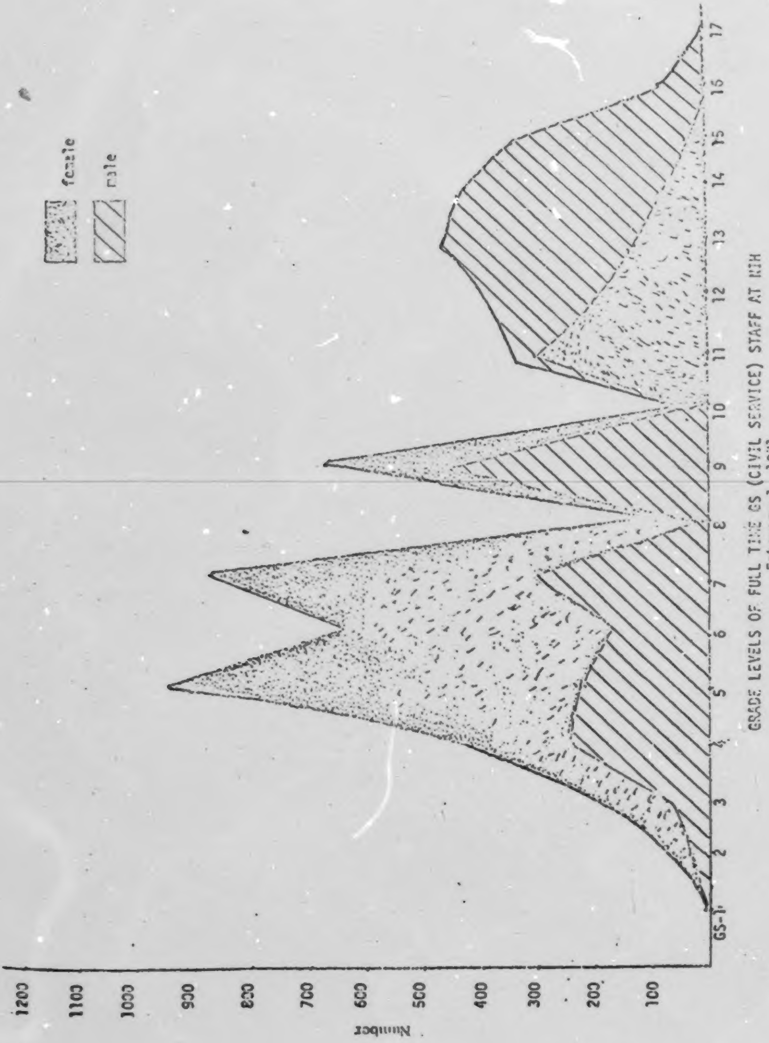


FIGURE 2

The information for women scientists in industry is also rather sparse. Figure 3 gives the occupational distribution of all men and women employed in industry also showing a low percentage of women in managerial positions. Table XXXIV gives the division of Ph.D. physicists in industry in 1970 and only one woman is found in a managerial position. The survey of the Committee on Women in Physics identified four Ph.D. women in industry in 1971 who were in managerial positions [14], a difference explainable by the time interval between the two studies and the difference in sample. However, it is not only true that there are very few highly placed women physicists in industry, it is also a fact that there are very few Ph.D. women physicists at any level in industry. For fields where industrial employment of women involves substantial numbers (see Table XXI) there may be an appreciable number of women at higher levels even if the percentage is relatively small.

TABLE XXXIV.—NUMBER AND PERCENT OF PH. D. PHYSICISTS BY SEX, TYPE OF EMPLOYER AND PRIMARY WORK ACTIVITY, NATIONAL REGISTER OF SCIENTIFIC AND TECHNICAL PERSONNEL, 1970.[13]

Type of employer	Basic research	Research and development [1]	Management and administration	Teaching	Total [2]
Education	3,759	4,446	834	4,167	9,748
Number of women	91	96	5	126	234
Percent	2.4	2.2	.6	3.0	2.8
Government	711	1,001	392	4	1,469
Number of women	18	20	5		29
Percent	2.5	2.0	1.3		2.0
Nonprofit	150	328	123	3	499
Number	5	6	1		9
Percent	3.3	1.8	.8		1.8
Industry	920	2,782	1,187	8	4,231
Number	11	26	1		29
Percent	1.2	.9	.1		.7
Total [2]	5,068	8,699	2,615	4,189	16,631
Number	127	151	12	126	347
Percent	2.3	1.7	.4	3.0	2.1

[1] Research and development includes basic research.

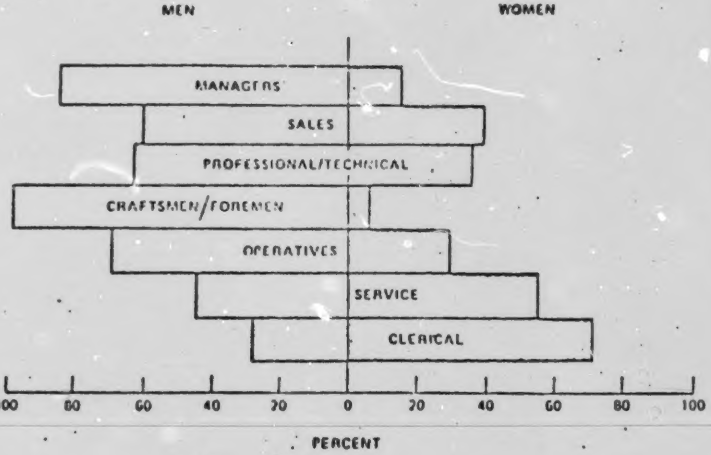
[2] Includes individuals in additional categories.

TABLE XXXV.—NUMBER AND PERCENT OF ECONOMISTS IN THE FEDERAL SERVICE BY SEX AND GRADE, OCTOBER 1971, AMERICAN ECONOMIC ASSOCIATION. [21]

	GS 4-10	GS 11-12	GS 13-14	GS 15-18	Total GS 4-18
All economic:					
Staff:					
Men	529	1,089	1,217	502	3,337
Women	187	178	130	20	515
Total	716	1,267	1,347	522	3,852
Women as percent of total	35	16	11	4	
Percent of all men at this grade level	16	33	36	15	
Percent of all women at this grade level	36	35	25	4	

Note: Median grade for all male economics staff: GS-13; median grade for all female economics staff: GS-11

FIGURE 3.—Occupational Distribution of Men and Women in Industry in 1968. [23]



V. AN INTERPRETATION OF THESE DATA

The overall impression conveyed by these statistics is that of small percentages, although not always of small numbers. However, if the selection criteria used to define a given sample are "full professor in ——— at a major university" then the numbers also become very small. There are signs that this may change in the next two decades. The academic affirmative action programs have started to increase the number of women in the lower ranks of the faculty. Similar programs in industry and government will also effect increases there, but again mainly by an influx of young women scientists. This should encourage the further increase in the percentages of women achieving advanced degrees in science and the percentage going into engineering and medicine. From this point of view affirmative action can be thought of as a pump priming operation. Once the patterns of the past are destroyed and women have equal opportunity and encouragement to flow into the professions with men, the need for affirmative action will vanish.

At present, however, the pattern visible is still very largely a legacy of the past and affirmative action is a necessity of the present. Therefore, the question of how one may interpret statistics such as those presented in this paper must be considered. In the case of positions relevant to the women who have recently received their degrees, the number available could be taken to be approximately equivalent to the number of degree receipients. However, this is an assumption that would not meet with universal acceptance. For example, many would argue that the number of women in the group from which faculty for the highest ranked institutions would be selected is a fraction of the total number of women similar to the fraction of men who are in the equivalent group. However, this ignores the fact that there is much greater pre-selection in the case of the women, both with respect to determination and ability. Figures 4 through 6 illustrate this point. They are taken from a study of high school ability patterns and give profiles of the high school performance of three groups of scientists by sex and marital status at the time of receiving their doctorate. The performance is based on grade point average (GPA) in four fields, rank in the graduating class, and a standardized ability test score. In all categories, the women are higher than the total sample. A profile was not given for other physical sciences or engineering since it was felt that the size of the samples made the data unreliable. However, for these fields and for medicine, it is reasonable to predict a similar result.

Since the women degree recipients are a group whose pre-selection criteria are different from those of men, it is not correct to assume that the percentages qualified for various positions are the same as the equivalent percentages for men. For present purposes then, a better assumption is that the number of women degree recipients in the group from which candidates for a given position would be drawn is approximately the total number in the sample.

FIGURE 4. Profile of Bio-Scientists by Sex and Marital Status at Doctorate, on Six High School Variables. [24]

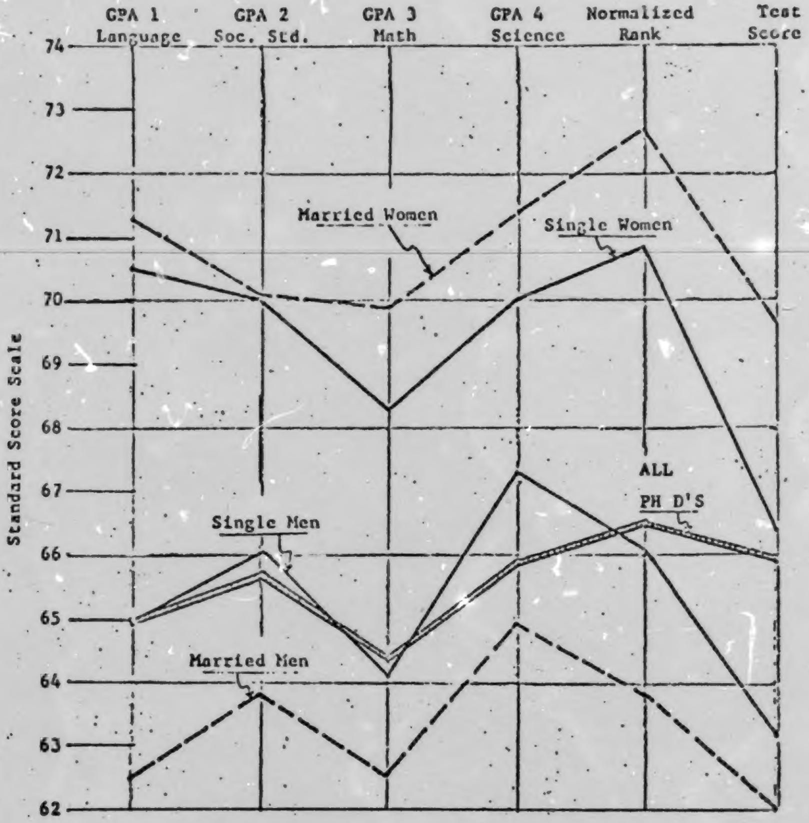


FIGURE 5.—Profile of Social Scientists, by Sex and Marital Status At Doctorate, on Six High School Variables.[24]

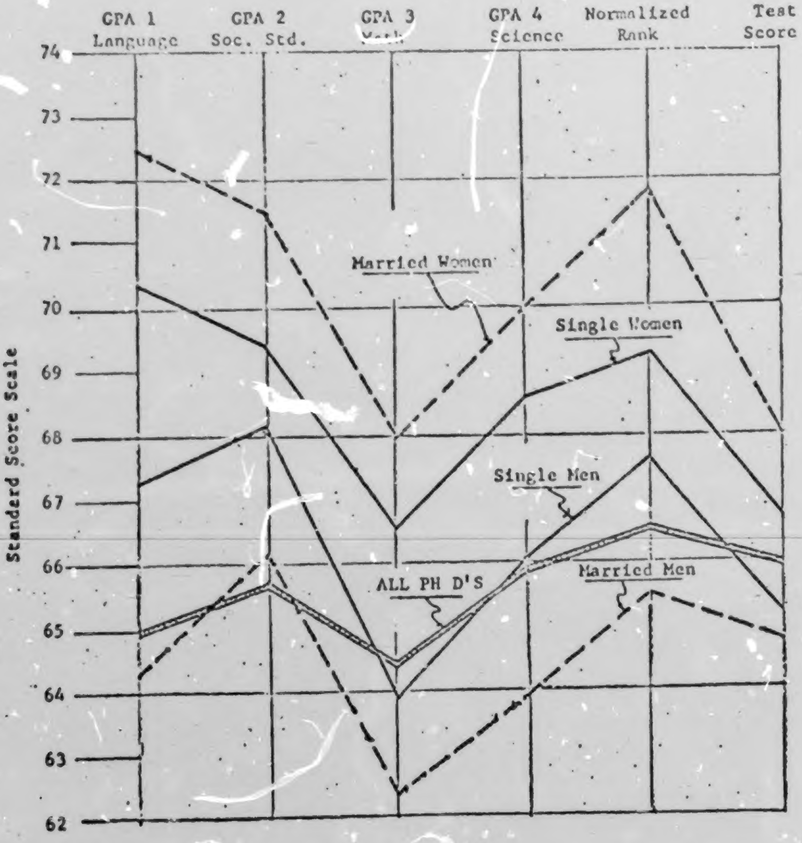
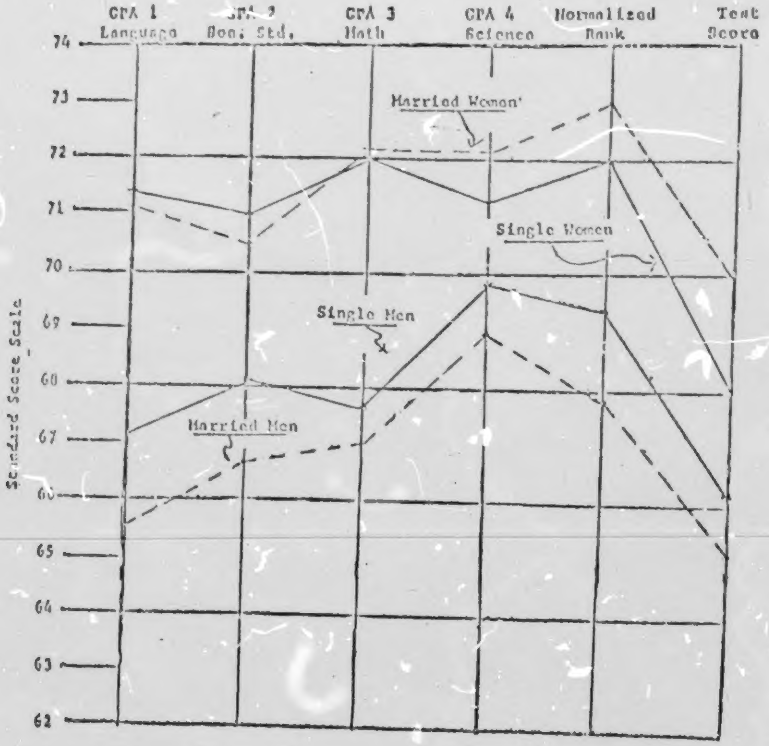


FIGURE 6.—Profile of Chemists, by Sex and Marital Status At Doctorate, on Six High School Variables.[24]



Turning to the women with at least several years of postdoctoral experience, the problem becomes even more difficult. Social patterns and discriminatory practices have caused a significant difference in the employment pattern of women. The NAS report, "Careers of Ph. D.'s", concludes: "Women's careers are less clear-cut than men's. Those of single women most closely resemble men's careers. Typically, women Ph. D.'s salaries are about three-fourths those of men at equivalent intervals past receipt of the Ph. D. degree. Fewer women are in the never-academic group; more switch back and forth between academic and non-academic jobs; those always in academia are proportional to the numbers of men always in academic jobs."[25] However, even in the group, "always academic" the percentage of women who achieved professorships was significantly less than that for men (~65% vs. ~85% in the biosciences and 55% vs. ~85% in the social sciences after ~25 years of experience [25]). The tables presented in Section IV of this report indicate the positions in which the rest of the academic women are found. In psychology (Table XXVI) 13% of the women are in research appointments and 33% in instructor, lecturer, etc. In sociology (Table XXVII) 27% of the women are in research appointments and 27% in instructor, lecturer, etc. In political science (Table XXIX) 12% are in "other" and 17% in instructor. In physics (Table XXX) 21% are in "lesser rank". Thirty-eight per cent of the women mathematicians in the nineteen departments surveyed (Table XXI) were instructors or lecturers. Fifty-five percent of Ph. D. women in the National Faculty Directory (Table XXXIII) were in unrated institutions and 10% were in junior colleges and "other". Of the $\sim$60% of women physicists who work at educational institutions, $\sim$19% are in junior colleges and secondary schools, $\sim$16% at colleges and universities but not on the faculty, $\sim$16% on the faculty at colleges and $\sim$7% on the faculty at universities.[13]

The minimum number of women in the pool of individuals qualified for a particular position can be arrived at by applying the same criteria as are used for men. For example, if the basic criterion for consideration for a particular position is "tenured professor at a top ranking institution or equivalent", then the number of women available is at least the number in this category. However, because of the different career patterns, other women who are also qualified for this position might be found in un-tenured or non-faculty positions or at less prestigious institutions. Therefore the actual number of women in the "pool" from which nominees for the position could be drawn should be increased to include the number of individuals in these other categories. It is obvious that there will also be men at less prestigious institutions who are equally qualified with others at top ranking institutions. However, the discussion so far would seem to indicate that this is a much more important effect for women since there are so few both in percent and number in the higher positions. Thus the actual number of women in any particular "pool" should be bracketed between minimum number reached by applying the usual criteria and a maximum number reached by including other appropriate categories. As an illustration, consider the size of the pool of women qualified for the position of associate professor in a given group of universities. The minimum figure would be given by the number of women at these universities who have been assistant professors for several years. A pool more in keeping with the goals of affirmative action would include women with research appointments and lecturer's positions at these universities, women who have not had formal positions due to nepotism rules but who have excellent research records and women at the appropriate level in a less prestigious group of institutions. Only by making such an adjustment to the realities of the pattern created by our previous history can the number of women at all levels be increased substantially in less than a decade.

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CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., October 9, 1974.

Hon. JAMES G. O'HARA,
Chairman, Special Education Subcommittee,
Washington, D.C.

DEAR JIM: I have been particularly interested in your recent hearings on affirmative practices and policies at institutions of higher education. Although unable to testify at the hearings, I am taking this opportunity to affirm my support for vigorous enforcement of federal guidelines.

As you know, there has been a great deal of publicity about the evils of reverse discrimination. The DeFunis case highlighted this issue earlier this year until the Supreme Court ruled it as moot. Now, the issue has extended to hiring practices at the college or university level, with particular focus on the Berkeley situation. I believe the weight of evidence strongly suggests an educational system in need of reform and greater compliance efforts.

In a July 1972 report entitled "Access to College for Mexican Americans in the Southwest," the College Entrance Examination Board concluded that while 140,000 Mexican Americans were enrolled in Southwestern colleges in fall, 1971, an increase of another 100,000 would be needed to "provide a number . . . proportional to their representation in population." Further, it documented a serious gap in Mexican American student to faculty ratio. The report pointed out that a 20:1 ratio was generally accepted as a "typical student/faculty ratio," but for Mexican Americans, the ratio was almost 100:1.

It is my opinion that, in contrast to quotas, goals, and estimates are essential to achieving equal opportunities for minorities and women. Without such guidelines, we would fall prey to vague and unenforceable standards. As Peter Holmes, Director of the HEW's Office for Civil Rights stated: "The affirmative action process is most certainly not anti-merit. . . . Indeed, it is because employment decisions have been based in part on practice and procedures that were unsound and invalid, to the disadvantage of certain persons or classes of persons, that Federal contractors are now required to take affirmative measures." Similarly, Assistant Attorney General Stanley Pottinger stated that "goal setting is an inducement to adopt sound employment practices. . . ." The federal courts have also confirmed the need for affirmative action including the use of standards which validly predict successful job performance.

It is my hope that your inquiry into this issue will help to develop a strong compliance program for colleges and universities. I have enclosed a copy of a letter from the President of the California State Employees Association, alleging discriminatory hiring practices in the University of California system. I would appreciate your keeping me informed as to the progress of your investigation.

With best wishes.

Sincerely yours,

EDWARD R. ROYBAL,
Member of Congress.

FREEDOM HOUSE,
New York, N.Y., October 11, 1974.

Representative JAMES G. O'HARA,
Rayburn House Office Building,
Washington, D.C.

DEAR CONGRESSMAN O'HARA: I have been instructed by the Board of Trustees of Freedom House to express our great interest in the revision of guidelines set forth by the Department of Health, Education and Welfare in administering Executive Order Number 11246.

At a meeting of the Board, followed by extensive communication on this subject, the attached statement on Affirmative Action was approved. It reflects Freedom House's effort—a tradition going back 33 years—to recommend a moderate, principled course of action on public policy matters.

The breadth of interests represented by the signators demonstrates, I believe, that the recommendations inherent in this statement are acceptable to a broad segment of Americans concerned with this issue.

We would be pleased to provide additional information at your request.

Very truly yours,

LEONARD R. SUSSMAN,
Executive Director.

FREEDOM HOUSE,
New York, N.Y., October 11, 1974.

Hon. CASPAR WEINBERGER,
Secretary, Department of Health, Education, and Welfare,
Washington, D.C.

DEAR MR. SECRETARY: I have been instructed by the Board of Trustees of Freedom House to express our great interest in the revision of guidelines set forth by the Department of Health, Education and Welfare in administering Executive Order Number 11246.

At a meeting of the Board, followed by extensive communication on this subject, the attached statement on Affirmative Action was approved. It reflects Freedom House's effort—a tradition going back 33 years—to recommend a moderate, principled course of action on public policy matters.

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Very truly yours,

LEONARD R. SUSSMAN,
Executive Director.

Enclosure.

AFFIRMATIVE NATIONAL LEADERSHIP TOWARD EQUAL OPPORTUNITY

Freedom House reaffirms its long-time commitment to "The most important unfinished business on the [domestic] agenda of the American people . . . the final dismantling of all vestiges of civil, social and economic discrimination against any citizen on grounds of race, creed or sex." [1]

Toward this end we strongly endorse the scrupulous enforcement of all Federal, State and local statutory prohibitions against discrimination in public and private employment, remuneration and promotion; in access to equal justice, education, housing, recreation and other rights and privileges of the individual as a citizen, regardless of race, creed, ethnic background or sex; and in any other area where public authority, in conspiracy with private prejudice, may yet be invoked to deny equal freedom and opportunity to any citizen.

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[1] "Toward a New American Consensus," statement of the Board of Trustees of Freedom House, March, 1973.

We recognize, however, that the removal of old barriers and disincentives does not by itself create an equal-opportunity society, or convert a divided society into a whole one, where competition is truly based on merit. Opportunities are not equal for those members of minorities—blacks, Chicanos and other Hispanics, American Indians, and others—who are now disadvantaged competitively because of prior economic and social discrimination, inferior education and training, and the psychological scars of having had to live apart from the mainstream values, customs and even vocabulary of the dominant culture. To a lesser degree, prejudice and similar impediments exist for considerable numbers of whites who are consigned to fringes of the national economy because of their isolation in areas of endemic poverty (residents of rural Appalachia, for example, and regions dependent on dead or dying industries). To some extent, pockets of lingering social prejudice may continue to limit the educational and professional opportunities of still other whites such as Eastern European and Mediterranean minorities, Catholics and Jews. There are, too, the subtler, culturally ingrained prejudices which have for so long denied women in our society equal access to employment and equal pay and advancement.

The human costs of all these stubborn patterns of prejudice vary enormously from one ethnic group to another, and from one region or community to another. The most pervasive damage has no doubt been done to racial minorities, especially blacks and American Indians, whose separate and inferior civil, social and economic status has historically been enforced by law. Affirmative national leadership is needed to accelerate the movement of such individuals into America's mainstream.

If we are in time to become a society of genuine equality in rights, opportunities and privileges it will be because we shall have learned to treat all citizens equally, neither denying nor affording benefits on any basis other than individual merit.

Endeavoring to speed that day, federal administrators have created "affirmative action" programs. Some supporters of these programs acknowledge that various quota systems have been devised to favor minority or female applicants over better qualified white males; other supporters of affirmative action deny this has been done and say opposition to these programs is added proof of the society's resistance to any substantial improvement in racial equality.

We endorse those affirmative-action programs which require commitment to search for motivated individuals for acceptance in higher education and for jobs; individuals who, because of race, ethnic origin, sex, socioeconomic background or related reasons have until now had limited access to these opportunities. As a corollary we endorse grants, tax incentives, training subsidies and comparable devices to encourage remedial education and special training for individuals who require such support to bring their skills up to levels that are competitive with others who have traditionally had easier access to these same opportunities.

We emphatically reject, however, bureaucratic administering of affirmative-action "numerical goals" and "timetables" in the form of inherently arbitrary quotas which dictate statistical compliance by educational institutions, labor unions or private corporations on the mistaken presumption that a society of equality is one in which all definable groups within the society are represented in all educational disciplines, professions, labor organizations, jobs and levels of remuneration in precise proportion to the distribution of those groups within either the whole society or the particular community. Privileging or depriving certain groups in the past contributed to the inequities which the nation now endeavors to repair; we must not perpetuate arrangements which undermine constitutional guarantees of the rights of the individual citizen.

We also deplore any administrative response to affirmative action, whether in higher education or in industry or commerce, which dilutes academic, professional or technical standards in order to retain or certificate women or members of minority groups in order to inflate statistically the institution's apparent compliance with objectives of such programs. Such a course is hazardous to public safety, scholarship and professionalism, as well as demeaning to those who are presumably favored by such concessions.

We recognize that some admissions and qualifications tests are subject to cultural bias, and that those who enforce academic, professional and even technical standards are no more perfectly objective than are the codes they administer. Yet our common national goal must be not the falsified appearance of equality, but actually equality in terms of the best standards which all can accept. Thus it is proper to bend or waive admission standards to, for example, a college or university only if that institution is prepared to insist on whatever remedial, compensatory and supportive tutoring may be required to insure that every student who completes that particular program is graded and certificated by the same uncompromised scholarly standards.

Finally, we suggest that the goal of a single, integrated American society, where achievement and recognition are based exclusively on individual merit and performance, cannot be achieved separately from the structurally more fundamental goal of a social-political economy which is expansive enough to be able to utilize, fully and productively, the cultivable talents and skills of all its citizens. There can be no equality of opportunity in an economy in which the burdens of unemployment are high and unequally distributed. For example, poverty among blacks, the past five years, has increased, reversing a ten-year pattern of progress. The median income gap between black and white families, which steadily narrowed during the 1960's, has begun to widen and there has been a greater rise in unemployment among black than white workers.

For the already disadvantaged, initial access to higher education or a job or union membership is meaningless if funds and facilities are not available to help the needy take full advantage of that opening, or if no meaningful employment beckons at the end of his or her effort. Equality or opportunity can best be fulfilled by expanding the educational, employment and other places to which all citizens may aspire. Racial inequality cannot be exercised by bureaucratic manipulation or the enforcement of anti-bias guidelines alone. There must be a massive commitment to full employment.

Some romanticism and hypocrisy accompanied earlier dreams of American equality, but now on the eve of its 200th birthday, this nation is beginning to come to grips with the full meaning of the ideals expressed in the Declaration of Independence, that "all men are created equal" and that their equal and "unalienable rights" include "life, liberty and the pursuit of happiness." Remarkable but insufficient progress has been made so far toward realizing those ideals—the equal rights Constitutional amendments, the women's suffrage amendment, the *Brown* vs. *Board of Education of Topeka* decision of the Supreme Court, the civil rights legislation of the late 1950's and early 1960's, the painfully disputed but still significant progress toward school integration.

Much, much more remains to be done, and Freedom House vigorously supports an accelerated effort to put our troubled and divided past behind us, and to seek together a truly open and equal society in which the rights of the individual citizen, and his or her personal fulfillment, are recognized by all as basic to this democracy. Such a course, indeed, requires affirmative national leadership.

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Prepared Statement of Barbara R. Bergmann, Member, Committee on American Association of University Professors, and Professor of Economics, University of Maryland

STATEMENT ON EQUAL PENSION BENEFITS FOR MEN AND WOMEN

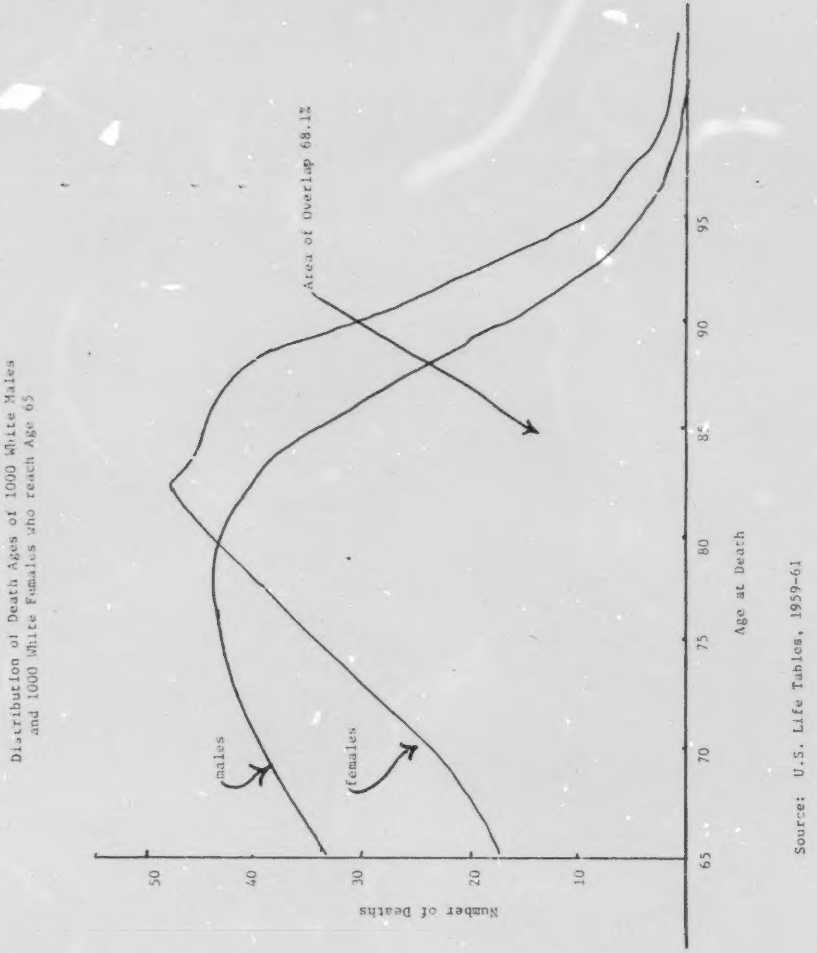
On April 27, 1974 at the Annual Meeting of the American Association of University Professors, an organization predominantly male in membership, the following motion was passed by a vote of 164 to 69:

> That the Sixtieth Annual Meeting of the AAUP direct the Council [of AAUP] promptly to take action to implement the principle of equal monthly retirement benefits for women and men faculty.

I offer these comments in furtherance of the action mandated by that motion.

Some employers, including many universities, are providing greater pension benefits for retired men employees than for retired women employees with equivalent work histories, forcing retired women into a lower standard of living as a result. This practice has been rationalized by reference to the greater costs due to the greater average longevity of women and to "actuarial soundness." We shall take the position here that allowing such practices to continue would be to permit discrimination which the Congress outlawed in Title VII of the Civil Rights Act, in the Equal Pay Act, and Title IX of the Education Amendments of 1972. We will argue that average greater longevity of women does not justify allowing employers to provide a lower standard of living for elderly retired women than elderly retired men, and that "actuarial soundness" can be achieved by other entirely feasible arrangements, arrangements which do not violate our sense of justice and the anti-discrimination laws of our country.

A great principle which has emerged from the anti-discrimination legislation is that it is no longer permissible for an employer to treat any particular woman as if she were "the average woman." The employer is no longer permitted to assume that any particular woman can lift no more than the "average woman" can lift, or assume she will stay on the job as long as the "average woman"s will stay, or assume that once on the job she will produce as much as the "average woman." Grouping people by sex when making decisions as to hiring, promotion, pay, or any other personnel action constitutes unlawful discrimination. An employer who wants to hire someone who will have to lift heavy objects is free to give all persons who apply a lifting test, but that employer is not free under the law to make the hiring decision on the basis of the conformation of the sex organs of the applicants. The fact of life which the law recognizes is that all men, are not, for purposes of work, different from all women; that there is a distribution of talents and propensities among men and another distribution of talents and propensities among women, and that these distributions, although not identical, do overlap. The "average" of the male distribution may be different than the "average" of the female distribution, but there are individuals in one distribution who have equivalent talents and propensities to individuals in the other distribution.



Distribution of Death Ages of 1000 White Males and 1000 White Females who reach Age 65

Source: U.S. Life Tables, 1959-61

FIGURE 1

As it is with talents and propensities, so it is with death ages. While the "average women" dies later than the "average man." there is considerable overlap in the distributions of death ages. If at a single point in time we were to pick at random 1000 men age 65 and 1000 women age 65, and follow them through and observe their death ages, we would find an overlap of 68.1 percent (see Figure 1). This means that we could match up 68 percent of the men with 68 percent of the women as having an identical year of death. This leaves 43 percent of the population, of whom 16 percent are men who die relatively early, unmatched by women's deaths, and of whom 16 percent are women who die relatively late, whose deaths are unmatched by male deaths.

Allowing employers to provide higher pension benefits for men than for women on the grounds of higher cost is to allow employers to assume that all men are like the "average man" and all women are like the "average woman" in terms of death age. It allows employers to arrange things so that the savings in annuity cost for the 16 percent of the population consisting of excess men who die early are entirely monopolized by men, 68 percent of whom are in the overlap group. The extra burdens imposed by the higher annuity costs of 16 percent of the population consisting of excess women who die late are entirely allocated by employers to women, 68 percent of whom are in the overlap group. This is "because" the conformation of the sex organs of men match those of the excess people who die early, and the sex organs of women match those in the excess people who die late. What is at issue is whether it is within the law to continue using the word "because" in this way in this context. We would argue that the law, which forbids using sex as a way of grouping employees, requires the sharing of these benefits and these costs over both sexes. Pension plans which group employees by sex constitute a denial of equal pay for equal work for the majority of the population which is in the overlap group.

The women in the large overlap group with lower pensions are, to say the least, in an unfortunate position. The considerable difference in their living standard is not even compensated for by the dubious utility of a longer life; they do not cost the system any more than men do; their only crime is that they have the same sex organs as the few people in the longer-lived group. This seems a slender reason to condemn them to a considerably meaner living standard than men. Public policy embodied in the anti-discrimination legislation requires that the burden of supporting the 16 percent of the population who are longer lived be shared by the entire population, rather than putting the whole burden on the 34 percent of the population who are like the long-lived group in sex organs but not in longevity.

Some employers, including many universities and colleges, purchase annuities for their employees from insurance companies rather than making pension payments directly. There are many ways these insurance companies might arrange their charges. They might (and for some purposes do) group men and women together, and, after consideration of the characteristics of the group they are insuring, charge an equal amount for each employee and promise to deliver equal monthly pension benefits to each. However, most private insurers will oblige the employer by offering to give the women employees less in terms of monthly benefits. This obliges the employer because it lowers the price the employer has to pay per employee from what it would be if all employees got the same benefit. As long as it is permissible for employers to seek to purchase such a package they will find insurance companies who will be glad to oblige them. The cost is lowered for the employer, and the buck is passed to the insurance company to do the discriminating. The pretext is the greater dollar cost of servicing the "average woman." This pretext is illegitimate for the employer to use in the context of salary, or hiring or promotion. There is no reason to permit its use in the field of pensions or fringe benefits generally.

Does the fact that the pension may be purchased, rather than being provided directly by the employer, alter the employer's obligation under the law not to treat each woman as the "average woman?" If it did, then, by the same logic, employers might contract out the provision of many other fringe benefits to firms who would charge the employer the same per employee regardless of sex, yet provide lower benefits to the woman on the pretext of higher average cost of servicing the women. Even the payment of wages might be contracted out in this way, and differences justified by reference to different "costs." There is no end to the possible ingenuity of employers in maintaining differences in compensation to men and women if employers were permitted to escape the mandate of the anti-discrimination laws by passing the buck. An employer who purchases the provision of fringe benefits from outside organizations which provide unequal benefits by sex is discriminating as much as if he provided unequal benefits directly.

The use of pensions as a discriminatory device is made crystal clear by the practice of many universities and colleges in treating death benefits and pension annuities in an inconsistent manner. In the case of benefits for death before retirement, higher mortality of the "average man" and the higher costs it entails are ignored and men and women are frequently given the same benefit. In figuring death benefits, men are frequently given the "advantage" of averaging out men's and women's mortality. The same university may then turn around and again give men the advantage in retirement benefits by *failing* to average out men's and women's mortality. If the university (and the insurance organization which sells them the policy) were truly interested in costs as a basis for the distribution of fringe benefits, it would not act in this inconsistent manner. We would assert that what the university and the insurance organization which services it are interested in is rather taking advantage of women's weak position in a discriminatory labor market to deny them the full measure of benefits the university gives to men. To lay down guidelines which would countenance this kind of behavior under the anti-discrimination laws would be to make a mockery of those laws.

Let us turn now to the issue of "actuarial soundness." The point we wish to make is that there are numerous ways of achieving "actuarial soundness." Certainly a system is financially sound if the total of discounted costs equal the total of discounted benefits, plus some margin for administration, deviations from past experience, etc. This may be achieved by splitting up the population for rate-making purposes into many small groups or into a few big groups, or keeping the entire population in one group. For example, it would be actuarially sound to split up the population into different rate-paying groups, the assignment of individuals to groups depending on blood pressure, number of cigarettes smoked in previous years, number of relatives dead of cancer, and the like. Or it would be equally sound actuarially for the law to mandate keeping the whole population in one group and charging each the average cost of servicing the entire population.

Which division of the population for insurance purposes, if any, should be encouraged by public policy? There are some forms of group-splitting which encourage desirable behavior and which are reasonably protected by public policy. Charging owners of frame houses more than owners of brick houses for fire insurance encourages the choice of safer building material. Charging accident-prone drivers higher auto insurance premiums encourages safer driving. Charging older people more for term life insurance than younger people encourages young people, whose need for insurance is greater, to purchase adequate amounts. But there is no desirable behavior which is encouraged by splitting up the population by sex and charging more for annuities for women than for men, and therefore no public interest in allowing such a split. On the contrary, splitting the population by sex for pension purposes is a device for allowing employers to discriminate against women, which is against public policy.

We have outlawed discrimination in hiring, promotion and in wages and salaries. To allow the continuation of discrimination in the delivery of fringe benefits through lower pension benefits for women would be to enshrine for no discernible reason the last vestige of a discriminatory system.

LONG ISLAND UNIVERSITY,
Brooklyn, N.Y., October 9, 1974.

Congressman JAMES G. O'HARA,
Chairman of Special Subcommittee on Education,
Washington, D.C.

DEAR CONGRESSMAN O'HARA: This letter is in reference to Executive Order 246 1907 Title Six Civil Rights Act. I wish to add my voice in protest against the affirmative action program now being implemented by HEW. I speak as an academic; that is, as one concerned with the highest possible achievements in both the traditional and newer academic disciplines, and with the opportunity to our students and citizens to attain such achievements. Here there are two points that must be immediately distinguished and explained.

The first is that of opportunity. No one potentially capable of achievement should be denied every recognizable opportunity to strive for this achievement. It is well recognized that there are many problems to be dealt with here. We are concerned with the home and with the social environment, including the quality and the availability of adequate primary and secondary school education. These have their own diagnosis and their own remedies. It is of the greatest importance both for the sake of everyone concerned, both of minority and majority persuasion that these be pursued to the limit. The second point is concerned with post-secondary education itself. The immediate aim of post-secondary education to the degree that it especially impinges upon institutions of higher learning such as universities and advanced technical schools has to do with advanced training and mastery in recognized fields. While the fruits of such education are made use of by the community at large, the standards are set within the institutions and by the disciplines and the professions immediately concerned, as well as by the States. The States, however, while they may set standards of opportunity, may never unilaterally promulgate professional and qualitative standards. Entrance can only be on the basis of merit. Any lesser qualification or shifting of authority which set such standards can serve only to degrade and to debase. It degrades society in its work, it debases the individual both in his estimation of himself and of others. If he is admitted to an institution of higher learning by way of any criterion other than that of merit, he will become aware that he is not what he appears to be and must in the end either fail, lower necessary standards or deny to others their own rightful opportunities. One injustice is never eliminated by another.

The nature of all advanced academic work is such that it always requires specific training, specific abilities and specific masteries. The way to these has been and always must be sex-neutral and color-blind. I may add in conclusion that inferior achievement not only lowers the individual but harms the country, and this in today's world where the country for its own welfare and security must preserve and advance every bit of good and quality that it can. Affirmative action must not and cannot affirm duel standards. The setting of appropriate standards is the work primarily of competent experts. It is the business and duty of the State as it is that of all of us, however, to make sure minority representations are included in the pool of persons to be given all opportunity and to make it possible to be selected, promoted, accepted and chosen, always subject to the limit of appropriate and objective professional standards. It is the duty of the individual and the State to do this to make it possible to secure and establish suitable and appropriate conditions and opportunities for qualification. Proved individual merit must always remain the final qualification.

Sincerely,

LINCOLN REIS.

THE CITY UNIVERSITY OF NEW YORK,
New York, N.Y., October 11, 1794.

Mr. WILLIAM A. CAREY, Esq.
General Counsel, Equal Employment Opportunity Commission,
Washington, D.C.

DEAR MR. CAREY: It has come to my attention that on or about September 16, 1974, the Equal Employment Opportunity Commission ("EEOC") submitted a motion for leave to file a memorandum *amicus curiae* in support of plaintiffs' motion for a class action in *Melani* v. *Board of Higher Education of the City of New York*, 73 Civ. 5434, with the Clerk of the United States District Court for the Southern District of New York. The papers were signed by a staff attorney of the EEOC in Washington, D.C. The *Melani* case is a purported class action brought by and on behalf of the women members of the instructional staff pursuant to 42 U.S.C. Section 2000e, alleging discriminatory employment practices on the basis of sex. To the best of my knowledge, the EEOC has never investigated or attempted to conciliate the claims of the 27 individuals named as plaintiffs in this action.

In the first paragraph of the EEOC's motion papers, it is asserted that the EEOC is requesting "leave to file the annexed brief an as *amicus curiae* in support of the plaintiffs in response to the motion to dismiss filed by the Board of Education of the City of New York." It should be noted that the Board of Higher Education, the defendant in the action in question, has not filed a motion to dismiss and the above statement in the EEOC's papers is one of many unfounded misrepresentations contained therein.

On page 12 of its memorandum of law, the EEOC states "the Board's policy of doing virtually nothing, in the face of the overwhelming evidence of blatant sex discrimination with which it has long been confronted, can be viewed as willfully contributing to the continuation of that practice." Without having investigated the complaints of the named individuals and without having familiarized itself with the facts and circumstances involved in the Federal court action, it is difficult to understand how the EEOC could have reached this conclusion, let alone be prepared to file such a statement with the Court. As a public agency charged with the evenhanded enforcement of the law, the EEOC must be held to a higher standard of responsibility than that evidenced in this case. A serious question is raised as to the ability of the EEOC to process matters relating to City University fairly in the future.

I hope that you will use your good offices to look into this matter so as to correct the situation.

Sincerely,

ROBERT J. KIBBEE, *Chancellor*.

THE CITY UNIVERSITY OF NEW YORK,
New York, N.Y., October 11, 1974.

Mr. JOHN H. POWELL, Jr.
Chairman, Equal Employment Opportunity Commission, Washington, D.C.

DEAR MR. POWELL: It has come to my attention that on or about September 16, 1974, the Equal Employment Opportunity Commission ("EEOC") submitted a motion for leave to file a memorandum *amicus curiae* in support of plaintiffs' motion for a class action in *Melani* v. *Board of Higher Education of the City of New York*, 73 Civ. 5434, with the Clerk of the United States District Court for the Southern District of New York. The papers were signed by a staff attorney of the EEOC in Washington, D.C. The *Melani* case is a purported class action brought by and on behalf of the women members of the instructional staff pursuant to 42 U.S.C. Section 2000e, alleging discriminatory employment practices on the basis of sex. To the best of my knowledge, the EEOC has never investigated or attempted to conciliate the claims of the 27 individuals named as plaintiffs in this action.

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I hope that you will use your good offices to look into this matter so as to correct the situation.

Sincerely,

ROBERT J. KIBBEE, *Chancellor.*

MICHIGAN STATE UNIVERSITY FACULTY ASSOCIATES,
Lansing, Mich., October 11, 1974.

Hon. JAMES G. O'HARA,
Washington, D.C.

DEAR CONGRESSMAN O'HARA: I am writing to you to express my strong support of previous congressional efforts to strengthen affirmative action type programs in our various colleges and universities, as reflected, for example, in the language of Title IX of the Higher Education Amendments of 1972.

It has been brought to my attention, however, that the proposed Holt Amendment to HR 16900, the supplemental higher education appropriations measure now before the Special Subcommittee on Higher Education and Civil Rights Obligation, if adopted, would have the effect of seriously weakening such gains in admissions and employment of women and minorities as have been made under present law.

For this reason, therefore, I wish to go on record in firm opposition to passage of this Amendment.

During the past year I had the honor to serve as Chairperson of the Higher Education Subcommittee of the Michigan Democratic Party's 1974 Platform Policies Study Committee. As you no doubt know, in adopting the several recommendations offered by the Subcommittee, the Michigan Democratic Party evidenced a commitment to and strong support of affirmative action type programs and policies in higher education.

Consequently, I urge you to uphold this action of the Party and exert all possible force and influence to defeat the Holt Amendment and any other efforts to negate the general improvements made by both women and minorities under present statute.

Sincerely,

GLADYS M. BECKWITH, *President.*

AMERICAN ECONOMIC ASSOCIATION,
COMMITTEE ON THE STATUS OF WOMEN IN THE ECONOMICS PROFESSION,
SOUTHERN METHODIST UNIVERSITY, *October 14, 1974.*

Hon. JAMES G. O'HARA, *Chairman,*
Special Subcommittee on Education,
Washington, D.C.

DEAR CONGRESSMAN O'HARA: On behalf of the American Economics Association Committee on the Status of Women in the Economics Profession, I strongly encourage that the Affirmative Action provisions of the Higher Education Act be maintained and strengthened.

Our Committie was organized in response to a unanimously-passed resolution of the American Economics Association and is now a Standing Committee. Our purpose is to devise programs and procedures to increase the opportunities for women economists and bring them into the system of management. Through research and discussion, we have become increasingly aware of the inequality of opportunity for women economists at Universities in particular. (See attached 1972 press release.)

We see affirmative action programs at universities as an integral part of the process of increasing the supply of women economists and improving the quality of education for women on university campuses.

Enclosed is a copy of our stated guidelines to obviate role prejudice and sex discrimination which were published in the attached article from the December. 1973 *American Economic Review*. Many of these guidelines parallel those of the Federal Government and Revised Order 4.

I will appreciate this letter being made a part of the Record of the Hearing on this matter.

Sincerely,

BARBARA B. REAGAN,
Chairperson and Professor of Economics, Southern Methodist University.

Enclosures.

COMBATTING ROLE PREJUDICE AND SEX DISCRIMINATION—FINDINGS OF THE AMERICAN ECONOMICS ASSOCIATION COMMITTEE ON THE STATUS OF WOMEN IN THE ECONOMICS PROFESSION[*]

I. ROLE PREJUDICE AS AN ECONOMIC PROBLEM[1]

It is less well recognized that discrimination among existing members of the labor market creates a general economic loss. Where certain people are excluded from jobs for reasons which have nothing to do with the performance of the jobs themselves, the loss to consumers plus the loss to those who are excluded is greater than any gain to those who are favored. There is now copious literature on this subject.

It is less well recognized that discrimination among existing members of the labor force is only a special case of a much larger process of role learning and role acceptance, which begins almost from the moment of birth. It is not merely that differences in skills are learned, as in Adam Smith's famous passage about the porter and the philosopher,[2] but images of possible roles on the part of both the role occupants and the role demanders are likewise learned in the long process of socialization. The existing division of labor at any one time, therefore, may reflect "role prejudice"—that is, a learning process by which certain irrelevant biological or genetic characteristics of individuals are associated with certain roles. Some genetic distinctions are significant for role performance, but many are not and yet are widely believed to be significant. These beliefs are products of a false social learning process, which can be a source of economic loss even larger than false discrimination within an existing labor force. Discrimination in an existing labor force indeed emerges as one consequence of the much larger process of the development of role prejudice.

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[*] This report is published pursuant to a resolution adopted by the members at the Annual Meeting of the American Economic Association, December 28, 1971. In providing for establishment of the Committee on the Status of Women in the Economics Profession, the resolution specified that "Its general findings, conclusions, and recommendations shall be published by the American Economic Association upon the Committee's request" (*Amer. Econ. Rev. Proc.*, May 1972, p. 474). This report has not been considered or approved by either the Executive Committee or the membership.

[1] Part I was drafted for the Committee by Kenneth E. Boulding, professor of economics, University of Colorado.

[2] "The difference between the most dissimilar characters, between a philosopher and a common street porter, for example, seems to arise not so much from nature, as from habit, custom, and education" (p. 15) Adam Smith.

Role prejudice tends to develop when there are genetic differences in the human population which are visible but are not necessarily significant for role performance. We see this clearly by considering those genetic differences which are undetectable except by refined methods and therefore are socially invisible. Some of the blood types are perhaps an example. In ordinary life we are quite unaware of a person's blood type. Consequently, it can be safely assumed that there is no role prejudice against blood types of different kinds, unless these happen to be associated with other characteristics which are socially visible. For the major types, this association is fairly minimal. Consequently, we would be very surprised to find a distribution of blood types in any occupational group or income group of any size which is markedly different from the distribution of blood types in the population as a whole.

For any particular distribution of genetic characteristics, it is clear that we can postulate "no-prejudice proportions" in all the different occupations and structures of society. In the case of the socially invisible and irrelevant characteristics mentioned above, the no-prejudice proportions, subject to random variation, in any group of society would be expected to be the same as the proportion of the characteristics in the society as a whole. If there were any case—and I must confess I have not been able to think of one—of a genetic characteristic which is relevant to role performance but which is socially invisible and not in the information system, then the existing structure of proportions of the characteristics in different occupations might not be the same as the proportions in society as a whole, and those occupations which this invisible characteristic favored would have a larger proportion than in the society as a whole, but this would still constitute a no-prejudice distribution. Paradoxically enough, without knowledge there can be no prejudice; without some knowledge, there can be no false knowledge.

Role prejudice may easily arise where there are highly visible and observable genetic characteristics, such as sex, race, height, size, color, and so on. Historically these have frequently been perceived as having some relevance to performance in different roles. But this relevance tends to be exaggerated, because a rational tendency to economize information can easily turn into an irrational process of stereotyping and false knowledge.

The genetic division of the human race into men and women qualifies in most societies as the major form both of discrimination in the existing labor force and of role prejudice. This is not surprising, as the genetic difference between the sexes is far greater than it is among the races in terms of the structure of information of the genetic code. There is one role indeed—that of bearing children—in which there is 100 percent genetic specialization between the sexes, in the sense that no men will be found in the childbearing population. The very social visibility of the distinction between the sexes, however, makes it a prime candidate for role prejudice, which creates a huge reservoir of false knowledge, false education, and false learning processes. All are costly to society in exactly the same sense that an unknown and unutilized natural resource is costly in the sense of opportunity foregone. We can, oddly enough, think of role prejudice as a large natural resource which can be mined by the development of true knowledge and better learning processes to the benefit of the whole society.

Where the sex distinction is completely irrelevant to role performance, role prejudice can be said to exist wherever there are substantial deviations from the 50 percent rule—that is, 50 percent of each sex in the occupation—this being assumed to be the proportion of the sexes in the total society. The difficult case, of course, is where there is some genetic foundation for partial role differentiation. It is the cases between the 50 percent and 100 percent that are difficult, and in these cases there is often no information system—at the moment at any rate—which can inform us as to the exact proportion of the sexes in different occupations which constitutes zero role prejudice. Fortunately, however, we do not have to know where the exact position of the ideal proportion is if the existing proportion clearly represents a gross disproportion. In order to set up a social policy we do not have to know exactly where the ideal lies. We merely have to identify those cases in which the deviation from the ideal is so clear and striking that we can find wide agreement as to the desirable direction of change. At the bottom of the mountain, one knows which way is up, even though one may not know exactly where the top of the mountain lies. Maximizing is an illusion, but betterment is not.

It is the contention of the American Economic Association Committee on the Status of Women in the Economics Profession (the Committee) that there is gross disproportionality in the proportion of women to men in the economics profession, and especially in university teaching, as revealed in the data which have been collected. Fortunately, we do not have to argue whether the genetic differences between women and men would result in a non-prejudice proportion of women in economics of 40 percent or 50 percent or 60 percent when the actual proportion is less than 10 percent. This gross disproportionality, of course, arises from sources in the long history of the human race, most of which are outside the economics profession. This, however, does not excuse the economics profession from setting in motion processes which will raise its proportion of women. We are a sector of the knowledge industry and a group of people concerned with eliminating sources of unnecessary economic loss. Only if we are successful beyond our wildest expectations, considering the vastness of the mine of ignorance and false learning, will it be necessary to raise the question as to whether we have gone too far.

The critical question, therefore, is that of the "betterment production function," as it might be called. The social indicator of betterment is in this case clearly an increase in the proportion of women in the profession, especially in those branches where the proportion is least. If the rate of change of this proportion is regarded as the product, the question is: What are the inputs which produce this output, and particularly, what are those inputs that can be most easily expanded and that have the highest marginal productivity? We might also look at those inputs which have a high negative marginal productivity and which can be contracted. Four broad classes of inputs may be named: Information, Persuasion, Rewards, and Punishments.

1. Information

Information properly organized changes the images of the world of people who receive it and consequently changes their behavior. There are two aspects of the information process—theoretical structures and information about fact. Better theoretical structures are an essential ingredient in the advancement of knowledge, and in this particular case it is important that the theory of role prejudice, as outlined above, should be widely recognized as a legitimate extension of economic and social theory. One of the greatest enemies of the fact of prejudice is the spread of the idea of prejudice. Once it is recognized as a theoretical construct, the facts of perverse social learning which previously have been invisible become glaringly visible. The improvement and elaboration in detail of the theory of role prejudice is still an important task for the future.

Coupled with a wider appreciation of the theory, the development of statistical information, case studies, and a continuing series of social indicators can serve as a constant criticism of what is false in existing theories of the world and a reinforcement of what is true. It is tempting to think of every advance in knowledge as the result of a combination of new theoretical insights with new information collection and processing procedures. In social systems, however, knowledge does not merely reflect the world—it changes it. And in this case particularly, the more we know about role prejudice, the less there is likely to be. Getting lost is one way to improve one's knowledge of the terrain, but studying a map is a better way, and diminishes the amount of getting lost.

2. Persuasion

The mere existence of knowledge and information is not always enough to insure its spread. One of the major sources of ignorance is inattention, and to insure the spread of new knowledge it is often necessary to call it to the attention of people in ways which are dramatic and persuasive. The fact that persuasion can be abused to propagate false knowledge does not excuse us from its proper use in the propagation of truth. Persuasion plays a particularly important role in the change of values, and without getting into the ancient controversy about the truth of values one has to recognize that change in our image of the world inevitably changes our values about it. As scientists, we have to guard against the information filter which our values create. We cannot pretend, however, that information is value free. Change in knowledge and change in values are joint products of a single process.

A problem of particular difficulty is that of irrelevant and unconscious sources and attitudes, even in the academic and intellectual community, which is supposed to be on its guard against irrationality. The relations between the sexes are often characterized by high levels of emotion, and hence are particularly subject to the distortions which arise from unconscious or irrelevant sources. It is one of the functions of ethical persuasion to raise our awareness and to set up defenses against attitudes and prejudices which arise from this source.

3. Rewards

It is widely recognized in the learning process that positive and negative payoffs are of great importance. Every economist is familiar with the proposition that any human activity which is rewarded above some neutral level will expand and those rewarded below this level will contract. The structure of knowledge and values in the human mind, likewise, grows towards its own more positive payoffs and away from the less positive and negative payoffs. It is by constructing a reward structure that society is most likely to achieve change. These rewards may be either internal or external. Our own applause, as Paul Samuelson suggested, may indeed be the greatest reward of all. No economist, however, can deny the significance of external reward, whether the applause of others or those more tangible things, such as subsidies, tax remissions, and price changes. Curiously enough, although psychologists seem to agree that rewards are more successful than punishments in the learning process, it seems harder to legitimate a reward structure. A suggestion, for instance, that dues paid by members of the American Economic Association should be scaled down if the organization or department to which they belong had a high proportion of women might be hard to legitimate, even though it might be effective. Nevertheless, the search for reward structures should go on.

4. Sanctions and Punishments

Punishments always seem to have been easier to legitimate than rewards, perhaps because of a belief that they are cheaper, in spite of much evidence that they do not contribute as much to learning. Nevertheless, there is one extremely good reason for the use of sanctions. In the case of public goods and public bads it is well recognized by economists that legitimated threat of some kind is essential if we are to avoid some "tragedy of the commons." Private reward structures, such as the market and the price-profit mechanism, are particularly well adapted to the provision of private goods, but are poorly adopted to public goods, where without some sanctions in the collection of taxes public goods would simply not be provided in adequate amount. Private reward systems are also poorly adapted to dealing with public bads such as pollution, of which role prejudice is a prime example, in the sense that everybody is somewhat diminished by it. The "freeloading principle" applies here, for if there are no sanctions it will pay the individual not to participate in a collective sacrifice required for the increase of a public good or the diminution of a public bad. To rely on purely private rewards and exhortations for the diminution of role prejudice is rather like trying to finance a government with purely voluntary contributions.

To say that sanctions are necessary does not mean to deny that there are acute problems both in the quantity and the quality of sanctions, and that bad sanctions might be worse than no sanctions. This, however, does not excuse us from the search for good sanctions, which must not be larger than necessary, must be credible, legitimate, precise, equitable, and so on. Sanctions should fall on violators and not on the innocent; they should be appropriate—that is, any punishment should fit the crime—and it should be recognized that, like all deterrents, punishments are most successful when they are not carried out. Economists will recognize, however, that no system of sanctions can be perfect and that there has to be some kind of tradeoff between imperfection in the system of sanctions which will inevitably lead to some failures of both justice and of deterrence, and the failure of the provision of public goods or the elimination of public bads which too weak a system of sanctions might involve.

The power of the American Economic Association to invoke sanctions is small indeed, and it could be argued that, apart from publicity—which under some circumstances is itself a sanction—a professional association should not legitimately engage even in linguistic sanctions like censure. Nevertheless, it is only realistic to be aware of the fact that sanctions of government can be invoked by groups in the society in the furtherance of what they believe to be general betterment. Even a profession is not exempt from participating in the society of which it is a part. It is important that vigilance be maintained against both the abuses of sanctions and their undue neglect, even though the primary emphasis of the intellectual community is properly on information, persuasion, and rewards.

The Committee is aware that it has a special task which is part of a much larger social process. Role prejudice in particular is by no means confined to women. Men also suffer from role prejudice, and it accounts for other kinds of discrimination than one based solely on sex. Nevertheless, as economists we believe in the division of labor and we believe that the pursuit of our particular task is to complement rather than compete with the labors of others in the long process of social betterment. The guidelines that we are proposing, while they are particularly applicable to our special case, are all simply examples of the fundamental general principle—that where there is clearly not enough, the simplest and most necessary guideline is "more." In what follows we spell out in detail this essential principle.

II. GUIDELINES TO OBVIATE ROLE PREJUDICE AND SEX DISCRIMINATION [3]

The following guidelines are written for members of the American Economic Association who, as faculty members in departments of economics in various colleges and universities, as economists in business, industry, or government, wish to remove, mitigate, or prevent discrimination against women economists. These suggestions have been prepared by the Committee to illustrate steps that can be taken by those of good will who seek to comply with the spirit as well as the letter of laws proscribing employment discrimination. Over time, other suggestions may be appropriate; and the guidelines may need amendment or modification to reflect changes in the conditions of employment faced by women economists.

Not all institutions will wish to implement all the recommendations given here. Nevertheless, thoughtful consideration of whether a particular suggestion has merit for a given institution may reveal needs heretofore unrecognized and may be the basis for setting in motion policies that will eliminate sources of discrimination and unnecessary economic loss.

Because many members of the American Economic Association will wish to review again the resolutions relating to elimination of sex discrimination among economists that were passed by the Association at the annual meeting in December 1971 at New Orleans, the resolutions are repeated here.[4] They provide the framework for the Committee's guidelines for positive policies and remedial action to obviate role-prejudice directed against women economists.

I. Resolved that the American Economic Association declares that economics is not exclusively a man's field. The Association herewith adopts a positive program to eliminate sex discrimination among economists, whether employed in universities and colleges, industry, finance, publishing, or other endeavors. The President shall make known, by all available means, the Association's adoption of the following principles:

> (a) To redress the present low representation of women in the economics profession, the Association shall actively encourage the study of economics by women at all levels of education.

Low representation of women in the economics profession occur in part because women students do not have appropriate role models at the university nor in visible positions in other places of employment. Women also lack accurate information and encouragement throughout the entire educational process. The role models needed are professional women economists with whom young women can identify and from whom young women can obtain information and counseling. It is also important that young men in the classroom recognize, as a matter of course, that professional women play a vital role in economics as well as other fields, and that professional competence among adults should not be sex-related. Throughout their entire training, children, both boys and girls, should have opportunities to appreciate the economic contribution of women to our society, and the economic circumstances of discrimination against women. By the time young women have completed high school, they should know that job planning is essential for everyone and should understand that economics is a perfectly appropriate field of study for women.

There are numerous things that economists can do to encourage the changes needed to overcome previous false social learning.

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[3] Part II was written by Barbara B. Reagan, professor of economics, Southern Methodist University, on behalf of the Committee. These guidelines reflect the input and discussion of all Committee members as well as public discussion in Toronto at the December 1972 meetings of the American Economic Association.

[4] The resolutions are contained in the Appendix to the minutes of the annual meeting, pp. 473–74.

(1) *Educational Institutions.*—The value of women faculty role models at the college or university level cannot be stressed too much. A substantial amount of talent that would otherwise flow into this profession is lost because, without the presence of women faculty, undergraduate women erroneously assume that economics is a profession for men only. An exclusively male department also lacks the abilities to correct these impressions, not least because men economists themselves overlook the difficulties subsumed under the cliché "economics is a man's field." A woman economist can provide encouragement and proof that it is possible not only to survive but to accomplish, even as a member of a tiny minority group. The positive role that women faculty can play in enhancing the education of both women and men should be considered in making appointment decisions.[5]

Departments should also use other methods of making women more visible—inviting guest lecturers (for example, women from government, industry, management, finance, public action programs, research), hiring women visiting professors, featuring women in career opportunity conferences, using women as special lecturers, recommending women experts when students want someone with whom to consult, and including women economists in informal gatherings of economists. Again, these are ways of doing away with role prejudice.

Departments should facilitate communication between senior women economics majors and freshmen women so that the latter may be appropriately informed and encouraged to study economics. Whenever possible, communication between women graduate economics students and women undergraduate majors should be similarly facilitated.

(2) *Government.*—Part of the lack of role models for potential women economists has arisen because the government at all levels has put little effort into appointing women economists to highly visible positions. Economists should work to increase the number of women economists in high ranking positions in the federal and state governments to serve as examples and encouragement to women facing career decisions.

The federal government, as part of the Federal Women's Program, should require that women be given equal opportunity in government-financed graduate student programs and should encourage women in such programs to study economics.

(3) *Private Industry.*—Private industry should search for women economists in order to place them in both research and administrative positions. The reciprocal employment relationship between industries and universities (and/or consulting arrangements) should be encouraged for women economists as it has been for men.

Training of mid-career women economists already employed in the private sector should be encouraged. Both full- and part-time training and educational opportunities should be made available to women economists, as to men, to enable them to acquire new skills and improve their status.

(*Resolution Ib*) No academic institution or department shall discriminate against women in admission to studies in economics or in the form or amount of financial aid. Every economics department shall actively encourage qualified women graduate students without regard to age, marital or family status, and shall actively promote their subsequent employment.

(1) *Admissions.*—The admissions process should be checked by economics departments to ensure that there is no discrimination on the basis of sex, age, marital, or family status. In efforts to eliminate or preclude such discrimination, whenever possible, women faculty or graduate students should participate in the admissions process. When prospective candidates for admission are interviewed, women applicants should not be asked questions about marital or family status (actual or prospective) that are not asked of men.

(2) *Recruitment.*—Because the applicant pool is often low, departments of economics should actively recruit women into their programs at both the graduate and undergraduate levels. Women graduates of the department form a good supplement to such recruiting efforts. To give evidence of career opportunities, departments might keep a file of letters from former economics majors on their experiences with further academic training and/or the labor market.

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[5] Elizabeth Tidball has established a correlation between the number of women faculty at a school and the number of women students who subsequently attain recognition for their achievements, using a random selection of listings in *Who's Who of American Women* for a three-decade period. The statistically significant positive correlation coefficient was +0.953 with $P<0.005$. By contrast, "the number of men faculty neither enhanced nor detracted from the output of women achievers."

Whenever possible, women graduates from the department should be invited back to give lectures. When recruiting graduate students, particular attention should be paid to institutions from which large numbers of qualified women may be recruited; such places may include state and city colleges and women's colleges. Letters to colleagues teaching undergraduates should publicize the department's interest in women applicants. When considering applications, women with undergraduate preparations that are closely related to economics should also be considered.

(3) *Financial Aid.*—When faculty members or department chairmen are making decisions with respect to the size of grants or fellowship aid for various graduate students, marital status should have no relevance. In particular, married women should be treated in the same way as married men. Under no circumstances should it be assumed that a married woman's needs are less than a man's without due consideration of the financial facts involved.[6]

Information on sources of fellowships and grants should be distributed so that all students, both men and women, receive the information on an equal basis. When departments are asked to make nominations for financial aid, qualified women should be included.

Federal scholarship and loan programs should actively seek out women graduate students as potential recipients and should inform all departments of their interest in women applicants.

(4) *Encouragement in the Program.* Those departments that at present have no women faculty members should make special efforts to schedule guest lectures by women economists so that graduate students will be more aware of the active participation of women in the field. Faculty should include publications of women economists on reading lists, particularly in basic courses.

(5) *Placement.*[7] In writing recommendations for prospective employment, economists should not include comments on physical appearance; such comments are not relevant in evaluation of a candidate's qualifications for employment. In particular, care should be taken that comments on physical appearance are not used differentially in evaluating female and male applicants. References to so-called "feminine" or "masculine" traits should be omitted. Marital status, number of children and other private facts of a candidate's life should not be assumed to affect a person's ability to meet professional obligations. Comments regarding political views, particularly the Woman's Liberation Movement, are appropriate only insofar as they are relevant to the applicant's field of research or scholarship.

Care should be taken not to use traditional sex-related stereotypes—downgrading women for conforming to the "passive-accepting" model, or condemning women as unduly "aggressive" for competing to a degree well within the bounds of normal behavior set by their male colleagues for themselves. The latter type of participation may seem unduly aggressive only when measured against a passive, accepting stereotype of the feminine role, but not when measured against professional standards.[8]

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[6] A relevant court case in 1971 involved John and Mary:

". . . high school sweethearts who married shortly after graduation. Mary went to work for a bank in a small city in Northern Indiana. John worked as a salesman in the same city. Mary prospered, was promoted, and eventually became a cashier. John did less well. Growing restless, he enrolled in college, using Mary's earnings as the basis of his support. Eventually he graduated with a Master of Science degree in Science Education and entered the teaching profession. In college, and after graduation, reportedly because of college experiences, John claims that he grew intellectually and socially while his wife stagnated. Finding Jane, a fellow teacher, more compatible, he fell in love and pursued an affair with her. Mary sued for divorce and claimed as part of her settlement the present value of the college education of her 41 year old male Caucasian husband, the value of which was computed at $49,653. In the face of this suit John saw Mary in a new light. They were reconciled."

(This information was provided to the Committee by David R. Witmer, Assistant Chancellor, University of Wisconsin-La Crosse.)

[7] Although these comments are written with respect to recommendations for and placement of women graduate students, they apply equally to placement of women economists in subsequent stages of their careers.

[8] "Women candidates, to win entire approval, have to be both chic and brilliant, and so the woman who is plain-looking, a spinster-scholar type, evokes a negative response for she is not a complete woman, she lacks sociability and will not flatter the egos of male department members. Dossier after dossier divulges irrelevant, negative commentary: '—is a large broad-boned, somewhat awkward young woman who must be close to six feet in height,' 'her mousiness belies a sharp mind'; '—is . . . tall and proportioned like an Olympic swimmer'; 'she is a steady woman who will never marry.' And within a single paragraph from a male at an elite graduate school; she has a 'comfortably upholstered' person and personality, she performed 'athletically' in a particular course, she would be the 'wheelhorse' of any committee on which she served. And of an older woman, 'if she has any faults, they are those that usually accompany the ambitious woman of her age.'

Employers should actively recruit women for the economics staff so as to increase diversity—sex as well as race, field or specialty, and school of training. Evaluation of employees' performance and potential for advancement should be based on the same criteria for women as for men. Assumptions about availability for employment as economists should not be made on the grounds of marital status, other employment, home obligations, or the like.[9] Women faculty members should share equally in administrative and committee appointments. Temporary positions or consultantships should not be used for women as a subterfuge to avoid naming them to permanent positions. Titles such as lecturer or adjunct should not be used to deny tenure track positions. Similarly, in government and industry separate job classifications should not be used as a subterfuge masking discrimination against qualified women economists.

All women should have access to management and executive training courses. In-service training opportunities, "acting" administrative portions, and other forms of "grooming" for advancement should be made available for women as well as for men. Informal benefits, as for example, travel reimbursement opportunities should be equitably apportioned. Government agencies should submit evidence to the Civil Service Commission that women are being included in these activities. Follow-up evaluations of training courses should include information as to whether women participants in such training courses move ahead in their jobs as rapidly as men.

Members of the American Economic Association should review written and unwritten membership criteria of local or regional economics associations to ensure that women economists enjoy equal access and equal opportunity for participation. Members of the Association can be effective in protesting the exclusion of women from membership in any local economic association or any *other professional organization* to which they belong that is not willing to invite women economists to be members. Membership in such organizations is an important part of the informal professional network, and denying women access to any part of the network is sex discrimination.[10]

Positive efforts to regularly include women economists in the informal professional network should be conscientiously encouraged by all. The inclusion of women in this network should be considered a matter of routine operating procedures.[11]

Resolution Id) Salaries, fringe benefits, and facilities and resources for research for women shall be the same as those for men in the same position and rank.

All employers should regularly compare the salary, training, fringe benefits, and other terms and conditions of employment for women economists with those for male economists with comparable education and experience. Where women have not received treatment similar to that given men, corrective action should be taken immediately. Remedies may include giving the woman assistance with "upgrading" herself through leaves or other devices, changing rank or position, increasing base pay and granting back pay. (That back pay should be accompanied with interest may seem an ideal to some professionals, but scarcely to economists.) Rectifying a previous inequity can in no way be construed as reverse

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In other words, the rare comment on a male's appearance is simply a footnote, the frequent comment on a female's, a thesis statement." . . . "Our experience of women's dossiers confirms that a letter writer, often unselfconsciously, diminishes a female candidate's intellectual power by stereotyping her as too feminine, too pretty. These comments, a composite from a type candidate's dossier, make a damning package: sweet, but not saccharine, quiet, unaggressive, shy, but very pretty, a decoration to the classroom." [M.L.A. Newsletter, p. 3]

[9] ". . . the employment form of a major oil company included the question, 'can this employee relocate?' On examining the completed forms of 300 women employees, the company found the appropriate box marked 'no' in every case. On probing further, they discovered that no one had actually asked the women whether they would relocate; it had simply been assumed that they would not." [Boyle: p. 94]

[10] In 1921 a woman graduate student at Stanford joined her professional association. When she married, she kept her membership; her husband was not then a member. Some years after that it seemed sensible for him to belong to the association and they made it a "family" membership, which they continued through 1972. In December they resigned their memberships. After some weeks the husband received a letter from the Secretary's office expressing regret for his resignation after having been a member for so many years and offering him a membership without publications. No such letter was sent to his wife although she had been a member for over half the century. (This information was presented to the Committee by Lucy Winsor Killough, a retired member of the Wellesley College faculty.)

[11] For many years, the Yale Economics Department conducted official business at a male-only club.

discrimination. Indeed, the aim of the action normally has to be to change the initial distribution of emoluments in favor of the party subjected to discrimination. By definition, at least the relative shares of all other groups must decline. There is no other way to correct unfair shares. What happens to absolute shares obviously depends on what's happening to the size of the pie.

After corrective action is taken, care must be exercised that equal treatment is maintained in the future. It is very easy to recognize that an equity raise has been given women, and then during the following years to slip into old patterns of thought so that merit raises gravitate to men in the department, thus reestablishing old patterns.

(1) *Salaries.* Employers should review and evaluate salaries paid to women even though no formal complaint or charge has been filed. Conferences with the women economists involved may prove helpful in diagnosing situations in which women feel that their salary is inappropriate. Lower geographic mobility among women should not be assumed or used as a rationalization for lower salary. Employers should not base the pay of a new employee solely on the basis of previous pay. The federal government should not continue to base GS ratings for entering academic economists primarily on the basis of total salaries before entering government service. Rather, the GS rating should be based upon objective criteria relevant to the job description. Otherwise, discrimination against women economists entering government service will simply compound past discrimination resulting from denial of equal access to outside consulting and related activities.

(2) *Fringe Benefits.* Employers should review all fringe benefits for possible sex discrimination and ways to facilitate employment of women. Examples include health and life insurance, pensioning, tuition grants for children, mortgage or other loans at low interest rates, subsidized housing, child care facilities on campus and at conferences, recreational facilities, and various sorts of leave. Women should not be discriminated against because of an actual or potential maternity leave. Men and women economists should be offered the same facilities and resources for research, including assistants, offices, and equipment.

Resolution Ic) There shall be no distinction between men and women as to what is considered to constitute full-time employment.

Both part-time and full-time positions should be described completely with respect to the obligations of the persons appointed. For example, many academic appointments consist of a combination of duties: teaching, consulting, advising students, departmental governance, recruiting supervising personnel, conducting research, representing the department, and so on. If one or more of such activities is optional, performance in the optional activity should not carry any weight in determining promotion or compensation. Those duties that are a necessary part of the job should be clearly stated and a minimum time should be specified.

Some women may wish part-time appointments, particularly for the few years while their children are small. Others may wish full-time appointments. Preference of individuals should be considered. Institutions should not base their hiring policy on the myth that most working women are interested in part-time work primarily to earn pin-money. On the other hand, institutions should increase the part-time options for those, men or women, who are interested. (See Resolution III.)

Decisions regarding appointment, promotion, salary, or tenure should be unaffected by the presence of a close relative in the same or related firm, department, or government agency. However, employees should neither initiate nor participate in institutional decisions involving a direct benefit (initial appointment, retention, promotion, salary, leave of absence, etc.) to members of their immediate families.

Much of the past discrimination against women has been related to their marital status as well as their sex.[13] Economists employed by a college or university,

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[12] "The invisibility of the female job candidate emerges nowhere more unselfconsciously than in the dossiers of young, married graduate students. The dossiers of undeniably brilliant, serious, promising women, filled with letters from eminent advisers, very frequently and so the less valuable member of the couple. Indeed, one often wonders for whom the compare the woman with her husband, stereotype her as the teacher not the scholar-thinker, letter was written. One woman's letter contains this sentence: 'Mrs. —s husband—is an excellent scholar, rather more disciplined and professional. . . . Mrs. — complements him with her more imaginative and enthusiastic . . . literary rather than historical perspective.' . . . Or another begins: '—and her very able husband' and continues 'like her husband, she' . . . " Such letters affect the reader by reinforcing his notion that a woman is an appendage, her career second to her husband's; her talents shine in the light of his. [M.L.A. Newsletter, p. 3]

a firm, or a government agency with practices in conflict with those suggested here should campaign actively to have the rules or practices changed.

Without compromising standards in any way, special efforts should be made to facilitate the employment of couples who apply to institutions as teams. Such employment should be in keeping with the individual talents of the team members so that neither part will be specially burdened.

III.

Resolved that the American Economic Association shall encourage flexibility in providing opportunities for education and employment on a part-time basis both for men and women.

Care must be taken that "part-time" is not another job title that is used as a convenient way to deny job opportunities for women who wish to work, or in fact do work full time.

Resolution If) Employment may not be refused to any qualified economist on the grounds of family relationship to another employee.

Departments of economics should review all educational requirements that include a time specification. It is expected that a conscientious reexamination of existing procedures will lead to considerably more flexible arrangements at many academic institutions.

The question of part-time employment is a matter of department or institutional policy, but the question of whether the policy applies equally to men and women is not. It is imperative that in considering whether to allow (or encourage) part-time appoinments, only the impact on work activities be considered, and not the reasons why people wish part-time appointments. If policies on part-time appointments enable an employer to secure an expert who will teach one course or do one project although engaged elsewhere in other paid employment, then part-time employment should also be available to women—or men—engaged in work ordinarily considered a nonmarket transaction. The person who carries a portion of a conventional full-time load should have assigned duties and base compensation (full-time equivalent) comparable to those of full-time appointments, and duties, salaries and fringe benefits should be prorated. Academic departments should particularly look at such fringe benefits as research assistants and travel grants which tend to increase professional competence.

The part-time person who teaches one course or does one project may be hired on a consulting basis for a flat fee. In such cases no fringe benefits need be available if the fee is adjusted accordingly. Economists at academic institutions can encourage and assist nonacademic organizations to increase part-time opportunities even if department policy has ruled against this for faculty positions. Credentials, skills, and professional creativity required of part-time personnel should be at least equivalent to the levels required of full-time employees so as to justify the equivalent base pay. Part-time appointments should not be a way to get cheap, low quality service. Nor should they be used as means of pseudo-compliance with Affirmative Action Plans.

The Committee is willing to discuss any of the above guidelines in the context of particular situations or additional suggestions of ways to improve current employment conditions. Members of the American Economic Association should report to the Committee on the Status of Women in the Economics Profession any cases that appear to involve sex discrimination directed against women economists. Members are reminded that the Wage and Hour Division of the U.S. Department of Labor as a matter of course receives complaints of wage or salary discrimination on a confidential basis, with the possibilities of back pay being awarded. Furthermore, the Equal Employment Opportunity Commission acts on complaints of unequal advancement opportunities for women.

III. SUMMARY OF ACTION RESPONSIBILITIES

To comply with the resolutions adopted by the American Economic Association on December 28, 1971, a summary of action responsibilities, italicized below, has been prepared. Their central thrust should command virtually unanimous support: to eliminate extraneous considerations such as an individual's sex from any judgment of ability, performance, or potential.

I.

Resolved that the American Economic Association declares that economics is not exclusively a man's field. The Association herewith adopts a positive program to eliminate sex discrimination among economists, whether employed in universities and colleges, industry, finance, publishing, or other endeavors. The President shall make known, by all available means, the Association's adoption of the following principles:

(*a*) To redress the present low representation of women in the economics profession, the Association shall actively encourage the study of economics by women at all levels of education.

Action responsibility:

It is our obligation to affirm, in precept and action, that there are no genetic distinctions between the sexes which would preclude the study of economics by women on a proportionately equal basis with men. Since the role prejudice on the part of role occupants and role demanders is an acquired (i.e., learned) characteristic, educational institutions, government, and private industry should help dispel the prevailing myth that the current division of labor in the economics profession reflects relevant biological or genetic differences between the sexes.

(*b*) No academic institution or department shall discriminate against women in admission to studies in economics or in the form or amount of financial aid. Every economics department shall actively enocurage qualified women graduate students without regard to age, marital or family status, and shall actively promote their subsequent employment.

Action responsibility

With respect to admissions, financial aid and placement, the primary concern should be individual merit, i.e., an objective assessment of the candidate's ability, performance, and potential—irrespective of sex, marital, or family status. With respect to recruitment and encouragement in the program, academic institutions and departments should be mindful of the need to redress past inequities and derelictions which have produced the present imbalance between the sexes in the economics profession. They should also be mindful of the possitive contribution and enrichment of the educational process to be achieved through an increased participation of women. The profession can only stand to gain from the benefits of pluralist diversity and the recruitment of previously excluded, underutilized or unutilized talent.

(*c*) No employer, academic or otherwise, may discriminate against qualified women economists as candidates for positions, or for promotion or tenure, or for assignment of duties and responsibilities.

(*d*) Salaries, fringe benefits, and facilities and resources for research for women shall be the same as those for men in the same position and rank.

(*e*) There shall be no distinction between men and women as to what is considered to constitute full-time employment.

(*f*) Employment may not be refused to any qualified economist on the grounds of family relationship to another employee.

Action responsibility

In making appointment, retention, promotion, and tenure decisions, as well as in matters of compensation, fringe benefits, and prerequisites, women candidates shall be judged on their professional merit. The only relevant criteria shall be ability, potential, and performance. Care shall be exercised to avoid subtle as well as blatant, institutional as well as personal, forms of discrimination, especially where apparently innocuous regulations or policies impose differential burdens on women candidates. Institutional nepotism rules constitute the perhaps clearest departure from our central rule of judging candidates on their individual merit.

II.

Resolved that the American Economic Association establish a Committee on the Status of Women in the Economics Profession, numbering at least eight persons to be appointed by the President for a term of three years. The Association shall provide or seek funds for this Committee to investigate the extent of conformity to the principles stated above, and shall make recommendations for affirmative action. The Committee shall present an interim report at the next annual meeting. Its general findings, conclusions, and recommendations shall be published by the American Economic Association upon the Committee's request. When the Committee finds evidence of discrimination against women, it shall make this available for publication by the American Economic Association, and for the Association to present, as *amicus curiae*, in any complaint, remedial action, or suit.

Action responsibility

Economists in educational institutions, government, and the private sector should help disseminate the findings of this Committee and its recommendations. The Committee wishes to assist in affirmative action programs and/or positive efforts to overcome role prejudice, but it also stands ready to receive complaints of discrimination. Rules to ensure proper procedures in handling such complaints are currently being formulated.

III.

Resolved that the American Economic Association shall encourage flexibility in providing opportunities for education and employment on a part-time basis for both men and women.

Action responsibility

Making increasing provisions for education and employment on a part-time basis should be viewed as a technique for increasing individual opportunity and institutional flexibility. Such arrangements should not be allowed to serve as a cloak for evading compliance with affirmative action programs or for segregating women into underpaid and underprivileged professional categories.

IV.

Resolved that the American Economic Association appoint women economists as members of the editorial boards of its economic journals, that it actively encourage the appointment of women as program chairmen and participants at all future economic meetings, and that it urge companion associations to follow its example.

Action responsibility

The Committee has written to the officers of regional and local economic associations as well as of allied social science associations, and to the editors of journals dealing with economics and economic affairs, urging that women economists be among those considered in selecting reviewers, referees, editorial board members, speakers, program arrangers, and so on. Those responsible for planning programs, conferences, commissioned articles or reports, and other opportunities for demonstrating professional achievement must remember that when women economists are less visible than men their competence or availability cannot be evaluated. The Committee has provided assistance in locating women economists and expects to continue to do so.

IV. CONCLUSION

The recommended actions are only symbolic of needed changes in policy and attitude, if we are to correct the bizarre and irrational underrepresentation of women in the economics profession. The unemployment and underemployment of currently available talent, as well as the loss of potential talent, require positive, broad-gauged action to correct some structural imperfections in the professional labor market. To help eliminate these imperfections, one minimum step is continuing analytical study of the problem and regular, detailed reports to the Association and its members. In most instances—given the massive good will of our colleagues—the dissemination of information in itself will suffice to assure corrective action because, as Louis D. Brandeis once observed, "sunshine is the best disinfectant and electric light the most efficient policeman." In other instances, to be sure, additional steps will be required to eliminate existing market imperfections and anomalies. This implies a continuing obligation of the Association and its members to consider alternative mechanisms, consistent with professional standards and ethics, to promote genuine equality of opportunity and meaningfully free access for all scholars and practitioners in the discipline of economics.

COMMITTEE MEMBERS

Carolyn Shaw Bell, Chair, Wellesley College.
Martha O. Blaxall, Secretary, National Academy of Sciences.
Walter Adams, Michigan State University.
Francine Blau, Trinity College.
Kenneth Boulding, University of Colorado.

John Kenneth Galbraith, Harvard University.
Collette Moser, Michigan State University.
Barbara Reagan, Southern Methodist University.
Myra Strober, Stanford University.
Phyllis Wallace, Sloan School, Massachusetts Institute of Technology.
Kenneth J. Arrow, Ex Officio, Harvard University.

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AMERICAN ECONOMIC ASSOCIATION,
COMMITTEE ON THE STATUS OF WOMEN IN THE ECONOMICS PROFESSION,
Executive Secretary, Helen Bollin Munzer, Brookline, Mass.

The Committee on the Status of Women in the Economics Profession today charged that when it comes to changing the status quo, America's men economists are lagging far behind American businessmen. While more and more executives in government and business are discovering that it is profitable to employ women economists, college professors of economics continue to discriminate, both in employment and education. Dr. Carolyn Shaw Bell, who chairs the Committee which held its second meeting in Washington, D.C. on October 6, accused the economics profession itself of wasting economic resources. "The brains and energies of women in this country are being neglected, and no reputable economist should condone waste, let alone encourage it."

Releasing a preliminary report on the education and employment of women economists, the Committee emphasized the sharp contrast between the situation in government organizations and business firms and that prevailing on college and university campuses. Of 239 department of economics with 3,125 full-time faculty members, 122, almost half, had no women on the faculty. The total women economists in this part of academia numbered 177, or 6% of the total. By contrast, women economists in the Federal government account for 14% of the total, according to preliminary figures for October, 1971. Over half these women were in senior position. Although the Committee's information on business firms is not complete, evidence suggests that women graduates with training in economics find employment in business today far more readily than a decade ago. Newer fields like computer services did not start out with well defined men's jobs and women's jobs, and in more traditional areas like banking, investments, and management, women are making headway because of their performance. Graduate schools of management and business have taken note of this and acted accordingly. Of 22 leading graduate schools that are members of the Graduate Admissions Council, only two have no women faculty members, and all have actively recruited women in the past few years. On the other hand, among 43 economics departments in the small group of universities that train most economists, 17 have no women faculty members and little active recruiting for women.

"These data suggest that the only place where economics is a man's field is within the world of academic economics and, perhaps, within the American Economic Association," commented Dr. Bell of Wellesley College. The Committee on the Status of Women itself provides a case in point. Only after two years of pressure by a woman's caucus were resolutions passed to put the American Economic Association on record against discrimination and to establish the Committee to carry out an action program. The Association does not know how many women members it has, nor how many women economists exist, and at the moment its officers have no plans to find out. One of the purposes of the Committee is to remedy this situation on behalf of women who are not (or may be in the future) professional economists.

Every indicator suggests that the market for economists in the decade ahead will be expanding and recent Federal moves to lessen discrimination have already caused the demand for women economists to rise sharply. While the Committee's program for action aims at increasing the supply of women economists to meet this demand, its efforts will require total support from the academic establishment and from the professional association. In December, at the annual meeting of the American Economic Association, the Committee will present guidelines for individual members to follow. "We want endorsement of our position not only by colleges and universities," concluded Professor Bell, "but also by every responsible economist as a professional commitment."

The Committee members were Walter Adams, Distinguished Professor of Economics at Michigan State University and President of the American Association of University Professors, Carolyn Shaw Bell, the Katharine Coman Professor of Economics at Wellesley College, Martha Ossoff Blaxall, Economist at the Office of Management and Budget, Francine Blau, Assistant Professor of Economics at Trinity College, Kenneth Boulding, Professor of Economics at the Institute of Behavioral Science at the University of Colorado and a former president of the American Economic Association, Collette Moser, Assistant Professor of Economics in the Department of Agricultural Economics at Michigan State University, Barbara B. Reagan, Professor of Economics at Southern Methodist University, Myra Strober, Assistant Professor of Economics at the Graduate School of Business Administration at Stanford University, and Phyllis A. Wallace, Vice-President for Research of Metropolitan Applied Research Center and Visiting Profesor at the Sloan School of Management at Massachusetts Institute of Technology, and ex officio, John Kenneth Galbraith, Paul M. Warburg Professor of Economics at Harvard University and President of the American Economic Association.

TOTAL FACULTY AND WOMEN FACULTY, THE 40—3 MAJOR U.S. ECONOMICS DEPARTMENTS, OCTOBER 1972

University	Total full-time faculty	Total full-time women
Brown University	15	0
University of California, Berkeley	27	0
University of California, Davis	16	0
University of California, Los Angeles	30	0
Carnegie-Mellon Institute	14	2
University of Chicago	30	2
University of Colorado	23	0
Columbia University	28	0
Cornell University	31	0
Duke University	20	1
University of Florida	26	2
Harvard University	44	3
University of Illinois	36	3
Indiana University	34	2
Iowa State University	50	0
Johns Hopkins University	12	0
University of Maryland	48	6
Massachusetts Institute of Technology	24	0
University of Michigan	53	6
Michigan State University	28	1
University of Minnesota	34	1
New York University	22	2
State University of New York, Buffalo	17	0
University of North Carolina	34	3
Northwestern University	28	0
Ohio State University	47	2
University of Pennsylvania	40	1
University of Pittsburgh	27	2
Princeton University	35	2
Purdue University	70	3
University of Rochester	21	0
University of Southern California	12	0
Stanford University	25	0
Texas A & M University	23	1
University of Texas, Austin	27	1
Vanderbilt University	24	0
University of Virginia	25	1
University of Washington	30	4
Washington State University	21	1
Washington University, St. Louis	18	1
Wayne State University	22	2
University of Wisconsin	55	3
Yale University	54	3
Total	1, 300	61

Note: Women economists as a percentage of total: 4.69 percent. Percentage of women to total on any economics faculty 0 to 14.29 percent.

PREPARED STATEMENT OF CAROLYN MARGARET ELLIOTT, DIRECTOR, CENTER FOR RESEARCH ON WOMEN IN HIGHER EDUCATION AND THE PROFESSIONS

CIVIL RIGHTS COMPLIANCE AND FEDERAL FUNDING OF INSTITUTIONS OF HIGHER EDUCATION

As a tenured Associate Professor at the University of California at Santa Cruz, and now Director of the Center for Research on Women in Higher Education and the Professions located at Wellesley College, I share fully the university community's commitment to excellence. I am convinced that the major responsibility for maintaining this commitment rests with the faculty, who by the excellence of their teaching, research and public service set standards for their students and for the continuing traditions of intellectual and scientific inquiry in our society. Therefore it is imperative that our universities and colleges recruit, foster, and reward persons of the highest intellectual caliber on their faculties. It is in service of this commitment to excellence that I am committed to affirmative action programs for women.

Our graduate schools are preparing increasingly large numbers of women to join university and college faculties. Yet, as many studies have demonstrated, a much lower proportion of these women are recruited to these faculties than are their male graduate school peers.[1] Furthermore, those women who do find academic employment are likely to be paid lower salaries and hold positions of lower academic rank than male colleagues of equal seniority and qualifications.[2]

There are at least three possible reasons for this discrepancy:

1. Women Ph. D.'s are less able than male Ph. D.'s. Not only does such an argument offend both common sense and the experience of many distinguished teachers of graduate students, it is also refuted by an array of studies. They show that: women entering graduate school have slightly higher scores on I.Q. tests and entrance examinations than entering males,[3] that in most fields a larger proportion of women secured their doctorates from one of the top ten graduate departments in their field than male doctorates,[4] and that while in graduate schools they have encountered more obstacles in securing fellowships, faculty and peer support, and study time than their male peers.[5]

We can only conclude that women Ph. D.'s are on the average at least as able as males, and are probably more highly committed to their work because they have survived more difficulties to pursue it. Furthermore, the greater concentration of women in the better graduate schools suggests that there is, if anything, more excellence proportionately in the pool of women Ph. D.'s than among the pool of males.

2. Women Ph. D.'s are not making themselves available for employment. This argument also is refuted by studies of labor force participation, which show that 91% of women doctorates are in the labor force, and that 79% have been fully employed since securing their degree. Of those who took time out for childbearing, the average period of absence was just 11–15 months, shorter than military service for males.[6] Therefore we cannot conclude that the low proportion of women on university faculties is because of their own disinclination to join them.

3. Resistance and neglect in male-dominated faculties. Graduate student and faculty committees across the country have shown how academic convention and university policies have systematically worked to exclude women from faculty positions. Exclusionary policies have been relatively easy to identify (though not to change.) Nepotism rules, stricture against part-time appointments carrying status and responsibility, reluctance to grant maternity leaves, etc. have

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[1] See reports by the American Political Science Association, the American Economic Association, Modern Languages Association, American Women in Science, and many others. These are available through the Federation of Organizations for Professional Women, Resource Office at Wellesley College, Wellesley, Mass.

[2] See "Woman's Place in the Scientific Community," a research study by Jonathan Cole, Associate Professor of Sociology at Barnard College and the Graduate Faculties of Columbia University.

[3] Cole, also Hearings before the Special Subcommittee on Education of the Committee on Education and Labor, House of Representatives, on Section 805 of H.R. 16098, 91st Congress, 2nd Session, p. 642–3.

[4] "Report on the Subcommittee othe Status of Academic Women on the Berkeley Campus," University of California, Academic Senate, Berkeley Division, 1970, p. 55.

[5] See the 'Report on the Status of Women at the University of Chicago," 1970, for testimony of women graduate students, and Helen Astin, *The Woman Doctorate in America*, 1969, p. 33, for the difficulties of women with children.

[6] Astin, p. 58.

forced many women to withdraw from the academic labor force or accept lower paying jobs.[7] Much more difficult to confront are the informal traditions of university life which discriminate against women. The professional and friendship networks through which academic recruiting has been done seldom include women.[8] Furthermore, reference letters written for women candidates frequently typecast women in roles ("best as a teacher") which are less valued in major universities, or describe their personal style ("aggressive") in ways which make them appear unattractive as colleagues.[9]

In my own experience of interviewing more than sixteen department chairmen at Santa Cruz, I found that most thought of themselves as open to the possibility of hiring women, but were unaware of how the conventions by which they proceeded made it unlikely they would find suitable candidates. These exclusionary policies and conventions must be identified and referenced. They are clearly incompatible with equal opportunity. But they also work against the pursuit of excellence in our universities and colleges. If the modes by which faculty are recruited, promoted, and rewarded make it likely that, for reasons irrelevant to their performance, persons are systematically disqualified, these practices are a disservice to our students and our society.

The limited experience with affirmative action programs to date suggests that they are critical to redressing this situation. Though these programs are deserving of close examination and criticism, they have begun to alter the pattern of discrimination and waste of talent that has prevailed.[10] In mathematics, for example, several women have recently been appointed to the prestigious named instructorships in major research universities which have previously been held almost exclusively by men. These positions give them an opportunity to be a part of a distinguished faculty during the critical early years of their professional lives. According to Professor Alice Schafer, President of the Association of Women in Mathematics, these women would not have been appointed without the pressure of affirmative action programs.

Thus I am proposing an essentially conservative reason for affirmative action programs. We need them to assist the university in researching the goal which it has always held highest, the recruiting and fostering of excellence. If the hiring in universities had in the past proceeded strictly according to the standards of merit which their faculties believed themselves to be pursuing, there would be no need for these programs. As they become more able to meet the standards they have set for themselves, such programs will disappear without notice.

Prepared Statement of Professor R. Creighton Buck, Mathematics Department, University of Wisconsin, Madison, Wis.

As a college teacher for more than thirty years, I must speak out against certain policies connected with the Affirmative Action program that have been fostered by officials of the Department of Health, Education and Welfare, through their use of the threat to withhold federal funds from colleges and universities, funds whose purposes have no intrinsic connection with the issues at hand but which are often central to our most vital national needs and goals such as research into energy sources and delivery.

The Affirmative Action regulations were initiated in response to historic patterns of discrimination, but their implementations have led instead to overt reverse discrimination which is in clear violation of the spirit of recent Civil Rights legislation; this is bringing a return to the malignant use of hiring quotas in institutions of higher education, and has created the threat of a serious decline in the quality of education itself if academic criteria based on quality are not retained as primary. The regulations themselves were written by bureaucrats inexperienced in academic policies and problems, based upon models developed within the Labor Department and entirely inappropriate to a field as unique as higher education.

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[7] Rita Simon, Shirley Clark and Larry Tifft, "Of Nepotism, Marriage, and the Pursuit of an Acadmic Career," *Sociology of Education*, Vol. 39, 1966, pp. 344–358.

[8] "Report of the Ad Hoc Committee on the Status of Women," Academic Senate, University of California, Santa Cruz Division, 1971.

[9] "Report of the Committee on the Status of Women and Minority Groups," forthcoming in the *Proceedings of the American Philological Association*," Vol. 105, 1975.

[10] For instance, the University of Wisconsin Law School reports that the grade-point average of entering students rose this year, coincident with a rise in the number of women students. Report of the Project on the Status and Education of Women, Association of American Colleges, May 1973.

My own discipline is mathematics. In recruiting staff members for the Department of Mathematics at the University of Wisconsin, we hire young men and women as Assistant Professors with the clear understanding that these are temporary positions of a probationary nature. Since they and their peers are in competition for the few permanent positions that may become open, each new junior staff member must be selected carefully, keeping in mind all the criteria that apply to the senior position of a tenured Professor at the University. Since Wisconsin is a research centered university of national stature, two crucial requirements are a demonstrated ability to do and direct original mathematic research of high quality, and the teaching skills needed to pass this knowledge on to others. It is not enough that a new tenured employee be as good as the least qualified person already hired; since our aim is continually to improve the department, each new permanent staff member must be better than half of all those already granted tenure.

These statements differ considerably from conventional hiring practices in most labor markets; perhaps the closest analogy for people unfamiliar with the academic world is the selection of a new junior partner in a law firm from among the law clerks on the staff, or outside candidates.

Affirmative action policies have introduced new factors into this process; academic departments are often under pressure from the administration to hire new staff members because they are women or because they come from designated minorities. In response to this, the primary criterion of competence may be given second place, or ignored altogether. If the quality of higher education is to be preserved, we must be able to hire the best qualified persons, regardless of race, sex, creed, political views, or national origins. The forces that exist are creating pressures to lead colleges to hire unqualified staff members in order to meet assigned quotas or to "balance the ratios".

The role of women in science is puzzling. For reasons that are by no means clear, there are only a relatively small number of research mathematicians who are female. This is as true in Russia and China as it is in the United States. In Russia and the United States, such women hold respected positions in universities and take their places in professional societies and advisory councils. Many women are admitted to graduate school to study mathematics but few emerge as qualified candidates for the positions which we seek to fill at Wisconsin.

In mathematics, the situation with respect to blacks and other minorities has its own special problems. At present, there is a suitable available job for every qualified black mathematician, but the number in training is still far below the percentage to be expected from the size of the total college black population. Until this changes, it is unrealistic to demand that colleges hire faculty to match an assigned ethnic ratio.

Professor Barbara Hughes Fowler, Chairman of the Classics Department at the University of Wisconsin, has a unique view of this entire situation. First as a women, second as a respected colleague in a very strong and able department, and thirdly, as chairman of a special Committee on the Status of Women and an assistant to the Affirmative Action officer for the campus, she has had a chance to see both the good and bad aspects of the program as it has been practiced. I have asked her to permit me to insert here her own personal statement, reflecting upon this experience.

First, let me quote from her final paragraph, for it seems to me to focus upon one of the more serious weaknesses of the entire program, certainly deserving the attention of the Special Subcommittee. "Finally, I should like to say, despite my own obvious profit, that Affirmative Action seems to me to verge on blackmail—ineffectual blackmail at that—and so to be morally dubious. I should like to think that it will result eventually in the dissipation of some prejudice, but I am not at all sure that it will not in the long run have quite the opposite effect."

She also sums up a personal reaction in a way that I have heard reciprocated by persons representing ethnic minorities. "It is, after all, just as insulting to be given something simply because you are a woman as it is enraging to be denied it for the same reason."

The complete personal testimony is as follows:

COMMENTS BY PROF. BARBARA HUGHES FOWLER, DEPARTMENT OF CLASSICS, UNIVERSITY OF WISCONSIN

I took my Ph. D. at Bryn Mawr College in 1955 and began my teaching career as an Instructor in Classics at Middlebury College in the fall of 1954. In 1970 I was a half-time Lecturer, teaching full time for an annual salary of $6,000 at the University of Wisconsin. Today I am an Associate Professor, Chairman of my Department, teaching full time for an annual salary of $18,000. I also serve now on several all-University committees where I have for the first time had the pleasure of meeting colleagues outside my own department and the stimulation of discussing with them matters of professional interest to me. I suspect that I owe my promotion to faculty status, which I had so often been denied, in part, but not entirely, to the prospect of a visit to this campus by HEW in the fall of 1970. I know that I owe the dramatic rise in my salary to the Affirmative Action Program, which was established here in 1971. I probably owe my appointment and election to committees to the recently awakened consciences of my male colleagues.

In the spring of 1971 I was appointed to the Chancellor's Committee on the Status of Women, and in the academic year 1972–1973 I served as its chairman. In the spring semester of 1974 I served part-time as an assistant to the Affirmative Action officer on this campus. I think, therefore, that I can make some valid observations about the strengths and weaknesses of the Affirmative Action program.

There can be no doubt that Affirmative Action has done much to improve the salaries of women on this campus. Last spring I reviewed with their respective Deans all the salaries in the Colleges of Letters and Science, Education, and Agriculture. Although women's salaries still lag behind men's, it is by no means by the average $2500 that they did in 1970. The difference is now, I should estimate, about $1,000, and in some cases that difference may be justified by poorer publication or service records. In only two departments did I find the differences outrageous (as much as $5,000 less for women who were clearly more qualified than their male colleagues at the same rank and with the same years of service), and in one of these many of the men were also very poorly paid.

The other great gain that can be attributed to Affirmative Action is in the area of athletics. I was not myself at all involved in this very bitter controversy and cannot therefore comment specifically upon the changes that have been made, but I do believe that the common access to all facilities and the equalizing of budgeting for inter- and intra-collegiate athletics has been the most sensational achievement of the Affirmative Action program. It has also caused the most hard feeling, not only because of the ingrained prejudice of the men involved but because of the financial strain it will put upon the University, which had apparently planned to pay off its athletic debt under the previous system.

Affirmative Action has had some success in the area of hiring. Almost ten percent of the new hires last spring were women or minorities. One large department, which receives no federal funding, did several years ago set about hiring women and minorities and quickly fulfilled its hiring goals with very well qualified people. Admittedly, this was in a field in which there are many women available, but before the establishment of our Affirmative Action program the record of that particular department was abysmal: two women in a faculty of more than sixty. Other large departments which have hired a scant number of women have shown poorer judgement. They have, for example, hired women without the Ph. D., (always a risk), and will probably have eventually to let them go. This, I might say, is a common, probably unconscious, male procedure: to hire an inferior woman who will substantiate their prejudices and fulfill their prophecies. There is really nothing that Affirmative Action can do about this.

One of the exemplary, small language departments, which receives no federal funding, has granted tenure to a faculty wife who had suffered from the old nepotism "rule" (which never really existed and applied in any case only to wives, never to husbands or sons), hired a woman who had threatened to bring suit against the University from another department, hired temporarily a woman who had been laid off at another Wisconsin campus, and graciously accomodates another young woman who has a baby almost every year. Ironically, the only complaint I received in my term in the Affirmative Action office was against this department. A woman wanted to bring suit because it had hired the laid-off woman instead of her. It had done so in accordance with another of the University's programs, designed out of compassion.

In the sciences, all of which receive large amounts of federal money, no woman has, as far as I know, been recently hired in a tenure-track position. There is one woman in one of the biological sciences, but I believe that she was hired before the establishment of our Affirmative Action program. It is true, of course, that in many of these fields there are relatively few women available. Still, a university with the stature of Wisconsin ought to be able to attract a few women scientists. As chairman of the Committee on the Status of Women and as the assistant to the Affirmative Action Officer I dealt upon several occasions with the chairman of a very large sicence department in a field in which a reasonable proportion of the recent Ph. D.'s are women. This department receives considerable federal support. This man made me a number of promises to recruit women. He kept none of them and actually suppressed the fact that he had been given by the women research associates in his department a list of five women with impecable qualifications, all of whom were probably available to fulfill a position he had open last year. He contacted none of them and in fact told me that there were absolutely no women Ph. D.'s available in that area. The department is clearly not at all concerned about losing federal funds. Why should it be? It probably knows, as I know, that funds are seeping through to the University of Washington and to Berkeley despite their failures to establish satisfactory Affirmative Action programs. Furthermore, I am told by a top-level administrator here that even if funds were cut, the only people to suffer would be the research assistants and associates, not the faculty. This man has dealt extensively with the University budget and with federal agencies. I m sure that he knows what he is talking about.

Although some women have been hired at the assistant-professor level, I know of no woman who has been brought in initially in a tenured position, and the number of women lecturers, instructors, and clinical professors has actually increased. I do not know the reason for this, but I do know that these are positions in which women are traditionally exploited. In addition, although some women have been promoted to the ranks of assistant and associate professor from that of lectruer, there is no noticeable movement to move them on from that level. One department, however, did promote from lecturer to full professor. Departments seem to feel that they have done their duty once they have done the minimum. On the whole, then, Affirmative Action has not been particularly successful in the realm of hiring or promoting. This, I should like to emphasize, is in no way the fault of the Affirmative Action officer. It is simply that there is no way to force departments to hire people that they don't want, and there are many ways for them to avoid doing so.

The chairman of one department who wanted to promote a male lecturer to a tenure-track position and did not want to advertise that—or any other—position, suddenly discovered that that man had had a Spanish-American grandmother and that another member of his faculty was one-quarter native American. He asked me so to list them on my report. I discovered that these men had not described themselves as minorities on the appropriate University forms and that this was the chairman's way of avoiding the recruitment of women. On the other hand, why should he not have had the right to hire the young man? He had, presumably, proved himself in the job. Had he been a woman, the chairman would not have had to play so silly a game.

There are many such abuses of Affirmative Action policy. Typical is the case of one of my own graduate students who applied for a job he had formerly held in the University Library. He was told that he could not have it back because they had to hire a woman or a black. That was patently not true—there are plenty of women in the library. The director of the University Libraries, who has been more cooperative than almost anyone on this campus and who has been fighting an uphill battle to improve the status of his women employees, would never have made such a statement. The young man may well have been an undesirable employee, and the person who interviewed him may have used Affirmative Action as an excuse not to hire him. Such spiteful comments are common: they serve as an excuse not to hire and made Affirmative Action look bad at the same time. Nevertheless, that incident embittered his wife, a militant feminist long before the Women's Liberation movement began, and she tried to persuade him to file a complaint with the Equal Opportunities Office. I think that she was right to do so. There can be no doubt that in some cases Affirmative Action results in reverse discrimination, and there is no doubt in my mind that this is wrong.

I should like to give one final example of the absurdities that can and do arise from Affirmative Action. As a result of complaints to the University's Board of Regents and consequent pressure upon the Affirmative Action office, I attempted to "integrate" the Marching Band. After many unfulfilled promises and some outright untruths, the band did admit two women. This was not because of my persuasive techniques but simply because the Chancellor promised the band the additional University—not federal—funds which it had requested upon the condition that some women appear in the band. The director of that band, surely the most prejudiced and in fact "sexist" person I've talked to on this campus, is now receiving all kinds of credit from the local press as a "liberationist"—a case perhaps of the punishment fitting the crime.

Finally, I should like to say, despite my own obvious profit, that Affirmative Action seems to me to verge on blackmail—ineffectual blackmail at that—and so to be morally dubious. I should like to think that it will result eventually in the dissipation of some prejudice, but I am not at all sure that it will not in the long run have quite the opposite effect. Deans and Chancellors seem to feel that they must protect their male faculty against people like me, and women who have managed to achieve some status through merit resent having it all attributed to Affirmative Action. It is, after all, just as insulting to be given something simply because you are a woman as it is enraging to be denied it for the same reason.

PRO. BARBARA HUGHES FOWLER.

While there are areas where Professor Fowler and I might differ in our interpretation of events and motives, we both see manifest weaknesses in the present policies of HEW. To underscore one of her points, I recently learned from a colleague in History of an excellent young PhD who has applied for teaching positions in colleges, to be told by some that he could not be hired "because he was neither black, nor a woman." Fortunately, Oberlin College did not see it this way. Since his specialty is Russian history, and since he is a Polish jew who was transported to Siberia, and who has managed to come to the United States from there, he may be forgiven if he believes that the real reason he was not hired at some institutions was anti-semitism, and not Affirmative Action.

The only clean way to erase this type of malpractice is to turn to a policy of hiring individuals as individuals, selecting the person best qualified for the position, without regard for matters of race, sex, national origin, or political affiliation, neither giving preference to nor discriminating against minorities.

Thank you for permitting us to present these views.

UNIVERSITY OF NORTH FLORIDA,
October 15, 1974.

Hon. JAMES G. O'HARA,
Chairman, Special Subcommittee on Education, Committee on Education and Labor, Washington, D.C.

DEAR CONGRESSMAN O'HARA: This is in reply to your letter of 26 September 1974 requesting a statement regarding the University of North Florida's Affirmative Action Program.

I am enclosing copies of two articles which together represent a comprehensive statement of the philosophy, objectives, procedures, successes, and failures of our program. Perhaps you will conclude that the two articles are more lengthy than the statement which you requested. If so, please let me know and I will prepare a summary statement.

I would appreciate an opportunity to appear before the Subcommittee and discuss our Program. We believe that the University of North Florida is well on the way toward being the first institution of higher education which genuinely merits the term "equal opportunity."

Very truly yours,

ROY L. LASSITER, Jr.,
Vice President and Dean of Faculties.

Enclosure.

AFFIRMATIVE ACTION AT THE UNIVERSITY OF NORTH FLORIDA: A FURTHER REPORT

(By Roy L. Lassiter, Jr.)

I. INTRODUCTION

In the April/July, 1972 issue of this *Review* I reported on the philosophy, objectives, and attainments of the Affirmative Action Program of the University of North Florida.[1] Since at the time of that report classes had not yet begun at the new institution, I pointed out that the appraisal was tentative. In the introduction to that article I indicated the lack of an exciting comprehensive statement outlining a successful affirmative model in higher education, and stated that the purpose of the article was to describe a tentative model under which significant achievements had been made and which gave promise of providing the first example of a comprehensive and successful program.

This sequel attempts to bring the earlier paper up to date and describe and analyze the results of the Affirmative Action Program through the University's first year of operation. The beginning of the second year of classes is an appropriate time to evaluate achievements and failures and to identify some of the lessons derived from the experience to date. Furthermore, some speculation about the future is in order. Again, however, the reader is warned that the personal involvement of the author in the Program may cast some doubt on the complete objectivity of the analysis.

TABLE 1.—RECRUITING EFFORTS BY THE UNIVERSITY OF NORTH FLORIDA DIRECTED TOWARD BLACK PERSONS TO FILL ACADEMIC POSITIONS FROM FEB. 1, 1970 THROUGH SEPT. 15, 1973

	Academic personnel category			
Recruiting action	Deans	Associate deans, assistant deans, department chairmen, and other academic administrators	General faculty	Total
Number of black persons interviewed and/or personally contacted for specific positions	5	[1] 12	[1] 131	148
Number of formal offers extended to black persons	1	[1] 9	[1] 24	34
Number of black persons accepting positions	0	[1] 5	[1 2] 16	[1] 21

[1] Double-counts 1 person on the general faculty who was offered and who accepted an academic administrative position at the end of the 1972-73 academic year.

[2] Includes 1 faculty member on leave to the Oak Ridge National Laboratory in 1973-74.

TABLE 2.—COMPOSITION OF THE FACULTY OF THE UNIVERSITY OF NORTH FLORIDA BY RACE, SEX, AND PROFESSORIAL RANK, SEPTEMBER 15, 1973[1]

	White		Black		
Professional rank	Male	Female	Male	Female	Total
Professor	19	1	2	0	22
Associate professor	28	3	4	1	36
Assistant professor	63	9	[2] 3	2	77
Instructor	3	3	4	4	14
Total	113	16	[2] 13	7	149

[1] Excluding faculty adjuncts and staff members holding professorial titles but paid from nonprofessorial line items.

[2] Includes 1 faculty member on leave to the Oak Ridge National Laboratory in 1973-74.

II. THE FACULTY

Beginning in the early Fall of 1971, faculty recruitment intensified as the institution prepared for the Fall, 1972, opening of classes. In October of 1972 the recruitment of additional faculty for the 1973–74 academic year assumed high priority as the University planned for adding senior year course offerings, two new masters degree curricula, and expanded junior year course offerings. Now that faculty recruitment for the basic programs has been completed, the overall results can be presented.

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[1] Roy L. Lassiter, Jr., "Affirmative Action at the University of North Florida," *The Negro Educational Review,* Vol. XXIII, Nos. 2 & 3, April/July, 1972, pp. 87–114.

As indicated in the earlier article, the major objective of the Affirmative Action Program was to build a faculty and staff whose racial compositions roughly approximated that of the population of the northeastern Florida region. As a result of a two and one-half year nationwide recruiting effort, 148 black faculty prospects throughout the United States were personally contacted and/or interviewed regarding the possibility of appointments to the faculty (see Table 1). Many of these persons indicated salary requirements or personal situations which precluded a move to the University. Thus the number of personal contacts substantially exceeded the formal offers. A number of associate and assistant deanships, department chairmanships and other academic administrative positions were filled by black persons (again see Table 1). The overall result was that 13.4 percent of the 149 regular academic positions authorized and filled at the beginning of the 1973–74 academic year were filled by black faculty members. A number of professorships and associate professorships were filled with black persons of substantial experience in several discipline areas.

However, due to salary limitations and the scarcity of senior black persons in many disciplines, it was concluded early in the recruitment program that a special effort should be made to identify prospects among younger black persons holding masters' degrees. Some exceptionally able younger men and women were appointed to the faculty as instructors (see Table 2). The experience of the first year of operations has amply demonstrated the teaching and advising capability of these younger faculty members and thus the wisdom of the decision.

III. THE STAFF

While most affirmative action programs in higher education emphasize faculty and student areas, equal attention was given to the staff in the University of North Florida's program. As with the faculty, recruitment of Administrative and Professional personnel was nationwide.[2] Recruitment of Career Service staff was largely concentrated in the northeastern Florida region, but did extend as far away as Atlanta. In the Administrative and Professional category 11.1 percent of the staff are black, and the positions filled by these persons include: Director of Admissions, Director of Student Financial Aid and Assistant Director of Libraries for Public Services (see Table 3). Approximately 26 percent of the Career Service staff is comprised of black persons, and the positions held include: Laboratory Manager, Assistant Director of Personnel, Audio-Visual Librarian, Library Assistant, Vocational Counselor II, Staff Assistant II and Accountant III.

TABLE 3.—COMPOSITION OF THE STAFF OF THE UNIVERSITY OF NORTH FLORIDA BY RACE, SEX, AND PERSONNEL CATEGORY, SEPT 15, 1973

Personnel category	White		Black		Total
	Male	Female	Male	Female	
Administrative and professional	25	7	2	2	36
Career service	78	88	17	40	223
Total	103	95	19	42	259

Many institutions have staffs in which the equivalent of the Career Service component may consist of a large number of black persons. However, a careful examination of the distribution of these employees among the various job classifications will reveal that the black personnel at these institutions are largely concentrated in the custodial and groundskeeping areas, and even within these areas relatively few of the supervisors are black. A partial distribution of black Career Service staff of the University of North Florida is illustrated in the selected position categories in Table 4. While approximately 41 percent of the custodial and groundskeeping staff are black, there is a higher proportion of black persons than white in the supervisory and higher pay classes in these categories. On the other hand, among the Library Assistant (relatively high paying positions requiring a bachelor's degree) black persons comprise 41 percent of the personnel.

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[2] In the State University of Florida there are three personel classifications: Faculty, Administrative and Professional (administrative and staff position essentially unique to universities), and Career Service (state civil service).

Table 4 also illustrates the breadth of the distribution of black persons among various University units and the Career Service positions which they hold. In general, the distribution of black persons is reasonably uniform with major exceptions in the Computer Center and the clerical support positions in the Colleges. Overall, the support departments and units have achieved greater success in finding and appointing black persons to Career Service positions than have many of the academic departments.

TABLE 4.—CAREER SERVICE STAFF OF THE UNIVERSITY OF NORTH FLORIDA IN SELECTED POSITION CATEGORIES BY RACE AND SEX, SEPT. 15, 1973

Category and designation of position	Race and Sex				
	White		Black		
	Male	Female	Male	Female	Total
Custodial and grounds workers:					
Custodial workers	5	3	1	3	12
Custodial supervisors		1		2	3
Building services assistant superintendent				1	1
Grounds keeper I	7		1		8
Grounds keeper II			3		3
Subtotal	12	4	5	6	27
Campus security:					
Security officer	5	1	2		8
Security sergeant	4				4
Security lieutenant	1				1
Security director	1				1
Subtotal	11	1	2	0	14
Clerical and secretarial:		8			
Clerk typist II				8	16
Clerk III				3	3
Clerk typist III		6		3	9
Secretary II		17		4	21
Clerk IV		1		1	2
Secretary III		11		1	12
Secretary IV		3			3
Subtotal		46		20	66
Finance and accounting:					
Teller I			1		1
Account clerk II		3		1	4
Fiscal assistant I				1	1
Cashier II		1			1
Property clerk II			1		1
Fiscal assistant II		1			1
Accountant I		1			1
Accountant II				1	1
Accountant III				1	1
Assistant director of finance and accounting	1				1
Subtotal	1	6	2	4	13
Staff assistants:					
Staff assistant I		4		1	5
Staff assistant II				1	1
Subtotal		4		2	6
Library: Library assistant	1	6		5	12
Total	25	67	8	37	137

IV. TRENDS IN STAFFING PATTERNS

The effectiveness of the Affirmative Action Program may be measured, in part, by the growth in number of black persons holding faculty and staff positions and by the changes in the percentage of total faculty and staff they comprise. Since September 1, 1970, the number of black faculty, staff and student assistants has increased from five to 137 on September 15, 1973, while the total filled positions at the University has increased from 35 to 587 (see Table 5). The percentages of black faculty and student assistants declined until April 1, 1972, although their absolute number increased dramatically. Beginning with the Fall of 1973, the percentage of black faculty increased over the preceding fall, but the percent of black student assistants and temporary staff declined further, even though the number increased substantially. Overall, 22.3 percent of the faculty and staff were black as the second year of classes began (again see Table 5).

TABLE 5.—RACIAL COMPOSITION OF THE FACULTY AND STAFF OF THE UNIVERSITY OF NORTH FLORIDA BY PERSONNEL CATEGORY AND ON SPECIFIED DATES[1]

Personnel category	Total number of positions filled				Number of positions filled by black persons				Percent of positions filled by black persons			
	Sept. 1, 1970	Sept. 1, 1971	Apr. 1, 1972	Sept. 15, 1973	Sept. 1, 1970	Sept. 1, 1971	Apr. 1, 1972	Sept. 15, 1973	Sept. 1, 1970	Sept. 1, 1971	Apr. 1, 1972	Sept. 15 1973
Faculty	6	22	71	149	1	3	9	[2] 20	16.7	13.6	12.7	13.4
Staff	26	77	109	250	1	10	24	61	3.8	13.0	22.0	24.4
Student assistant and OPS [3]	3	19	31	188	3	10	16	56	100.0	52.6	51.6	30.0
Total	35	118	211	587	5	23	49	[2] 137	14.3	19.5	23.2	23.3

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[1] Excludes adjunct faculty and staff members holding professional rank.

[2] Includes 1 faculty member on leave to the Oak Ridge National Laboratory in 1973-74.

[3] Other personnel services, i.e., temporary staff.

V. THE STUDENT BODY

In my earlier paper I described in some detail the University's efforts to project its affirmative action objectives to students in general and black students in particular. Recruitment of students for an upper level and graduate institution is considerably different from that for four year institutions, in that the incoming undergraduates are primarily graduates of the community colleges. The difficulties in recruiting black students were further complicated by the fact that many black students have perceived the public community college system of Florida to be relatively unresponsive to their needs particularly in university parallel programs. As a result, the pool of students from which the University of North Florida recruited was comprised of a relatively small proportion of black students. For example, in the Fall of 1972 only 9.3 percent of the 123,920 students enrolled in the public community colleges of the State were black, and many of them were ineligible for transfer since they were enrolled in technical and terminal programs and adult education (in a few institutions) rather than the college parallel programs.[3]

Despite this handicap, the University opened in the Fall Quarter of 1972 with slightly over 7 percent black enrollment among the 1997 students (see Table 6). This percentage was substantially above any other institution in the State University System of Florida, excepting Florida Agricultural and Mechanical University.[4] Over the full 1972–73 academic year black students averaged about 7.5 percent of the total student body of the University of North Florida, and in the Summer Quarter of 1973 the percentage increased to 9.25 percent (again see Table 6). In the Fall Quarter, 1973, nearly 9 percent of the 3171 students were black.

TABLE 6.—RACIAL COMPOSITION OF THE STUDENT BODY AT THE UNIVERSITY OF NORTH FLORIDA, BY QUARTER 1972-73 AND FALL, 1974

[In percent]

Term	Race						Total
	White	Black	Oriental	Spanish	Indian	Other	
Fall quarter, 1972	91.20	7.06	0.56	0.62	0.11	0.45	100
Winter quarter, 1973	90.63	7.84	.41	.51	.15	.46	100
Spring quarter, 1973	91.34	7.41	.38	.44	.05	.38	100
Summer quarter, 1973	89.42	9.25	.38	.38	.06	.51	100
Fall quarter, 1973	89.40	8.96	.47	.57	.20	.40	100

VI. SUMMARY AND CONCLUSIONS

In the previous article I concluded that the Program had not been in operation long enough to apparise its effectiveness. Nearly two years later a similar conclusion is indicated. However, for the University of North Florida it can be stated that the achievements have been considerable and that the prospects for developing a genuine equal opportunity University are brighter than ever.

It is also possible now to identify more clearly the lessons derived from experience, the problems encountered, and some of the challenges for the future. The more significant of these include:

1. The wisdom of emphasizing the recruiting and identification of prospects, as opposed to rigid quotas, has been clearly established. Because the deans, chairmen and directors were free to appoint the best qualified from among the candidates, after demonstrating a good faith effort at identifying minority prospects, no one can reasonably assert that appointments were offered or withheld because of race. A far ranging and vigorous recruiting program for all University positions is and will continue to be the core of the Affirmative Action Program.

2. The most significant continuing source for the identification of prospective black candidates for faculty and staff is the cadre of minority persons already associated with and committed to the institution.

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[3] The racial composition of enrollments in the public community colleges of Florida is found in *A Plan for Equalizing Education Opportunities in the State University System of Florida:* Tallahassee, Florida Board of Regents, June 15, 1973, Appendices, pp. i and ii.

[4] The State University System of Florida is comprised of Florida International University, Florida State University, University of West Florida, University of North Florida, Florida Agricultural and Mechanical University, Florida Atlantic University, University of South Florida, Florida Technological University, and University of Florida.

3. It is possible to achieve a momentum which may maintain at least one component of the Affirmative Action Program, even with reduced efforts. This has been particularly true with the Career Service staff. Initially, extensive advertising and contacts with community service agencies were necessary to identify prospects. As the number of black Career Service staff has increased, these efforts have been reduced, and increasing reliance on "word-of-mouth" has been possible as the staff itself spread information regarding job opportunities. With the exception of certain technical specialties, it now appears that an increasing number of black applicants will be forthcoming without intensive recruiting.

4. The University has now reached a turning point requiring further intensification of recruiting efforts for administrative and professional personnel and faculty. With the exception of new professional positions in the Library, the administrative and professional staffing is essentially complete, and recruiting will be for specific expertise to fill vacancies. The faculty will grow at a much slower rate than in the past two years, and recruiting will be more selective as particular capabilities are sought to fill vacancies and staff new programs. Perhaps these conditions will provide the real test of the Affirmative Action Program.

5. Increasing emphasis must be placed on in-service training for administrative and professional personnel and career service staff to insure equal opportunity for promotion and advancement. In addition, opportunities for doctoral study must be provided for the young faculty members with master's degrees. A comprehensive faculty and staff development program is required and is currently under development.

6. One vital dimension of a successful affirmative action program initially overlooked at the University was the area of human relations and preparation of the various components of the University community for a totally integrated situation.[5] Because of the recency of integration in the educational system in particular, and society in general, there is no guarantee that white professors would be sensitive to the needs of black students or that white students would be prepared for the prospect of being taught by black professors. Furthermore the general interspersion of blacks and whites among the faculty and staff positions might tend to increase communication problems and stresses, and the general public could have difficulty accommodating to a bi-racial enclave in its midst. Although there have been no problems of serious magnitude to date, some of the misunderstandings and stresses which have developed because of differences in cultural backgrounds could have been alleviated by an educational effort within the University community. One step taken to rectify this omission was the creation of a Task Force on Human Relations which has been charged with both the assessing of the present status of racial relations within the institution and recommending appropriate additions to the Affirmative Action Program to overcome any existing and/or anticipated problems.

7. Academic persons generally profess a liberal position on equal opportunity, but practice tends to fall short of the expressed ideal. Thus, if an affirmative action program is to be successful, commitment is required at the highest administrative level and, to quote my earlier paper, "a display of muscle" may be required at times. This is particularly true as the faculty grows in size and the original commitment diffuses among greater numbers.

8. Finally, I earlier deplored the fact that no successful model was available in higher education when the initial planning for the University of North Florida was begun. Since that time no such model has come to my attention, although the number of conferences, consulting firms and university officers concerned with affirmative action have proliferated beyond imagination. Hopefully, the University of North Florida will be the first to provide the much needed model.

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[5] I must confess that the major fault for this omission is my own. As the University officer charged with the responsibility for developing, implementing, and administering the Affirmative Action Program I proceeded on the naive assumption that proximity to persons of different cultural background and participation in a significant enterprise such as building a university would substantially mitigate against the development of stress arising within a community which was unique in every member's experience.

FREED-HARDEMAN COLLEGE,
Henderson, Tenn., October 16, 1974.

Mr. PHILIP J. DAVIS,
Director, Office of Federal Contracts Compliance, U.S. Department of Labor, Washington, D.C.

DEAR MR. DAVIS: We were very pleased to see in the Federal Register of March 29, 1974 the proposed exemption for religious entities reading:

"CONTRACTS WITH RELIGIOUS ENTITIES

"The requirements of [illegible] equal opportunity clause shall not apply to a religious corporation, association, educational intitution or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational intitution, or society of its activities."

As noted, this proposal was "intended to establish consistency between the religious exemption provisions of section 702 of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, and the rules and regulations of the Office of Federal Contract Compliance."

On a recent trip to Washington, I learned that the proposed exemption has not been adopted and that consideration is being given to revising it so as to exempt only personnel employed for specifically religious functions of the organizations. This possible limited exemption would be most unsatisfactory.

Congress has not prohibited religious entities, including religious educational institutions, from considering religion in the employment of personnel because it is clear that such a prohibition could change the fundamental character of such entities, even to the point of eliminating their reason for being.

Equality of educational opportunity in America includes the opportunity to choose a private college with particular values, traditions, and convictions. The diversity so widely acknowledged to be a virtue of American higher education (albeit one diminished and threatened by homogenizing inflences) is realized through public institutions, secular private institutions, and religiously-oriented private institutions (whether or not under the control of a particular church).

Should such colleges be required by regulation to disregard the presence or absence of religious convictions (or hostility to religion) in the employment of administrators, faculty members, counselors, and dormitory personnel, they would find their influence diluted and the distinctive character which attracts students to them diminished. The institutions' demise would not be unexpected. Permitting consideration of religion only in the selection of a few persons such as chaplains or religion faculty would not preserve the institutions. Some institutions would, in fact, be subject to loss of their facilities because of deeds, charters, and bequests which relate to their commitments.

Freed-Hardeman College is an independent Christian college governed by a self-perpetuating board of directors. It does not discriminate on the basis of race, sex, or religion in the admission of students or their opportunities. It does not exercise preferences on the basis of sex or race in the employment of personnel. This is all the law requires or should require.

If Executive Order 11246 as amended by Executive Order 11375 requires that no consideration be given to religion (sectarian, irreligious, antireligious, nonreligious, or non-Christian convictions) in the employment of personnel, the executive orders should be amended, the regulations should exempt religious entities as proposed, or Congress should provide an exemption by law.

A member of your staff with whom I talked (and who was very helpful and understanding) said "at this time" there is no plan for goals and timetables. The specter of requiring religious entities to establish goals and timetables for integrating into their staff employees of varied religions and nonreligious persons in proportion to their presumed distribution in the general population (even as a future possibility) is most disconcerting.

Freed-Hardeman College is not a federal contractor, and it is unlikely to seek contracts until or unless this matter is resolved. The exemption should be clearly applied to contractors, grantees, institutions enrolling aided students, and entities holding tax exemptions or eligible to receive deductible contributions.

I was told that while the deadline for comments was past, comments would be considered while the matter is pending. We are most anxious to know of any developments related to the proposed exemption.

Sincerely,

J. D. THOMAS, *Academic Dean.*

Milwaukee, Wis., October 18, 1974.

DEAR REPRESENTATIVE O'HARA: I read with great approval of your subcommittee's investigation of the effects of affirmative action in academia. I would like to offer a few thoughts.

I have studied for ten years in preparation for an academic career. Now I find it blocked, and even auxiliary careers, such as educational administration shut off, from me due to the accident of my birth. I find it hard to accept that all of the sacrifices I have made are supposed to be washed away simply because someone in Washington feels guilty about America's past.

Affirmative Action will garner only hostility as a dwindling number of positions are competed for and the competent denied due to the fact they are white males. Inevitably, extremist politics will take hold, and all the vaunted gains for blacks and women will be repealed.

I am opposed to bias of all kinds, including that practiced against white males. I hope you will be too. End affirmative action now.

Sincerely yours,

JAMES L. JABLONOWSKI.

STATEMENT BY NELLIE M. VARNER, DIRECTOR, AFFIRMATIVE ACTION PROGRAMS, THE UNIVERSITY OF MICHIGAN

AFFIRMATIVE ACTION: A TIMELY NEW MANAGEMENT TECHNOLOGY

In the two years that I have served as an Affirmative Action Officer at the University of Michigan, I have come to believe that, beyond altruism, affirmative action has a lot to recommend its survival in the competitive marketplace of public policies. I would like to share some of my thoughts about it with you in the next few minutes.

I invite you to consider affirmative action as a timely new management technology which lends itself to the handling of an array of problems faced by colleges and universities in a period of financial austerity, pressures for change and the need to be accountable for the efficient use of resources. I believe that it would be a concept with intrinsic merit as a modern administrative instrument even if Federal regulations were repealed. Affirmative action policies are programs for institutional change. They offer a means whereby institutions can effectively manage and accommodate that change rather than being controlled by it. As presidents of colleges and universities, you are the chief change agents in your institutions. You have the leadership responsibility for implementing institutional change.

It was not until the enactment of the Executive Order 11246 six years ago and the passage of the Higher Education Amendments of 1972 that Federal regulations in the area of equal employment reached back (I deliberately say "reached back" rather than "caught up with") and brought higher educational institutions under the requirements to contribute directly to the social goals of equal employment opportunity. Unfortunately, as is so often the case when institutions encounter late demands for social responsiveness, they react rather than take the initiative. In this climate, the quest for equal employment opportunity in higher education became a prism of negative perceptions: quotas, preferential treatment for women and minorities, compromise of excellence, plans, timetables and endless government interference. The protected groups, too, have begun to view affirmative action through cynical reactionary eyes as tokenism, game playing and insincere efforts carried out under the threat of compliance rather than a commitment on the part of administrators to equal opportunity and a willingness to participate in the solution of social problems. In fact, affirmative action, more often than not, has come to be viewed by management as the problem rather than as the solution. However, I offer for your consideration several areas in which affirmative action can serve management as a positive problem-solving mechanism. These are personnel administration, institutional planning, organizational goal setting and management accountability.

Let's examine affirmative action as a new personnel technology. It is not just a device for bringing excluded groups into the system. It is a means of making personnel systems fairer and more objective. Strictly from the standpoint of management accountability, affirmative action's demand for more open recruitment and selection procedures ought to be welcomed improvements for the unaccountable, inaccessible, patronizing "old boy network". In a period when institutions must be able to explain and account for their utilization of resources, it is difficult to justify the waste of human resources. To reject women and minorities and restrict one's search for talent to less than one-half the population, namely, that portion composed of white males, is profligate. Institutions of higher education have the task of certifying knowledge and skills. It is appropriate for them to review their own occupational categories. If such reviews eliminate arbitrary requirements unrelated to job performance, unfair credentializing and indiscriminate linking of degrees with jobs, this cannot help but result in greater utilization of employee talent. We can rely on rigorous peer review to maintain excellence in our faculties. However, in a period of declining enrollments, budgetary cutbacks, a surplus of Ph.D.'s and a concentration of tenured faculty, merit is not the sole ground for granting or denying promotion. Consequently, a clarification of standards and criteria for promotion—integral requirements of affirmative action—is needed to make the best judgments for both the individual and the institution. And, in the last analysis, it is just plain good management to conduct a self-audit, to review and identify employment practices which have discriminatory effects before the Federal government intervenes with the prospect of costly litigation, back pay awards, court imposed goals and timetables and changes in employment practices.

Planning is another modern administrative requirement for which affirmative action can be an effective instrument. An essential part of affirmative action is the planned, engineered access of members of protected groups into the institutional mainstream. Affirmative action has been criticized for subverting the ends by the means in placing institutions at the mercy of data analysis and the numbers game. However, I submit that planning is a creative, enlightened, efficient and accountable way to orchestrate and accommodate change. The question is not whether plans and timetables are needed, but how to best utilize the opportunity that their necessity presents to implement the change mission of the organization. For example, affirmative action programs require availability data, needs analyses arrived at through a systematic examination of attrition, determination of workforce pools in terms of numbers and skills and the assessment of employee potential for career development and upgrading. These studies can provide a reliable base for decision-making about an organization's use of human resources. Computer analyses of appointments, promotions, retirements and turnover can project future profiles of the entire workforce on the basis of past and present distributions and project needed rates of progress toward the fulfillment of employment goals. Whether we call it "affirmative action" or by some other name, it appears to me that as the executives of complex educational enterprises, you would not wish to consider the consequences of alternative policies in the absence of such information.

Planning seems to imply greater control, and in an educational environment autonomy and decentralization are sacrosanct. However, the participatory bureaucracy which characterizes academic governance has never been noted for its efficiency; and if greater central planning and control are inherent in affirmative action, then, affirmative action is a healthy mechanism for challenging an institution's accustomed practices. Additionally, it affords an opportunity for administrators to draw on the academic tradition of "governance by consultation" to operationalize one of the basic axioms of the managerial grid: effective managers get things done through people. Affirmative action goals and objectives are more likely to be achieved when line supervisors help set them and have knowledge of their stake in the outcome. Thus, institutional leaders can strive to achieve total involvement from top-management down, in the commitment to equal opportunity. Such involvement not only conveys to the organization that the leadership is serious, but also enhances accountability by making each unit accountable for contributing its share. Moreover, administrators can be appraised in terms of their success in achieving affirmative action goals just as they are evaluated on their ability to reach other important objectives. In such a climate, affirmative action monitoring, which has so often been the object of criticism, becomes a useful tool for assessing the goal achievement process. It is inconceivable that university presidents, like all good executives, would not want to keep track of what is happening in their organizations.

I would like to conclude by challenging you as presidents in higher education to take the leadership in implementing the creative management techniques that are embodied in affirmative action processes. This leadership entails shifting the thrust of higher education's response to affirmative action and equal opportunity. Instead of reaction, complaint and criticism, let's turn to creative implementation. If we will concede that the government may have asked the right question, namely, "Are the goals of affirmative action just?" but may have provided the wrong answers with respect to some procedural and due process matters; then it is the responsibility of higher education to inform government of what will work. If we do not want the government intervening and interfering like a thug coming in from the cold, both literally and figuratively, we must make affirmative action work for ourselves. And we can do it. As presidents, you head the greatest talent pools in this country. Let's unleash this talent to help our institutions meet their social needs with respect to equal employment opportunity. It simply makes good administrative sense.

RUTGERS UNIVERSITY,
New Brunswick, N.J., October 28, 1974.

Hon. JAMES O'HARA,
Chairman, Special Subcommittee on Education, U.S. House of Representatives, Washington, D.C.

DEAR MR. O'HARA: Enclosed you will find a critique I have prepared of Richard Lester's book Antibias Regulation in Universities. I would appreciate it very much if you would insert this report in the written record of the hearings you have been holding on anti-discrimination legislation in education.

I am an Associate Professor of Spanish and Associate Dean of Rutgers College, Rutgers—The State University. I am also past president of the New Jersey Division of the Women's Equity Action League and past head of the National WEAL Education Committee. The views expressed in the enclosed paper are my own, not necessarily those of the above institution and organization, which I have mentioned for identification purposes only.

I would appreciate it very much if you would send me a copy of the hearings when the printed record becomes available.

Sincerely,

PHYLLIS Z. BORING,
Associate Dean.

Enclosure.

ANTIBIAS REGULATION OF UNIVERSITIES: A BIASED VIEW?

(By Phyllis Zatlin Boring)

The recent publication of Richard A. Lester's Antibias Regulation of Universities: Faculty Problems and Their Solutions (McGraw-Hill, 1974) and the discussion that it has generated are reason enough to examine once again the issue of affirmative action in higher education. As former Dean of the Faculty of Princeton University, Lester has impeccable credentials. His book, sponsored by the prestigious Carnegie Commission on Higher Education, appears authoritative—even though the Commission does not necessarily endorse its contents and Lester does, in fact, disagree with the Commission's own findings. Given the reputation of author and sponsoring organization, Antibias Regulation of Universities has already become a powerful weapon in the backlash arsenal. This is unfortunate for two reasons. The number of excellent proposals Lester makes in the book are being overlooked by those who delight in the attack on affirmative action, and the unsupported assumptions upon which that attack is built are being accepted as undisputed fact.

A scholarly work, Lester's book contains a good bibliography and numerous footnotes, thus giving the impression of thorough research and objectivity. But the study is not objective, and the conclusions are all the more dangerous because the bias in the work is subtle. The whole analysis of the university situation is structured on some shaky premises. Lester writes from the standpoint of the handful of prestige universities, but his title does not indicate that his position, if it is valid, probably does not apply to the majority of institutions of higher education in the country. He indicates that he interviewed adminstrators and faculty at twenty universities before writing his book, but he fails to identify the institutions. Did his selection of administrators and institutions prejudice the outcome of his findings? Two years ago, in addressing the New Jersey State Conference of AAUP Chapters, Lester made statements almost identical to those in his book; did he perhaps reach his conclusions before all the evidence was in? Lester assumes that those who criticize higher education do not understand the system, apparently not realizing that Uncle Sam was called onto campus in the first place by those already there. He also assumes that in the democratic procedures used in hiring and promotion, only merit is taken into consideration. If women are promoted more slowly than men or paid less than men, it follows logically that they are less meritorious. Except for one fleeting reference, Lester never acknowledges that differential treatment of women and minority faculty could be the result of prejudice.

The ultimate solution that Lester proposes includes an in-house arbitration system for grievances. Instead of going to governmental agencies, a faculty member who felt that he or she had been illegally discriminated against could bring the case before a panel of arbitrators, specially trained for settling such disputes, and could receive more informed and speedier action than might come from HEW. The proposal is an interesting one and should be studied by an organization such as AAUP. The system would not, in fact, be substantially different from AAUP's own Committee A, which has successfully settled differences between faculty and administration for many years. Universities would prefer to have such grievances reviewed by people with firsthand knowledge of higher education, and individual complainants, who now sometimes have to wait for years before their cases are acted upon would probably also benefit. The proposal is a positive one, which merits discussion and study, as are other suggestions from Lester. He recommends internal data collecting—perhaps more efficient than what now takes place in many universities—and he further recommends that junior faculty be advised periodically on their progress so that they will know what is expected of them.

What Lester does not point out is that, if higher education had set up such machinery and had been willing to listen to complaints of discrimination in the first place, there would have been no need to resort to HEW. And that brings us back to one of the fallacies in his argument.

Executive Order 11246, as amended by 11375, went into effect in October, 1968. No college in the country paid any attention to the non-discrimination clause on their federal contracts. No HEW investigator knocked on any administrator's door. Academic women who stood up at that time and talked of discrimination were laughed at. As Dr. Bernice Sandler of the Association of American Colleges has said, the most concrete result that has come from affirmative action efforts across the country has been the realization that discrimination does exist. The people who demanded government reviews of campus hiring and promotion practices were not uninformed outsiders; they were academic women who found that they had to fight the system to survive. Only after women's groups put pressure on Congress to put pressure on HEW and the Labor Dept. did Uncle Sam make any effort to enforce the executive order.

Lester criticizes HEW, as well he might. He says that compliance action varies from region to region and even from investigator to investigator. He says that HEW has failed to act on many of the affirmative action plans presented to them. And certainly this is true. Although Lester approaches the problem from a different perspective than do women's rights groups, the conclusions are the same. HEW has not been doing a very good job. The Women's Equity Action League (WEAL), which filed the majority of the class complaints under the executive orders, has, in fact, called periodically for an investigation of the investigators. Understaffed, underfunded, and under political pressure, HEW has accomplished very little for women and minorities. When claims of reverse discrimination started trickling in, HEW put a full-time investigator to work on them; in the meantime all individual complaints from women and minorities were referred to EEOC and put on the back burner, where many of them remain. Lester may feel that HEW is destroying higher education, but women's groups are still waiting for them to show some signs of life.

The Rutgers University situation is illustrative. A class complaint on behalf of all women faculty throughout the university was referred to the New York regional office in April of 1970. (This is the same office Lester has dealt with in his capacity as dean at Princeton.) The file is still open. The investigation has never been completed, the plan has never been approved, the findings have never been released. The much-publicized Rutgers-HEW salary settlement for hundreds of women and minority faculty was, in fact, negotiated by the AAUP with the University administration. HEW only made an effort on behalf of eight women in one college. While progress has been made in Rutgers to improve the status of women and minorities, it has been primarily done through the voluntary cooperation of the University and the persistence of the faculty collective bargaining agent. It must be noted, however, that the positive climate that allowed some forward progress to be made was generated initially by the WEAL complaint. Without the potential clout of Uncle Sam in the background, we might still be where we were four or five years ago. It must also be noted that while Lester would like to amend the Equal Pay Act again so that faculty would not be covered because unequal pay proves unequal merit, the Rutgers salary review committee, composed of University faculty and administrators, identified over 200 faculty members who had been discriminated against in their pay on bases other than merit or qualifications. Yes, Virginia, salary inequities do exist.

It is understandable why Lester, from his vantage point, cannot see the bias that those of us on the other side can see all too well. He tends to idealize faculty judgment. When superior scholar-teachers meet to review a faculty member's credentials in a democratic way, how can discrimination creep in? Perhaps he has simply never experienced the overt discrimination that others of us have. He gives the hypothetical and obviously ludicrous example of several universities bidding for the services of a female electrical engineering professor to meet their affirmative action goals. (In that goals are based on supply and the supply of female Ph.D.'s in electrical engineering is virtually nil, no reasonable person would set a short-term goal in this area.) He does not point out the existence of departments with no women in disciplines where women hold large percentages of the doctorates. In my own field, Spanish, women outnumber men up through the master's degree level and hold about a third of the doctorates. Nevertheless, when I received tenure in my department I was the first woman to do so in 205 years at that point in my career as an associate professor I still earned less money than some of the assistant professors in my own department. Lester suggests that women do not progress as rapidly as men because they have childcaring and housekeeping responsibilities. Maybe so, and maybe departments assume so and make decisions accordingly. After my son was born, I was only given my position back because I persisted and because my husband gave my department his permission. I have heard faculty colleagues seriously propose that all married women be fired to meet a cutback in lines because the women don't need the money anyway. I, who have been asked to serve coffee to the male faculty and the students at faculty-student get-togethers, simply cannot share Lester's idealism. There has been a great deal of consciousness-raising on campus in the past few years, and much of the overt bias is disappearing, but even that has only been accomplished because women faculty had laws and court decisions supporting their complaints.

Lester makes much of the difference between married and single women, suggesting that single women progress in their careers equally with men and married women just can't cope. The thrust of his argument is in direct opposition to all equal employment opportunity legislation, for he is defining an individual's capabilities by an assumption of how a particular class of people functions. Lester's documents his statement that married women are less committed to their professional growth with the statistical results of a survey of some academic women made in 1965. It is not only entirely possible that the same survey in 1974 would give different results, but it is also unreasonable to assume that all married women fall into the same pattern. The question is not how much time a married woman spends with her home and family but how much time she devotes to her professional work, and how much she gains from the time spent. The question in each case must be with the individual, not with a class to which he or she belongs. But even within the framework of classes, the study Lester cites is inadequate. Some valid conclusions might be reached if we knew how much time single men and married men spent on their personal responsibilities. Do married men, like married women, have greater obligations outside their professional lives? Where do divorced women fall into the picture? Does Lester categorize them with single women or with married women? Do married women with home responsibilities compensate by sacrificing social activities? Do they skip lunch to fit in more research time? And in Lester's careful bibliography, what happened to the studies that indicated that married women assistant professors outpublished all other classes of scholars, that single women are also promoted more slowly than men, married or single, and that department chairpersons, when evaluating credentials of equally qualified people will take the man every time?

Lester also tends to make age evaluations that run counter to equal employment opportunity legislation. He tells us at one point that a person must be productive between the ages of 25 and 35 to become qualified for a tenured position, and that, unfortunately, is the age span when women are most heavily committed to home and children. Later he tells us that a person must be productive between the ages of 35 and 45 to become a nationally-known scholar, and that, unfortunately, is the age span when women are most heavily committed to home and children. Aside from condemning women to twenty years at hard labor, he implies that there is not and cannot be in academe any room at the top for anyone who broke the lockstep academic pattern. Not only does this adversely affect women who chose to dedicate time to child-rearing, but it also discriminates against people who serve in the military, people from low-income families who had to work their way through school, people who did not discover their academic calling at the age of 18. Even Bell Telephone Laboratories, which hires only the top engineers in the country and used to judge professional staff by age group, now more fairly evaluates people by their professional age. Under Lester's system, Galileo would never have made the grade at Princeton. Nor Cervantes nor any of the other late-bloomers.

Without documentation, Lester says that women are less meritorious because they teach lower level courses, publish less, and do less research. Whether or not these assumptions are true, they deserve some discussion. Academic women claim that where these situations exist, they are frequently the end result of a discriminatory system. Women teach elementary courses not by choice but by assignment. A survey of faculty career patterns at Rutgers University did, in fact, reveal that women were just as interested as were men in teaching advanced, specialized courses. Most scholarly journals are run by male-dominated editorial boards; many academic women feel that the boards themselves are biased. Women scientists in particular complain that they are not given equal access to research facilities and therefore cannot conduct their professional work as they would like. The "old-boy" system, which women have so vigorously opposed in recruitment, extents to all aspects of academic life and will not be overcome very quickly. This is, of course, the explanation for the continuing pyramidal pattern of Soviet women in academe. Lester cites the fact that women are not equally represented at the top even in the Soviet Union as evidence that women cannot succeed, while relegating to a footnote the researcher's observation that women's progress in Soviet universities is still hampered by the professional contacts of the older male professors.

Statistics may, of course, always be interpreted differently by different people. Studies may be accepted as valid if they prove what we believe and carefully rejected if they don't. Even the most careful scholar is guilty of this kind of bias from time to time, and that is the case with Lester in Antibias Regulation of Universities—and certainly in my reading of it. Lester, as I read his work, cites page after page of studies that confirmed that women have been paid less than men in academe, then he carefully rejects all of it as not valid. On the other hand, he says that women and minorities are now being overpaid, but he documents this not at all. At one point he says that blacks are given large salary increases to lure them from dominantly black institutions to dominantly white ones, but he fails to mention that the black colleges generally have a much lower salary scale than white colleges. (The Woodrow Wilson Foundation instituted a special internship program to supplement salaries that black institutions pay so that white professors could afford to teach there!) He suggests that advertising academic vacancies is useless because women do not hold more teaching positions in Great Britain than they do here even though British universities advertise; it does not occur to him that there might still be a bias in hiring even if vacancies are advertised. He dutifully quotes some unidentified mathematicians as saying that there is only one or at most two female mathematicians in the country qualified to hold a tenured position in a major university even though up the road from Princeton at Rutgers there are five tenured women in a graduate department that considers itself very good indeed.

He repeatedly asserts that goals are meaningless because they do not take into consideration the supply factor although goals are defined on the basis of underutilization, and underutilization is determined by supply. Certainly the supply of qualified women is very limited if you look only for tenured women at major universities; but women contend that they have been underemployed—that equally qualified women are found in non-tenured positions and at less prestigious institutions because they have been denied equal opportunity in the past. The purpose of affirmative action is not to play musical chairs with the handful of women who made it at Harvard, Princeton, and Yale despite all the obstacles but to remove the obstacles so that the rest of us can play, too.

Sidney Hook, in his review of Lester's book ("The bias in anti-bias regulations," in the publication of the University Centers for Rational Alternatives," summer 1974) makes a number of excellent points, but erroneously equates affirmative action with giving women and minorities two votes to compensate for their not having the right to vote in the past. It would be a far better analogy if one equated affirmative action with the abolition of poll taxes and with a concerted effort to register new voters. No responsible spokesperson for the civil rights movement is asking for two votes or for preferential treatment. We are asking for reform.

Lester himself makes a strong case for affirmative action in education, for a concerted effort at encouraging more women and minority students to prepare for professional careers. His proposals along these lines are far more positive and potentially effective than the wishy-washy guidelines HEW has presented for enforcement of Title IX of the Education Amendments of 1972. But in a time of retrenchment in higher education, when qualified people of both sexes are having a hard time finding and keeping a position in academe, we cannot put all of our emphasis on training future professors. We must continue strong affirmative action efforts for those already qualified and we must urge graduate students to prepare for alternative careers.

This caveat aside, there is much merit in Lester's solutions, particularly with respect to arbitration of grievances and with respect to affirmative action in education. It would indeed be unfortunate if the positive contribution of his book went unnoticed because of the way in which he has outlined the problems.

UNIVERSITY OF COLORADO,
Colorado Springs, Colo., November 22, 1974.

CONGRESSMAN JAMES G. O'HARA,
Chairman, House Special Subcommittee on Education, Cannon House Office Building, Washington, D.C.

DEAR CONGRESSMAN O'HARA: I understand House Special Subcommittee on Education is holding hearings on affirmative action in higher education and secondary education.

Enclosed herewith is a copy of my article, "Reverse Discrimination in Hiring in Sociology Departments: A Preliminary Report."

I request you to include the article as part of the record of the Subcommittee hearings.

With best regards,
Sincerely yours,

BARBARA R. LORCH,
Professor of Sociology.

Enclosure:

[Reprint from the American Sociologist—Published by the American Sociological Association]

REVERSE DISCRIMINATION IN HIRING IN SOCIOLOGY DEPARTMENTS: A PRELIMINARY REPORT

(By Barbara R. Lorch)

INTRODUCTION

Federal regulations require colleges and universities to develop Affirmative Action Programs establishing goals and timetables for recruitment to assure an immediate increase in the percentage of women and minority faculty and staff.[1] The Department of Health, Education and Welfare is responsible for accepting and rejecting the programs proposed by individual academic institutions and for enforcing rules that they have developed and call "guidelines." Loss of federal funds is a penalty for lack of compliance.

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[1] In this article the HEW definition of minority groups will be used and will refer to blacks, Spanish-surnamed, Asians and American Indians.

With the entrance of HEW and their Affirmative Action Plans on campuses throughout the United States has come the claim of increased hiring of women and minority group members and also the cry of reverse discrimination.

Some knowledge about the possible extent of reverse discrimination should be of importance to the profession of sociology and is a first step toward a meaningful discussion about ways in which the goal of reducing discrimination and increasing the employment opportunities for women and minorities in academic institutions can best be accomplished. J. Stanley Pottinger, director of the Office of Civil Rights in the U.S. Department of Health, Education and Welfare states that there is "little if any evidence" that reverse discrimination exists.[2] If it is occurring to any extent and if we are indeed sincere in our desire to reduce discrimination, a start might be a re-examination of the policies and administration of Affirmative Action Programs and of suggestions made for the improvement of such programs.

Although I have heard and read of specific cases of reverse discrimination, I am not aware of any systematic research to determine the extent to which such discrimination may be occurring. I therefore designed a short questionnaire to investigate the occurrence of reverse discrimination in sociology departments in the United States.

In November 1972 I sent an anonymous questionnaire to sociology department chairmen located at 200 four-year colleges and universities in the United States. These 200 were obtained by simple random sampling of all four-year colleges and universities in the United States listed in *The 1972 World Almanac*, published by the *Rocky Mountain News*. One hundred and sixty-two (81 percent) of the department chairmen returned the questionnaire.[3] The high return rate gives some indication of the interest in this topic. Below is a preliminary report of the findings. A more thorough analysis will be completed later.

DESCRIPTION OF THE SAMPLE

Of the 162 returned questionnaires, 19 percent came from colleges and universities having over 20,000 students, 30 percent from those with 10,000 to 19,999 students, 36 percent from those with 5,000 to 9,999 students and 15 percent from those with a student enrollment under 5,000. Seventy-one percent were public institutions and 29 percent private. The Ph.D. degree was the highest degree in sociology offered in 39 percent of the institutions, the Master's degree in sociology in 29 percent, the B.A. degree in sociology in 31 percent and one institution offered no degree in sociology at all—only a minor.

Eighty-four percent of the department chairmen stated that their colleges or universities had an Affirmative Action Plan, 6 percent stated that their institutions had no Affirmative Action Plan and 10 percent stated that they didn't know whether their institutions had such a plan or not.

HEW GUIDELINES CONCERNING AFFIRMATIVE ACTION PROGRAMS IN ACADEMIC INSTITUTIONS

Ninety-five percent of the sociology department chairmen reported that they were either very familiar or somewhat familiar with the HEW guidelines (43 percent very familiar and 52 percent somewhat familiar), and only 5 percent reported that they were not at all familiar with HEW guidelines for colleges and universities concerning the hiring of women and minorities.

Below are some excerpts from the HEW guidelines for Affirmative Action Programs, August 14, 1972:

> To design an effective affirmative action plan the contractor must first establish a basic data file on employees including name or identification number, sex, ethnic identification, current salary, current job, family and title, years in current job and employment status.
>
> A unique aspect of equal employment opportunity under the executive order is the required compilation of availability data on women and minorities for use as a measure of the contractor's equal employment opportunity.

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[2] *Los Angles Times*, Friday, January 12, 1973, Part 11, p. 1.

[3] One returned questionnaire was discarded and not included in the 162 mentioned above because the respondent stated that no course work in sociology was offered at that institution.

> For academic employees the basic national data on earned doctors degrees will provide the basis for utilization analysis of a contractor's work-force, unless the contractor can otherwise demonstrate that the labor market upon which it draws is significantly different from this base.
>
> A contractor must examine recruitment activities and policies of each unit responsible for recruiting. Where such an examination reveals a significantly lower representation of women or minorities in the applicant pool than would be reasonably expected from their availability in the work-force, the contractor must modify or supplement his recruiting policies by vigorous and systematic efforts, to locate and encourage the candidacy of qualified women and minorities.
>
> Affirmative action requires the contractor to do more than ensure employment neutrality with regard to race, color, religion, sex, and national origin. As the phase implies, affirmative action requires the employer to make additional efforts to recruit, employ and promote qualified members of groups formerly excluded, even if that exclusion cannot be traced to particular discriminatory actions on the part of the employer.
>
> Affirmative action in hiring and promotion simply means that in departments or other employment units where employment opportunities traditionally have not existed for women and minorities, so that their presence is significantly less than their availability, they must be recruited, hired, and promoted over all competitors where their qualifications are the same as or better than those of other applicants.

In almost direct contradiction to the above guidelines is another excerpt from HEW guidelines for Affirmative Action Programs, August 14, 1972:

> Contractors agree when contracts are signed that they will not discriminate and that they will take affirmative action to see that employees are treated without regard to race, color, religion, sex or national origin.

CIVIL RIGHTS ACT OF 1964 CONCERNING DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, AND NATIONAL ORIGIN

Nearly identical percentages were obtained on the familiarity of department chairmen with the Civil Rights Act of 1964 as for their familiarity with the HEW guidelines concerning the hiring of women and minorities at academic institutions. Ninety-seven percent stated that they were either very familiar or somewhat familiar with the Civil Rights Act of 1964 (40 percent very familiar and 57 percent somewhat familiar), and only three percent stated that they were not at all familiar with the Civil Rights Act of 1964.

Here are some pertinent excerpts from Section 703 of Title VII of the Civil Rights Act of 1964 in which preferential hiring would appear to be expressly forbidden:

> (a) It shall be an unlawful employment practice for an employer:
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation; terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The use of quotas, or goals and timetables, for the recruitment of women and minority members are not called for in the Civil Rights Act of 1964. See (j) below:

> (j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Although HEW has changed its terminology from "quotas" to "goals" and "timetables," the meaning appears to be exactly the same.

COMPARISON OF HEW GUIDELINES AND THE CIVIL RIGHTS ACT OF 1964

The Civil Rights Act of 1964 seems to be perfectly clear on the illegality of giving preferential treatment in hiring on the basis of sex, race, color, religion or national origin. The printed HEW guidelines are by no means as clear on this matter. Although reference is made to disregarding sex, race, color, religion and natural origin in matters of employment, there are repeated contradictions. A few examples are provided below.

(1) Underutilization in employment is determined by HEW by comparing the percentage of women and minorities at the academic institution with their respective percentages in the academic national labor pool. If there is a discrepancy, HEW calls this a "deficiency," and the goals and timetables of that institution's Affirmative Action Plan are adjusted to correct the "deficiency" by bringing the number or percentage up to that in the national labor pool. Whether you call this "quotas," or "goals and timetables," it is contrary to the Civil Rights Acts of 1964 and also to the HEW guideline that states that contractors agree when contracts are signed that they will not discriminate and that they will take affirmative action to see that employees are treated without regard to race, color, religion, sex or national origin.

(2) HEW guidelines state that where the presence of women and minorities is significantly less than their availability, they must be recruited, hired and promoted over all competitors where their qualifications are the same or better than those of other applicants. This obviously gives preference to women and minorities and again is contrary to the Civil Rights Act of 1964 and the HEW guideline stated at the end of the previous paragraph.

(3) In order to recruit and hire women and minorities over all competitors where their qualifications are the same or better than those of other competitors, minority group members must be identified and classified by their minority group and sex and this identity used in the hiring process. This is again opposed to the Civil Rights Act of 1964 and the HEW guideline stated in the first example.

(4) Vigorous and systematic efforts to locate and encourage the candidacy of qualified women and minorities without similar vigorous efforts to locate candidates of all social categories is also discriminatory.

FINDINGS

The intended or unintended consequence of the HEW guidelines (in addition to employing more women and minorities than previously, many of whom are highly qualified) has been in some cases to coerce the administration of academic institutions (in fear of losing federal funds) to in turn coerce academic departments to give preference in their hiring to women and minorities. The result in some cases has been reverse discrimination. This is clearly contrary to the Civil Rights Act of 1964, to the equal protection and due process clauses of the United States Constitution, to Executive Order 11246 and to some of the explicit statements within the HEW guidelines as well.

Sociology department chairmen, in response to the question, "Do you believe that to follow HEW guidelines concerning the hiring of women and minorities would force you to act contrary to the Civil Rights Act of 1964?", responded as follows: Seventeen percent marked "yes," 44 percent marked "no" and 39 percent marked "don't know." Although some 95 percent of these people indicated familiarity with both the Civil Rights Act of 1964 and the HEW guidelines, the fact that 39 percent indicated that they didn't know whether following HEW guidelines concerning hiring of women and minorities would force them to act contrary to the Civil Rights Act of 1964 shows confusion and lack of being able to clearly interpret either the Civil Rights Act of 1964 or the HEW guidelines. Seventeen percent indicated that they felt that to follow HEW guidelines concerning the hiring of women and minorities would force them to act contrary to the Civil Rights Act of 1964. Litigation will undoubtedly settle this issue in time.

Of the 162 department chairmen who responded, 35 percent indicated that their departments had formally determined a priority list for the hiring of women and minorities.

One hundred and thirty nine of the 162 respondents stated that their departments had been in a position to hire faculty members within the last two years.

Of these, 44 (32 percent) reported that they felt coerced to hire a woman or a minority member regardless of whether he or she was the best candidate for the job.

Those chairmen who felt coerced indicated various sources of the coercion which are found in Table 1. The most frequently mentioned source of coercion was the administration of their institution.

TABLE 1.—*Source of coercion of sociology department chairmen*[1]

Source of coercion	*Number*
Administration	34
Colleagues in one's own department	16
Student groups	11
Community groups	11
Other	8

[1] More than 1 source could be listed.

The form of coercion indicated by respondents is given in Table 2. The most frequently mentioned forms of coercion were formal and informal pressure from the administration of their institution.

TABLE 2.—*Form of coercion of sociology department chairmen*[1]

Form of coercion	*Number*
Pressure from the administration in the form of a policy concerning the hiring of women and/or minorities	19
Informal pressure from the administration	18
Informal pressure of colleagues in one's own department	14
Fear of loss of the position if a woman or minority member were not hired	14
Pressure from the department in the form of a general policy concerning the hiring of women and/or minorities	10
Fear of negative student reaction	7
Fear of negative community groups' reaction	1
Other	6

[1] Respondents could mark as many as applied.

In recent years many faculties have won the right to be primarily responsible for hiring in their own disciplines. The above tables indicate the renewed entrance of the administration as a crucial force in the determination of such matters. This has undoubtedly been largely due to HEW's intrusion into faculty hiring.

The 139 department chairmen who were in a position to hire faculty in the last two years were presented with the question, "Has your department in the past two years bypassed the best candidate for a position in order to hire a woman or a minority member?"; 22 (16 percent) marked "yes," 15 (83 percent) marked "no," and two reported "don't know." The reason for the "don't know" response in these two cases was that these departments only solicited applications from women and minorities. The highly selective recruitment, which itself is evidence of discrimination against other categories of candidates, makes it impossible to know whether better candidates were by-passed.

The fact that 32 percent of the department chairmen *felt coerced* to hire a woman or a minority member regardless of whether he or she was the best candidate while only 16 percent *did in fact* practice reverse discrimination was reported to be caused by several varied circumstances. In some cases the coercion was resisted; in others the woman or minority group member turned down the offer of the department and it then turned to its best candidate who was an Anglo male; in some cases the best candidate for the job was a woman or a minority group member; in some cases women and minority candidates for the position could not be solicited because of the short supply of such candidates.

In view of the limited supply of women and minority sociologists[4] and the difficulty in locating them[5] which in turn limits the applicants for academic positions and thus the opportunity for reverse discrimination, the extent of reverse dscrimination is surprisingly high. I do not have information on the exact number of applicants by sex and racial and ethnic identity for each of the cases in which departments in this study hired a person, since HEW has only recently required departments to keep such information. This data will be available for future research.

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[4] Maurice Jackson in an article "Minorities and Women in Sociology: Are Opportunities Changing?" (1972:3) gives a rough indication of the percentage of women and minority sociologists during the time period of the study. The Ph.D.s in Sociology granted to women and minorities in 1970 and granted or expected in 1971 are as follows: Women—21 and 24 percent in 1970 and 1971 respectively; Blacks—3 and 4 percent in 1970 and 1971 respectively: Asians—1.0 and 0.3 percent in 1970 and 1971 respectively: Chicanos 0 and 0.3 percent in 1970 and 1971 respectively and 0 for Indians and Puerto Ricans for 1970 and 1971 respectively.

It is interesting to note that more sociology department chairmen believe that reverse discrimination is occurring in other departments in their colleges and universities than in their own. Forty-six percent responded "yes," 45 percent "no" and 9 percent "don't know" to the question "Do you believe that reverse discrimination is occurring in other departments in your college or university?"

DISCUSSION

The fact that 32 percent of the sociology department chairmen who indicated that they had positions to fill in the past two years felt coerced to practice reverse discrimination, and 16 percent reported that they actually did, is reason for grave concern. Surely no one can deny the importance of improving the opportunities for empolyment of women and minorities in academic institutions and in doing everything possible to remove whatever discrimination that is presently occurring in the hiring of women and minorities. But discrimination is removed by nondiscrimination, not by added illegal discrimination. Under the Supreme Court's consistent interpretation of the equal protection and due process clauses of the U.S. Constitution, and in light of the plain language of the Civil Rights Act of 1964, hiring should be based solely on qualifications disregarding sex, race, color, religion and national origin. The Affirmative Action Programs, as administered at the time of this research, involve a collision of rights and principles, and in a number of cases are a major factor in coercing department chairmen in academic institutions not only to lower their employment standards and to engage in discrimination, but also to break the law.

If the goal is to reduce discrimination, then we should be as concerned about discrimination against Anglo males, for example, as against women and minority members. Surely ways can be found to increase the employment opportunities for women and minorities without promoting reverse discrimination.

REFERENCES

Jackson, M. 1972 "Minorities and women in sociology: are opportunities changing?" American Sociologist 7 (October): 3–5.

[From American Sociological Association Footnotes—September, 1973]

AFFIRMATIVE ACTION IN ACTION

(By Edgar F. Borgatta of Queens College)

The stimulus for the brief research reported here was the coverage of "Affirmative Action" in several letters in the ASA Footnotes August 1973 issue, but particularly the Committee on the Status of Women in Sociology protest concerning an earlier aricle (May 1973) reprinted from the *Washington Post* titled "Reverse Bias Alleged in College Hiring." The CSWS protested that the article gave the "impression that affirmative action is discriminatory," had a "pernicious main thrust," and was a "gratuitous insertion of inflammatory material." While this is an age of posturing and using of "rhetoric," the protest of the CSWS may still seem "way out" to some. In any event, at the suggestion of the CSWS a statement by Bernice Sandler was reprinted (referred to below) which served as a reference point to gather some information from sociologists on their experience with Affirmative Action. This research was initiated with the knowledge of an overlapping research in progress (Lorch 1973).[1]

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[5] Jackson (1972:4) states that 63 percent of the sociology departments in his survey had difficulty in locating minority candidates and 25 percent had difficulty locating women candidates.

[1] Barbara R. Lorch, "Reverse Discrimination in Hiring in Sociology Departments: A Preliminary Report," *American Sociologist* 8 (August): 116–120.

THE QUESTIONS ASKED

A one page questionnaire was devised and sent with an accompanying letter reading as follows.

"In the August 1973 issue of Footnotes some question is raised about the meaning and operation of 'Affirmative Action' on campuses. At the request of the ASA Committee on the Status of Women in Sociology, a brief article was reprinted, the critical paragraph of which is noted below. In the same issue, Joan Huber, President, SWS, asks for facts, and the enclosed brief survey is designed to get a few of these. I hope you will cooperate by completing the enclosed and returning it as soon as possible. We have a number on your form as a checkoff to determine from whom we have received answers. Naturally, all information will be treated confidentially and data will only be reported in statistical form. We will appreciate any comments on the topic you may add."

"If institutions give preference to less-qualified women and minorities over better-qualified white males, then such institutions are violating the very laws and regulations they are seeking to observe. There is a distinction between affirmative action and preference, the latter being a clear violation of Executive Order 11246, Title VII of the Civil Rights Act, and the 14th Amendment," (Sandler 1973).[2]

In determining what questions could be asked of staff and faculty, the implied meaning of preference derived from the statement by Sandler was taken as the key. Preference, it would appear, could be extended in several ways. One way would be to open the position only for certain people. Question 1 was directed to get such information in one form: "During the last three years, have you (has your department) received any communication from your administration to the effect that positions would be made available (added, replaced or not deleted in the budget) if an acceptable candidate from a minority group could be found?" As was pointed out by several persons who sent back questionnaires with comments, it would be possible to get the formal statement made by the administration on Affirmative Action. Those who have some knowledge of what goes on in departments and universities recognize that many things are carried out informally. Thus, interest was on the experience of the chairman, and, presumably, information as it is socialized to other staff members.

Preference may be suggested by the administration, also, in a more general way beyond controlling the position that is the "increment" for the department. Question 3 was designed to get at this: "During the last three years, have you (has your department) received any communication from your administration, formally or informally, to seek out and give preference to candidates of minority groups in filling positions, i.e., not treat one or more of the positions as open to all comers on a competitive basis?"

Another approach to information on preference could be directed specifically to hiring experience in the department. Aside from whatever the administration's implied or actual policy was, what did the department do? Question 2 deals with this: "During the last three years, has any candidate been sought out preferentially (non-competitively) because of sex, race, national origin, or other arbitrary characteristics (assuming, of course, the person was presumed to have acceptable qualifications as a sociologist)?" It would seem clear that in responding "yes" to this question we would have a statement of attempted preferential hiring.

An alternate approach to experience deals with the kinds of inquiries that individuals may have had from other institutions with regard to hiring practices. Thus, we asked the following question. (#4): "During the last three years, have you (or has the staff member in charge of answering requests about your students and faculty who are entering the market) received any requests which explicitly or implicitly indicate ~~that~~/ preference in filling a position will be given (non-competitively) to a person of minority group status?"

Finally, we asked for a report on what Affirmative Action meant on the campus, and since if there are formal statements, they are relatively likely to be complex, three were composed that might span the range of directive that might be encountered. The entire question (#5) is noted below:

"In your opinion, which of the statements below represents the interpretation of Affirmative Action on your campus according to actual procedures (and the explicit or implicit support of your administration)?

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[2] Bernice Sandler, "Male vs. Female: A Bread-and-Butter Issue," *Chronicle of Higher Education*, February 5, 1973. Reprinted in *Footnotes*, August 1973, page 8.

1. Affirmative Action requires special attention to finding some minority group candidates, with the objective of preferentially hiring them if the (minimum acceptable) standard of the department of the school can be satisfied.

2. Affirmative Action requires special attention to finding minority group members in the recruitment process so that they can be evaluated with other candidates, but preference in selection is to be given to some minority group members among candidates who are acceptable to the department and school if this is the only way to add minority group members to the department.

3. Affirmative Action requires that attention be given to locating all possible candidates for a position; including those of minority group status, but once the inclusive recruitment base is established only the factors related to academic potential and excellence are to be used."

One additional statement could have been phrased between numbers, 2 and 3, but in discussion with a number of persons, it was decided to leave it out as too much of a "hedge." This would be the statement that says that Affirmative Action requires locating all possible candidates for the position, including those of minority group status, and when the choice is between two equally good candidates, the preference should be given to the minority group member. One possible reason this was omitted was that the weight of most discussions included the fact that minority group status was often included in the initial rating and ranking of candidates. However, this was not the major reason for omitting the question. Rather, it was the almost universal response in the discussions to the effect that one never really ends up with a tie among candidates for a position, although if one uses a minimum standard a number may satisfy the minimum. Possibly this was an error in strategy in getting information, but it is doubtful that the additional alternative would have altered the results.

SELECTION OF SAMPLE

The sample was selected from the ASA *Guide to Graduate Departments of Sociology*, 1972–73. For various reasons a relatively small sample was selected as follows. For every even page corresponding to a department, a questionnaire was sent to the Chairman. In the same Department, the (non-chairman) female with the highest rank, if one was listed in the department, also was sent a questionnaire. Then, a third departmental member with a male name having the same rank as the female was selected arbitrarily. The clerk carrying out the selection appeared to have no difficulty with the instructions. Queens College, was omitted, and thus a total of 78 questionnaires were sent to Chairmen (white form), 60 to female (pink form) and 60 to male (blue form) staff, a total of 198 questionnaires. The mailing was on August 29, 1973, timed so that presumably the questionnaires would be at the departmental offices of the respondents when they returned from the ASA meetings or for the new semester. The usable responses were 65 for chairman, 38 for females and 34 for males as of October 12.[3] In addition, two questionnaires were returned undelivered and four were returned with comments but no responses marked.

RESULTS

Table 1 presents the basic distribution of responses for the Chairmen, Female Staff, and Male Staff. On question 1, 37 percent of the Chairmen answered "yes" and percentages of the other categories are similar. From the point of view of Affirmative Action involving addition, replacement, or non-deletion in the budget if an acceptable candidate from a minority group could be found, a substantial portion of the respondents report that within the last three years communication had been received from their administration to the effect that positions would be made available. This, then, presumably means that the positions would not be available on an open and competitive basis to all comers, and preferential allocation of positions would be occurring.

The second question was focused directly on whether in the last three years any candidate had been sought out preferentially (non-competitively because of sex, race, national origin, or other arbitrary characteristics), assuming, of course, the person was presumed to have acceptable qualifications as a sociologist. Again, on this question the Chairmen responses appear to be similar to those of the other respondents. Forty percent of the Chairmen reported such preferential, non-competitive attempts to locate candidates because of sex, race, national origin, or other characteristics. This, of course, is a direct statement that Affrmative Action has been interpreted to mean preferential seeking out of candidates.

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[3] Thanks are due to the respondents, and special appreciation is noted for the many comments which could, easily and usefully, fill a book.

The third question, dealing with receiving direction from the college or university administration to seek out and give preference to minority groups in filling positions received fewer "yes" responses except for the male staff. Among the chairmen, 23 percent answered "yes" to this question. Since the words "formally or informally" are included in the statement, conceivably many of these communications arrived informally, and thus answers may depend more on the interpretations of the respondents than the prior two questions.

TABLE 1.—DISTRIBUTION OF RESPONSES

[In percent]

	Chairman (N=)	Female staff (N=38)	Male staff (N=34)
Question 1.—Administration opening up positions for minority candidates:			
0			6
1	37	39	35
2	18	18	26
3	45	45	32
Question 2.—Preferential hiring by department:			
0	2		3
1	40	42	47
2	15	11	18
3	43	47	32
Question 3—Communication from administration giving preference to minorities:			
0	2	8	3
1	23	24	38
2	8	18	15
3	68	50	44
Question 4—Inquiries indicating preference for filling positions with minority persons:			
0	2	11	6
1	57	26	38
2	9	16	21
3	32	47	35
Question 5—Interpretations of affirmative action:			
0	3	3	3
1	15	13	24
2	23	42	32
3	58	42	41

Note: 0—Blank or D.K.; 1—Yes, or 1st alternative on Q 5; 2—Possibly, or 2d alternative on Q 5; 3—No, or 3d alternative on Q 5.

Question 4 is the one on which the experience of respondents may be seen potentially to differ most as it is probably most directly affected by position in the department; the Chairman gets many personnel inquiries and Chairman more often report the experience of receiving requests which explicitly or implicitly indicate that preference in filling a position will be given (non-competitively) to a person of minority status, the percentage being 57 percent. An example of an explicit statement might read: "Mount Holyoke College is seeking a black sociologist . . ." Implicit statements might again be subject to considerable interpretation by respondents.

Finally, Question 5 deals with the interpretation of the Affirmative Action orientation on the respondent's campus. In different degrees of preferenial definition, statements 1 and 2 indicate Affirmative Action requires preferential selection. Here we find that the chairmen most closely interpret Affirmative Action as merely requiring the most inclusive recruitment base, which means including, with some deliberate concern, minority group candidates. Still thirty-seven percent of Chairmen indicate that Affirmative Action on their campuses means giving preference in selection in some degree. The other staff responding to this question appears to have a stronger impression that Affirmative Action means preference in selection, with over 50 percent of both Male and Female staff answering "yes" to statements 1 or 2.

CONCLUSION

In summary, with whatever limitations this abbreviated research may have, it is doubtful that any conclusion can be reached other than that in a large proportion of academic institutions Affirmative Action has meant giving preference to women and minorities, and, in the words of Bernice Sandler, *violating the very laws and regulations they are seeking to observe.* In corroboration of the findings of this study, another report recently appeared with findings that 35 percent of responding chairmen from a broader sample of institutions indicated that their departments had formally determined a priority list for the hiring of women and minorities (Lorch 1973). Other findings in Lorch's article, as well as the discussion of issues, should be interesting to those concerned with the problems of discrimination in the academic professions.

STATEMENT BY PETER E. HOLMES, DIRECTOR, OFFICE FOR CIVIL RIGHTS, U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

[Note: The following memorandum was mailed out on December 11, 1974:]

We are releasing today a memorandum which provides to the nation's colleges and universities additional guidance to help them fulfill their affirmative action responsibility.

Under the law (Executive Order 11246, as amended) institutions of higher education which hold government contracts or subcontracts are required to take affirmative action to ensure that minorities and women have equal opportunity to employment and are treated equally as employees. Colleges and universities must implement acceptable affirmative action plans to give practical effect to this commitment.

The memorandum reiterates the principle that colleges and universities are entitled to select the most qualified candidate, without regard to race, sex or ethnicity, for any position. Further, it makes clear that colleges and universities, not the Federal Government, determine what constitutes qualification for any particular position.

The memorandum is designed to encourage the adoption of sound and effective action measures by providing practical advice in the following areas:

Proper means of recruitment for vacancies.

Application of job requirements without regard to race, sex, or national origin.

Use of job-related employment standards.

Collection of necessary data.

A major objective of the affirmation action obligation is to broaden an institution's pool of applicants so that qualified women and minorities will have an equal chance to be considered for employment and promotion. The memorandum seeks to distinguish between impermissable recruitment devices and sound, unbiased procedures which ensure that minorities and women are in fact notified of job openings and considered for positions on an equal basis.

Second, affirmative action provides that job requirements must be applied uniformly to all candidates for a particular position. There is no obligation to waive or lower such requirements in order to attract women and minority candidates and, indeed, the Executive Order expressly prohibits such differential treatment.

Third, the affirmative action obligation does not require a college or university to eliminate or dilute legitimate employment standards. If such standards work to exclude women or minorities as a class, however, the institution must demonstrate that they are clearly related to job performance.

Fourth, in order to be able to implement and monitor affirmative action steps, institutions must collect and analyze data on the race, sex, and ethnic identity of applicants for employment. There are appropriate means of ascertaining and applying such information on applicant flow without violating confidentiality or unduly risking abuse.

In short, the memorandum clarifies certain aspects of the affirmative action obligation which have been subject to persistent misinterpreation or misapplication. We hope that this more specific treatment of the issues will prove helpful to colleges and universities as they work with us to prepare and implement effective plans.

As set forth the provisions in the memorandum do not depart from existing regulations or policy. Rather, they re-affirm the affirmative action commitment by describing and exemplifying measures which should be either undertaken or avoided to meet that commitment

In the public sphere, the concept of affirmative action is still misunderstood and widely questioned. We also hope, therefore, that the memorandum will serve to stimulate public support by laying misapprehensions to rest and by deterring the kind of employment abuse that undermines good faith compliance and complicates our job of enforcement.

Department of Health, Education, and Welfare.
Washington, D.C., December 1974.

Memorandum to College and University Presidents

The Office for Civil Rights (OCR) has responsibility for the enforcement of Executive Order 11246, as amended, with respect to employment at colleges and universities which hold Federal contracts. Under the Executive Order, Federal contractors, including institutions of higher education, are prohibited from discriminating against any person on the basis of race, color, religion, sex, or national origin in recruitment, selection, promotion and any other employment practices and procedures. Further, contractors are required by the Executive Order to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin." (Section 202(1)) Such affirmative action should be designed to expand employment opportunities for women and minorities and to eliminate those policies and practices which have had the effect of excluding or limiting female and minority group employment.

Further, under Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, both of which are within the compliance jurisdiction of the Office for Civil Rights, educational institutions which are recipients of Federal financial assistance must ensure nondiscrimination. Under Title VI the recipients of Federal financial assistance may not discriminate on the basis of race, color, or national origin. Title VI prohibits employment discrimination only to the extent that such discrimination tends to exclude individuals or deny them the benefits of Federal financial assistance. With certain exceptions, Title IX prohibits discrimination based on sex in federally assisted education programs or activities. It extends to all employment practices of a covered institution. While the Executive Order coverage is extended only to those institutions which are Federal contractors, Title VI and Title IX reach all of the nation's higher education institutions which receive Federal financial assistance. Whereas affirmative action in employment is expressly required under the Executive Order, even in the absence of a finding of specific discrimination by the institutions, it is not required under Title VI or Title IX. However, voluntary affirmative action is *permitted* under both Title VI and Title IX ". . . to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, national origin, or sex."

It should be noted that where there has been a specific finding of discrimination under the Executive Order, Title VI or Title IX, specific remedial or corrective action is required. Remedies in these cases are tailored to the specific wrong which has occurred. This memorandum is not intended to apply to corrective actions undertaken pursuant to a specific finding of discrimination.

This Office, in October 1972, issued *Higher Education Guidelines* which set forth the compliance responsibilities of colleges and universities under the Executive Order. In the time during which the *Guidelines* have been in effect, OCR has been faced with determining the permissibility of many common practices designed to distinguish such positive steps from others which might conflict with nondiscrimination requirements.

At the outset, certain general principles should be made clear. Colleges and universities are entitled to select the most qualified candidate, without regard to race, sex, or ethnicity, for any position. The college or university, not the Federal Government, is to say what constitutes qualification for any particular position. No single appointment will be objected to where those not appointed are less well-qualified than the candidate actually selected.

I. RECRUITMENT FOR EMPLOYMENT VACANCIES MUST BE UNDERTAKEN WITHOUT DESIGNATION OR IDENTIFICATION BY RACE, SEX, OR ETHNICITY

As defined on page five of the *Guidelines*, "[r]ecruitment is the process by which an institution or department within an institution develops an applicant pool from which hiring decisions are made." As indicated on page six of the *Guidelines*, a contractor must make an explicit statement of its commitment to equal employment opportunity in all recruiting announcements and advertisements, and it may do so by specifying that it is an "equal opportunity employer." There is a caveat:

"It is a violation of the Executive Order, however, for a prospective employer to state that only members of a particular minority group or sex will be considered."

A major purpose of the affirmative action provision of the Executive Order is to broaden the pool of applicants so that women and minorities will be considered for employment along with all other applicants. The affirmative action process must not operate to restrict consideration to minorities and women only. Acceptable nonrestrictive language designed to broaden the pool of applicants would be: "The English Department of X University is subject to the requirements of Executive Order 11246 and is an affirmative action employer. All interested persons are encouraged to apply."

It would, however, be unacceptable to state that "women and minorities are preferred" or "this is an affirmative action position." Status as a member of any specific group should not be mentioned in any advertisement as preferred.

The type of announcement which identifies the category of applicants who will be considered on the basis of race/or sex would be unacceptable because it has the effect of discouraging the candidacy of other categories of persons. Therefore, it would be unacceptable for an announcement to read: "Pursuant to our affirmative action plan establishing goals for the employment of women and minorities, the English Department of X University is seeking to fill this position with a woman."

Of course, under the Executive Order, all employment advertising must contain a statement that the institution is an equal opportunity employer.

It has been suggested that a position might be designated on the basis of race or sex in order to meet an employment goal. This would be in violation of the nondiscrimination provisions of the Executive Order.

The following case represents an example of an improper interpretation of the affirmative action obligation:

"For the past four years, the Mathematics Department of X University has been operating under an affirmative action program. Although its goal for hiring women was established at 20 percent over a five-year period, during the past four years, each of four vacancies has been filled by a male. At an annual professional association conference, the department chairman informed a male applying for a fifth vacant position that he could not be given consideration regardless of his qualifications because Federal regulations require the department to fill the position with a woman."

The Mathematics Department has violated its equal employment opportunity obligations by designating the vacancy as a position for a woman, or as one in which a woman would be preferred, thereby excluding all other categories of applicants from consideration. Such action is forbidden by the Executive Order, and it is improper to suggest or to act on the assumption that Federal affirmative action provisions require that any particular position be filled by a woman or minority person.

The Mathematics Department has misunderstood the nature of goals. Goals are good faith estimates of the expected numerical results which will flow from specific affirmative actions taken by a college or university to eliminate and/or counteract factors in the university's employment process which have contributed to underutilization of minorities and women in specific job categories or resulted in an adverse disproportionate impact in terms of promotion, compensation and training of currently employed minorities and women. They are not rigid and inflexible quotas which must be met. Nor should a university strive to achieve goals as ends in themselves, for "[n]o contractor's compliance status shall be judged alone by whether or not he reaches his goals and meets his timetables. Rather, each contractor's compliance posture shall be reviewed and determined by reviewing the contents of his program, the extent of his adherence to this program, and his good faith efforts. . . ." (41 Code of Federal Regulations, Sec. 60-2.14, known as "Revised Order No. 4")

The Mathematics Department must be able to demonstrate clearly that it has adhered to its affirmative action obligation by making a full and good faith effort to recruit and consider women for each of the five vacancies. If the Department is able to make this demonstration, its inability to meet its employment goal would not be deemed a violation of its affirmative action obligation. However, a failure by the Mathematics Department to make a sufficient good faith effort to recruit and consider women and minority candidates for the four earlier openings would constitute a violation of the Executive Order regulations.

As noted on page seven of the *Guidelines*, minorities and women are often sought to fill positions in women's and ethnic studies programs. Consider the following example, which would constitute a violation of the Executive Order:

"A job description for an instructor position for a University's Black Studies Program, included, as job requirements, the ability to bring special insights to the course material and the ability to relate well to the large number of black students attracted by the program. The Dean of Arts and Sciences decided that only a black person could meet these requirements. When questioned by a white applicant, the Dean defended the selection of a black person on the grounds that race was a necessary element for the proper performance of the job."

While the university established job requirements to answer what it deemed as its special need for the Black Studies Program, its actions amounted to giving exclusive consideration of candidates on the basis of race. Such action results in the restriction of the applicant pool and is a violation of the Executive Order.

In this case, the job requirements themselves (ability to relate to students, special insights, etc.) do not limit the applicant pool on the basis of race and do not by their own terms prohibit non-minorities from applying or being employed. However, it is the university's assumption that only a black person can meet the job requirements and serve as an instructor in a successful Black Studies Program which brings the university into violation of the Executive Order.

II. IF AN INSTITUTION HAS FAILED TO FOLLOW ITS AFFIRMATIVE ACTION RECRUITMENT PROCEDURE OR IF ITS RECRUITMENT EFFORTS DO NOT YIELD AN EXPANDED APPLICANT POOL, THE RECRUITMENT PERIOD FOR ALL CANDIDATES MAY BE EXTENDED.

The *Guidelines*, on pages 5–7, set forth a specific framework to which the recruitment process should conform. An institution or institutional department must develop a nondiscriminatory applicant pool from which hiring decisions are made, and failure to do so constitutes a violation of the Executive Order. Consider the examples which follow:

> A. The psychology Department of X University was given a period of two months to fill a vacany on its clinical teaching staff. Prior to beginning its recruitment efforts, the Department received the unsolicited application of a qualified white male applicant, and made no further efforts to recruit for the position. Shortly before the two-month period was up, the nomination was sent to the Vice Chancellor for approval as a choice candidate. On the advice of the affirmative action monitoring committee, the Vice Chancellor rejected the nomination on the ground that the Department had failed to make adequate attempts to reach female and minority applicants, and required that the recruitment search be reopened and extended for another month.

The obligation to take specific steps to recruit applies even in instances where a university has not previously made a practice of active recruiting. Hence, even though it had received an unsolicited application from a person who was qualified, the Department's failure to recruit and consider women and minorities constitutes a violation of the Executive Order. In such case, further action is required under the Executive Order and the Vice Chancellor's decision to extend the period for recruitment does not amount to an abuse of the affirmative action process with respect to the Department's first choice, who will be subjected to greater competition for the job.

> B. In seeking to fill an academic position, the English Department took the recruitment steps required under its affirmative action plan. At the end of the recruitment period, during which time it had not received the applications of any women or minorities, the Department nominated one of the white male applicants as its first choice. Although the Vice Chancellor noted that good faith efforts to recruit women and minorities had been made, he required the Department to extend the recruitment period for another month during which period additional specified efforts were to be made to reach available women and minority applicants.

In carrying out an affrmative action plan, the period for recruitment may be extended, particularly where a utilization analysis indicates that the percentage of women and minorities recruited is substantially less than the percentage of qualified women and minorities available in the work force. In such cases, additional positive recruitment efforts may be undertaken to broaden the applicant pool to include qualified women and minorities. OCR would approve (but not require) the decision to keep open competition for the position. But it must be emphasized again that nothing in an affirmative action plan requires the employment of any specific number of women or minorities.

Thus, if the Department can demonstrate that it has taken all recruitment steps required under its affirmative action plan—and even though no (or very few) applications have been received from women and minorities—there would be no requirement that the recruitment period be extended, as in the following example:

> C. The Physics Department took all the affirmative recruitment steps called for by the university's affirmative action plan, and advertised the opening for several months. At the end of that time, no women and no minority candidates had applied and the recruitment procedure was concluded.

The Department was justified in ending the recruitment period, inasmuch as it had done everything possible to publicize the opening for a reasonable period of time.

III. JOB REQUIREMENTS MUST BE APPLIED UNIFORMLY TO ALL CANDIDATES WITHOUT REGARD TO RACE, COLOR, SEX, RELIGION, OR NATIONAL ORIGIN

The *Guidelines* stress the need for standardized employment practices that minimize the opportunity for arbitrary and/or discriminatory hiring decisions. It is not intended that affirmative action should result in a dilution of standards in order to attain the objectives of the Executive Order. Consider the example of the following institution, which violated the Executive Order:

"Because of the small size and location of X University, its History Department had experienced considerable difficulty in recruiting women and minorities for several teaching positions in the past. Consequently, the department chairman, with the support of his faculty and administration, waived the Ph. D. requirement for those women or minorities who wished to apply for the vacant Associate Professor position but retained the requirement for males or non-minorities applying for the same position and for all other positions."

The Executive Order does not require that job requirements be waived or lowered in order to attract women and minority candidates. Indeed, it expressly forbids differential standards based on race, color, sex, religion or national origin. Further, it requires that once valid job requirements are established, they must be applied equally to all candidates. It is discriminatory for such requirements to be applied selectively on the basis of race, color, religion, sex, or national origin. Thus, the history department must either waive the Ph. D. requirement for all applicants (without regard to race or sex) or maintain it for all applicants.

IV. A JOB REQUIREMENT WHICH RESULTS IN A DISPROPORTIONATE IMPACT UPON MINORITIES AND/OR WOMEN CAN BE MAINTAINED ONLY IF IT IS JOB-RELATED

As the *Guidelines* make very clear (page 4), the Executive Order does not require an institution to eliminate or dilute legitimate employment standards by which to measure prospective employees. On the other hand, no standards or criteria which have, by intent or effect, worked to exclude women and minorities as a class can be utilized, unless the institution can demonstrate the necessity of such standards to the performance of the job in question. For example:

"X Law School has established a Teaching Fellows Program which is responsible for the administration of the law school's clinical practice program. The requirement for Teaching Fellows includes holding a graduate law degree as well as an LL.B. or J.D. Degree. In analyzing its workforce for its affirmative action program, the law school learns that this job requirement disproportionately excludes blacks from consideration for the Teaching Fellows positions."

In order to continue the requirement for a graduate law degree, the law school must demonstrate that the requirement is related to successful job performance. If the law school is able to demonstrate that the skills and knowledge acquired through the advanced law degree are necessary for effective job performance, the job requirement can be maintained. On questions relevant to the validity of the requirement, the opinion or testimony of persons experienced in the conduct of legal aid clinics will be given substantial weight by HEW.

V. A UNIVERSITY IS REQUIRED TO OBTAIN INFORMATION ON THE RACE, SEX, AND ETHNIC IDENTITY OF APPLICANTS FOR EMPLOYMENT

The Executive Order establishes the principle that Federal contractors, including colleges and universities, are required to collect and maintain data on the race, sex and ethnic identity of all applicants for employment.

The collection and analysis of such data is recognized as an essential means of providing both the institution and the Federal Government with the information necessary to monitor the compliance posture of the institution. In the case of universities and colleges, the collection of such data is particularly essential for the workforce analysis required by Revised Order No. 4. Each institution must adopt safeguards to ensure that such information cannot be used as a basis for discrimination.

Preserving the anonymity of applicants in the collection of applicant flow data can be accomplished by gathering the requisite race, sex, and ethnic data separately from the application form. Furthermore, applicants should be instructed not to identify themselves by name or number on this form. If the institution wishes to determine applicant response for a particular position, the data form may be coded by position, as long as it does not individually identify any applicant.

This document is intended to help clarify areas of confusion which have arisen during the implementation of contractor requirements set forth in the Executive Order regulations. This Memorandum should be circulated among all members of your administrative staffs. Experience of the recent past seems to indicate that much of the existing confusion over affirmative action requirements has resulted from an absence of clear lines of communication concerning Federal regulations. It is most important that all officials charged with recruiting and hiring responsibilities have a clear understanding of the *Higher Education Guidelines* and that they ensure that institutional employment conforms to the provisions of those *Guidelines*.

Additional copies of this Memorandum may be obtained from the Regional Office for Civil Rights in your area, or from the Office for Civil Rights, Department of Health, Education and Welfare, Washington, D.C. 20201. Requests for technical assistance and inquiries relating to development and implementation of affirmative action programs should also be addressed to these Offices.

Thank you for your continuing cooperation.

PETER E. HOLMES,
Director, Office for Civil Rights.